“新时代知识产权法治论坛”

中国知识产权法学研究会
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论文摘要集

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中国知识产权法学研究会 2018 年年会

一、基础理论

知识产权法定原则的困境、本意澄清及其应用

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摘要：知识产权法领域中是否要坚持权利法定原则，这一问题的答案决定了法官能否基于自由裁量权而在个案中解释创设立法上未曾规定的权利。就立法而言，《著作权法》第 10 条第 1 款第（十七）项中的“其他权利”、《商标法》第 32 条中的“在先权利”和《反不正当竞争法》第 2 条第 2 款中的“权益”的模糊表述都与权利法定原则直接冲突，而司法裁判则正在进行从“权利”到“权益”的措辞转变。从立法技术层面的合理性入手，权利法定原则中的“权利”仅为绝对权，“定”包括权利种类和内容由成文法明确“规定”和“限定”。权利法定原则排除法官的自由裁量权，排除“权利推定”的可能性。法官以上述模糊表述为法律依据、发挥自由裁量权在个案中保护的，是未上升为权利的法益，未上升为权利的法益才能通过解释的方式推定创设。对于知识产权单行法中存在着的违背权利法定原则的弹性规范表达，未来修法时应有所改变。知识产权法定原则也要求法官在裁判说理时必须谨慎适用开放性概念，明确“权利”与“利益”的区分保护。

关键词：权利法定原则；绝对权；法益；自由裁量权；权利推定

Re-explanation about the Numerus Clausus Principle of Intellectual Property Rights

Abstract: It is doubtful whether or not we should stick to the Numerus Clausus Principle in the field of intellectual property law, the answer to this question determines whether a judge can create a new right that have not been stipulated in the legislation based on discretion through explanation in a case. In terms of legislation many ambiguous expressions are directly conflict with the Numerus Clausus Principle, while the judges' wording changing from “rights” to “rights and interests”. Starting from the rationality of legislation technology, the term “right” in the Numerus Clausus Principle is only the absolute right, and “determine” includes the type and content of the right which is defined by the statute law. The Numerus Clausus Principle excludes judges' discretion and the possibility of "presumption of rights". What the judges protects in a case by the discretion based on those ambiguous expressions is legal interests that not ascended as rights, and only legal interests that not ascended as rights could be create through explanation. We should revise those flexible expressions which conflict with the Numerus Clausus Principle in the specific law that protecting intellectual property in the future. The Numerus Clausus Principle requires judges to apply open concepts carefully when judging and reasoning, and clarify the distinction between "rights" and "interests".

Keyword: the Numerus Clausus Principle, Absolute Rights, Legal Interests, Right of Discretion, Presumption of Rights

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双重误读：知识产权特殊性反思

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摘要：长期以来，学界存在一种颇为流行的观念，即知识产权具有特殊性，故知识产权问题不适用民法的一般原理和规则，这种观念不仅阻碍了对知识产权本质属性的认知，更直接影响了知识产权的立法、司法与执法等法律实践。这种观念建立于两个似是而非的基础之上，即对知识产权对象的自然属性把握有误，且想当然地认为权利对象的特性决定了权利本身的特性。本文旨在阐明这种观念的危害、澄清知识产权对象的自然属性以及论述为什么权利对象的特性并不导致权利的特殊性，进而从根本上消除这种观念上的迷思，证成知识产权的私权基因与民法母体。

关键词：知识产权；基本理论；特殊性；事实与价值二分

Twofold Misreading: Rethinking the Particularity of Intellectual Property Right

Abstract: For a long time, there is a generally accepted concept in academic circles, that intellectual property right has the particularity, so the general principles and rules of civil law are not applicable to the problem of intellectual property right. This concept not only hinders the understanding of the nature of intellectual property right, but also affects directly the legislative, judicial and enforcement practice of intellectual property right. This concept is based on two specious foundations, which are, the misunderstanding on the natural attributes of the object of intellectual property right, and the assumption that the characteristics of the object of rights determine the characteristics of the right itself. This article aims to illustrate the harm of this concept, to clarify the natural attributes of the object of intellectual property right, and to argue why the characteristics of the object of

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right does not lead to the particularity of right itself, and fundamentally eliminate the myth of concept, prove the private-right gene of intellectual property right and its belongingness to civil law.

Keywords: intellectual property right; fundamental theory; particularity; fact-value dichotomy

我国高校知识产权运营路径探究

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摘要：在新的发展形势下以及“大众创新、万众创业”的大背景下，高校作为科技创新的核心主体和主要阵地，如何通过建立健全系统完善的知识产权运营模式，加强知识产权运营管理，进而提高科技成果转化运营的效率，促进科研成果的产业化进程，切实落实创新驱动发展战略成为社会和各界学者日益关注的重要课题。知识产权运营也是科研成果转化运营为现实生产力不可或缺的重要过程，因此探索知识产权运营发展路径，不仅对于高校和科研院所科研创新水平的提高有着重要作用，而且对于促进产学研机制的建立、校企合作模式的发展以及区域经济的繁荣具有巨大的推动作用。

关键词：高校；知识产权；运营路径

Research on the Operation Path of Intellectual Property Rights in Chinese Universities

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Abstract:Under the new development situation and the background of "mass innovation, entrepreneurship", colleges and universities, as the core subject and main position of science and technology innovation, how to strengthen the operation and management of intellectual property rights through the establishment of a sound and systematic intellectual property operation model, and thus improve The efficiency of the transformation and

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operation of scientific and technological achievements, the promotion of the industrialization process of scientific research achievements, and the effective implementation of the innovation-driven development strategy have become an important topic of increasing concern to scholars from all walks of life. Intellectual property management is also an indispensable process for the transformation of scientific research results into practical productivity. Therefore, exploring the development path of intellectual property rights plays an important role not only in the improvement of scientific research and innovation level in universities and research institutes, but also in promoting the establishment of industry-university-research institutions. The development of the school-enterprise cooperation model and the prosperity of the regional economy have greatly promoted.

Keywords: universities; intellectual property rights, operating paths

习近平知识产权法治思想的科学内涵与时代意义

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摘要：党的十八大以来，以习近平同志为核心的党中央高度重视知识产权强国建设。截至 2018 年 6 月底，习近平总书记先后 17 次在公开场合提及知识产权保护问题。同时，以习近平同志为核心的党中央围绕加强知识产权保护，作出系列重大战略部署。这些讲话和决策部署体现了习近平总书记对新时代中国特色社会主义知识产权法治建设的新认识、新概括，形成了习近平知识产权法治思想。习近平知识产权法治思想包括 4 个方面的内容：完善法律法规的知识产权立法思想、加强保护力度的知识产权执法思想、深化审判改革的知识产权司法思想、倡导创新发展的知识产权文化思想。习近平知识产权法治思想的体系科学、内涵丰富，回答了为什么加强知识产权法治建设、怎样加强知识产权法治建设等一系列重大理论和实践问题，为我国知识产权领域各项工作的开展提供了根本遵循和行动指南。当前，尤其应在习近平知识产权法治思想指导下稳步推进知识产权领域的下列重点工作：完善民法典中的知识产权保护制度，将知识产权一般规定在民法典中独立成编；厘清党和国家机构改革与地方知识产权综合管理改革的关系，在遵循加强党的集中统一领导和管理、解决分头重复执法的思想下结合地方实际开展知识产权综合管理改革；积极应对互联网社会背景下知识产权司法新问题，司法裁判过程中积极坚持符合互联网社会发展规律和竞争规则的价值导向。

关键词： 习近平知识产权法治思想，知识产权保护，知识产权立法

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从《俄罗斯联邦民法典》看我国知识产权法如何入典

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摘要：成文法典的出现是人类文明走向成熟的标志，法典编纂活动是人类持续了几个世纪的亚里多德似“善”的追求。2006 年通过的《俄罗斯联邦民法典》知识产权部分，在内容、结构、立法技术等方面具有鲜明地特点，成为世界知识产权法典化史上里程碑式的立法成果。时值我国第五次民法典编纂活动，笔者建议充分的运用这笔宝贵财富，在知识产权立法中借鉴其富有价值的经验，同时绕开或改进其不足点，促进我国知识产权法科学合理、快速有效入典的目标顺利实现。

关键词：《俄罗斯联邦民法典》；法典编纂；知识产权；知识产权入典

Abstract: The emergence of the written code is a mark of the maturity of the human civilization, codification activities are humans for centuries in the pursuit of Aristotle "good". Intellectual property part of the "Civil Code of the Russian Federation," adopted in 2006, in terms of content, structure, technology, legislation clearly has the characteristics and to become the world's procedure landmark achievements in the history of intellectual property. A time when the activities of the Fifth Civil Code, the author recommends the full use of this valuable asset to absorb its valuable achievements in IPR legislation, while bypassing or improve its shortcomings point to promote the scientific and rational method of Intellectual Property quickly and efficiently into the canon target smoothly.

Keywords: The civil code of Russian ,Codification, Intellectual property right, The Code of Intellectual Property

商业化司法救济新模式

——知识产权争议解决中的第三方资助

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摘要：第三方资助是一种诉讼融资工具，旨在帮助当事人先行垫付诉讼或仲裁所需的费用，同时在当事人获得有利判决和裁决后，从赔偿额中获取一定比例的回报。第三方资助起源于英国和澳大利亚，可以有效帮助争议当事人支付无法独立负担的律师费和转嫁败诉风险。近年来，我国知识产权争议数量不断增加，争议本身也呈现出复杂性和独特性等特点，因此为知识产权争议解决支付的费用成本，尤其是律师费也在同比增加。而处于初创阶段的知识产权创业企业，因其持有的知识产权难以准确估值，融资能力较弱，而动用紧缺的流动资金来支持通过诉讼维护权益来换取一个并不明确的结果的需求显然不够急迫。借助第三方资助，可以使无力支付维权费用的知识产权权利人在增强维权实力的同时有效规避风险，实现知识产权权利人和资助者之间的双赢，并且有利于在全社会层面遏制侵权行为，保护与支持创新。同时，对于以知识产权为主要业务领域的律师而言，第三方资助也可以有力协助律师展业，增强律师的核心竞争力。

关键词：第三方资助；知识产权争议解决；司法救济

Abstract: Third-party Funding is a litigation finance instrument to provide the cost of litigation or arbitration to parties of the dispute. In the meantime, the funder will acquire certain revenue from the recovery after a positive decision and arbitral award. Third-party Funding originate from England and Australia and intend to help the parties who is not capable of bearing the attorney fee and transfer of risk. In recent years, the amount of IP disputes arises in a significant way. The dispute itself also turned into complicity and specificality. Thus the cost of dispute also arises. For companies who are at a starting stage, the value of IP cannot be assessed in a proper way which increases the difficulty of financing. Using the scarce cash flow in exchange of an uncertain litigation result is not urgent enough. With the help of Third-party Funding, impecunious party will have the power to claim the remedy and acquire a win-win between the right holder and funder while prevent infringement in the entire society and thus protect innovation. Meanwhile for IP lawyers,Third-party Funding can help them build up their business and enhance their core competitiveness.

Keywords: Third-party Funding; IP Dispute Resolution; Legal Remedy

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知识产权民事诉讼举证问题研究

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摘要：知识产权民事诉讼举证难问题源于知识产权本身固有的无形性、隐蔽性、技术性、易灭失、易修改的特点。作为诉讼证据规则中的举证制度的核心在于举证证明责任及证据收集制度。举证证明责任应作行为意义上的主观证明责任与结果意义上的客观证明责任之分，以法律要件规范为依据进行客观证明责任的分配。我国知识产权民事诉讼举证制度应该坚持制度法定、法院介入、诚实信用、公平均衡原则。针对缺乏统一知识产权民事诉讼证据规则以及法院案多人少的现状，应在既有的法律框架下，通过积极采取证据保全、调查取证措施；充分利用责令证据提供、真实事实陈述制度；强化律师取证举证职责；严守举证期限和证据失权制度；运用和释明举证妨碍、自认推定事实，生效裁判、仲裁、公证文书确定事实等举证责任免除、减轻规则措施以提高当事人及其诉讼代理人的举证能力和举证效果以及法院在证据收集中的威信和效率。当事人之间自行进行证据照会的证据披露开示制度在法律修改之前，无适用余地。

关键词：知识产权　　举证证明责任　　证据收集　　证据披露

Research on the Issue of Proof in Intellectual Property Civil Litigation

Abstract: The problem of finding evidence in civil litigation of intellectual property rights originates from the inherent intangibility, concealment, technicality, easy loss and easy modification of intellectual property rights. The core of the evidence system in the litigation evidence rule lies in the burden of proof and the evidence collection system. The burden of proof should be divided into the subjective burden of proof in the sense of the conduct and the objective proof of responsibility in the sense of the result. The distribution of objective burden of proof is based on the legal elements specification. The system of proof in the civil litigation of intellectual property rights in China should adhere to the principles of system statutory, court intervene, honesty and credit, fair and balance. In view of the lack of unified intellectual property civil litigation evidence rules and the fact of "fewer judges with more cases", which we should actively adopt evidence preservation, investigate and collect evidence measures under the existing legal framework; and make full use of the evidence provision and factual representation system; and strengthen lawyers to proof and collect evidence duties; and strictly observe the period of proof and the system of evidence loss; and use and interpret the spoliation of evidence, self-recognized and presumptive facts, effective judgments, arbitration, notarial documents to determine the facts, etc. Such measures of exemption and mitigation rules of burden of proof, that to improve the ability of the parties and their agents to produce evidence and the effectiveness of evidence, as well as improve the prestige and efficiency of the court in the collection of evidence. There is no room for the disclosure of evidence before the law is amended by the evidence disclosure system between the parties.

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知识产权特别程序法的若干思考——高效审理知识产权纠纷案件的十五项举措

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摘要 知识产权案件技术性强、审理周期长、赔偿低，目前司法实务界正在根据知识产权案件特点，探索与之相适应的知识产权民事程序、行政程序的司法保护模式。[2]随着探索的深入，有必要结合司法实践就知识产权特别程序法的构建和完善，提出兼具可操作性和前瞻性的构想，以期提升知识产权案件审理质效，进一步强化知识产权司法保护的全面性、及时性、时效性。

关键词 知识产权 特别程序法 十五项举措 司法保护

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[2]赵静：《论知识产权审判组织及审判运行模式的建制》，载于《知识产权》，2003年第3期.28。

从权利体系和客体的重构看知识产权客体

——知识产权法体系化及其纳入民法典之理论基础探索

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摘要：知识产权是有别于传统财产所有权的一项新型民事权利，传统权利体系调整对象不涉及知识产权客体。本文通过发展利益说，认为：一定特点的法律之力作用于一定客体，则产生特定的权利；利益是客观事实，却不是客观存在，而对象是有形或无形的客观存在；权利的客体是力作用的对象（如物、行为、关系、表达、人格），它本身并不是利益，力作用于对象产生的结果（效用）才是利益，经法律确认和保障则为权利；权利的客体与载体（有形物）相区分。通过以上权利体系的重构，本文得出，知识产权客体是表达这种无形物，知识产权的特点是客体和载体的可分离性，并通过逐一罗列分析权利客体的方式进行验证。民法理论体系应随着系统内元素的增加而调整变化，在此基础上于民法典编撰之中整体纳入体系化之知识产权法。

关键词：权利体系　权利客体　知识产权客体　客体和载体的可分离性

Abstract: Intellectual property is a new type of civil right that is different from traditional property ownership. The object of adjustment of traditional rights system does not involve intellectual property objects. By developing the "Interest Theory", this paper believes that certain legal powers of certain characteristics act on certain objects, and then produce specific rights; interests are objective facts, but not objective existence, objects are tangible or intangible objective existence. The object of rights is force the object of action (such as matter, behavior, relationship, expression, personality) is not an interest in itself. The result (utility) of the force acting on the object is the interest. The right is confirmed and

guaranteed by law; the object and the carrier of the right (tangible) is distinguished. Through the reconstruction of the above rights system, this paper concludes that the object of intellectual property is to express this intangible object. The characteristic of intellectual property is the separability of object and carrier, and it is verified by analyzing the method of analyzing the object of interest one by one. The theoretical system of civil law should be adjusted and changed with the increase of elements in the system.

Key words: Rights System; Rights Object; Intellectual Property Object; Separability of Object and Carrier

知识产权指导案例运行困境与突破

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摘要：知识产权指导案例制度是具有中国特色的司法制度，具有保障创新驱动发展、促进司法裁判统一、提高司法审判质量、推动法律制度完善的应然价值。通过实证研究发现，当前我国知识产权指导案例存在数量偏少、质量有待提高、参照援引频次低、指导功能有限、援引效果不佳等问题，主要原因在于：指导案例效力不明致使拘束力不强，指导案例质量和数量难以满足统一裁判需求，法官指导案例援引技能不高难以满足援引要求。为了实现知识产权指导案例制度应然价值，应当推进知产庭审实质化，加强裁判文书说理化；拓宽案例编选方式，提高案例数量质量；明确类似案件判断标准，提高法官案例援引技能；明确指导案例"准法源"地位，完善效力保障制度。

关键词：知识产权；指导案例制度；指导案例制度价值；知识产权指导案例；司法援引；运行样态

Operational Predicament of Guiding Case on IPR and Breakthrough

Abstract: The case guidance system of intellectual property rights is a judicial system with Chinese characteristics. The case guidance system of intellectual property rights has the necessary value of ensuring innovation-driven development, promoting the unification of judicial judgment, improving the quality of judicial trial and improving the legal system. Through empirical investigation, it is found that there are some problems in the current guiding cases on intellectual property rights in China,such as less quantity, low quality, low reference frequency, limited guiding function and poor citing effect.There are three main

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reasons. Effectiveness of guiding case is unclear, which cause binding is not strong, The quantity and quality of guiding case is difficult to meet the demand of unified referee, The skills of judges in case citing is not high to meet citing requirements. In order to realize the proper value of the case guidance system of intellectual property right, we should promote the substantive nature of intellectual property trial and strengthen the rationalization of judgment, Widen the way of case selection and improve the quality of cases, Clarify the judgment criteria of similar cases and improve the skills of judges in case citing,Clearly guide the status of "quasi-legal source" of cases and improve the effectiveness guarantee system.

Key Words: Intellectual Property Rights; Case Guidance System ; The Value of the Case Guidance System; Guiding Case on IPR; Judicial Citing; Operation Form

知识产权侵权损害赔偿 AHP 层析法的实践及完善

洪颖雅

（福建省泉州市中级人民法院法官助理）

摘要：如何确定损害赔偿数额这一“司法定价”的争议始终尘硝未落，历来是审判中的重点和难点，近几年各地法院也在积极探索该定价的制度构建和裁判规，其中有部分法院在实践中运用 AHP 司法层次分析法，实乃惊艳至极。本文从实证分析着手，尝试梳理和厘清知识产权司法实践样态中侵权损害赔偿的问题，探寻 AHP 层析法在侵权损害司法认定机制中的适用及完善路径。

关键词：知识产权 侵权损害赔偿 司法定价 AHP 层析法

事实和规范之间：举证妨碍规则在知识产权诉讼赔偿中的适用

洪颖雅

（福建省泉州市中级人民法院法官助理）

摘要：赔偿确定属于事实问题。但在司法实践中，该问题仍有赖于当事人双方的举证、举证责任的分配以及法官对证据规则的运用；为此，赔偿的确定在一定意义上又是法律问题。事实的难以探寻促使我们依赖程序规则，但如何运用程序规则使我们最大程度地接近客观事实则是我们的任务。赔偿可视为一种特殊的司法“定价”，赔偿额的高低体现了知识产权价值的大小，适度的赔偿额可以提升知识产权的市场价值，体现其保护力度。[1]正是在这个背景下，诉讼赔偿阶段的举证妨碍规则的立法和司法探索就显得异常重要。举证妨碍规则是知识产权诉讼赔偿中居于枢纽地位的、处于事实和规范之间的问题。这一规则之于知识产权诉讼比之其他诉讼尤显得重要。本文将首先分析知识产权赔偿的法律困境；其次，初步介绍举证妨碍规则，包括初步分析举证妨碍规则的法律规范、法律性质及其对知识产权赔偿确定的积极作用等；再次，探讨该规则的程序细则及其运用。最后，本文的重点在于把握现行法律体制对举证妨碍规则的确认及其立法缺陷，分析如何在现行体制下完善司法的适用规则，以促使知识产权的赔偿最大程度上接近损害事实。

关键词： 举证妨碍 法定赔偿 损害赔偿计算 自由心证

[1] 孔祥俊：《知识产权保护的新思维——知识产权司法前沿问题》，中国法制出版社 2013 年 11 月第 1 版，第 97 页。

知识产权法定赔偿量化规范构建

——基于2015至2017年泉州中院商标侵权案件的调研分析

黄熠

（泉州市中级人民法院民三庭）

摘要：我国在知识产权损害赔偿上虽然设置有一定的计算方式，但出于权利人的维权成本及在损失方面举证难等原因，可以预见我国的知识产权诉讼仍将长期适用法定赔偿制度用以确定知识产权侵权损害赔偿数额。证据规则的强化运用能够帮助法官查清知识产权侵权损害赔偿方面的案件事实，法定赔偿制度的量化细则能够帮助法官准确界定法定赔偿额，文章通过实证研究并进行归纳总结后的制度探索希望能够为我国知识产权损害赔偿制度提供些许有益建议。

知识产权行民交叉保护模式的冲突与解决

——以行政处罚与民事侵权诉讼为视角

李骏*

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摘要：知识产权制度的核心是保护知识产权，而知识产权行政保护作为我国知识产权保护体系的特色之一，在现阶段对于推进我国知识产权战略、提升我国知识产权保护水平、营造保护知识产权的社会氛围起到了不可替代的巨大作用，特别是行政机关对于侵犯知识产权的行为所采取的行政处罚，更是以其执行迅速、威慑力大、程序简便、成本低廉而成为知识产权保护利器。但是由于行政机关与司法机关在执法理念等方面的差异，两个机构可能对同一行为侵权与否作出完全不同的认定，而这种结果的发生都将严重损害了法律权威，更会将使得知识产权权利人无所适从；同时，由于行政保护的终局决定亦有可能需接受司法机关的复审，其行政行为一旦被人民法院确认错误或无效，也将挫伤了行政机关的执法积极性、损害行政机关的执法权威。此类冲突案件的不断涌现，使得如何处理知识产权行政保护与司法保护的配合与衔接成为司法实践的重要课题。为此，笔者以行政保护中最具代表性的行政处罚以及司法保护中最具代表性的民事侵权诉讼为视角，对两者之间的冲突及其产生的原因进行系统的梳理和研判，以求能够提出相应的解决对策及其完善手段，促进知识产权保护工作的完善和健全。

关键词：知识产权　行政处罚　司法保护　民事侵权

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Abstract: The system of intellectual property protection is to protect intellectual property. One of the features in the Chinese system is that we have specific administration organizations to provide protection for intellectual property. At present, they play a significant role in facilitating our strategy, promoting our ability and increasing awareness of intellectual property protection. Moreover, they are a sharp weapon in terms of their quick execution, powerful influence, simple procedures and low cost. However, because of disparity in values and other respects between administration institutions and judicial institutions, they give two complete different verdicts on the same case of infringement, which seriously affect the authority of law and confuse people. Moreover, the final verdict from administration institution is still subject to rules of judicial institutions. If they are ruled as mistakes or invalid, which dampen the enthusiasm of administration staff and affect their authority. More and more cases show the importance of coordination between two institutions. Therefore, the author analyzed the conflicts and their reasons from a perspective of the administrative penalty and civil lawsuits and hope the advice in the article could be available for the promotion and improvement of intellectual property protection.

知识产权法的利益平衡原则探析

王春艳

（内蒙古财经大学）

摘要：知识产权法之中，立法确认了利益平衡，是依循的准则。从法理视角看，利益平衡调和了多重的利益冲突，平衡现有权益。知识产权法不可脱离本源的平等准则，是应有的价值。维护公共利益，就要妥善去平衡多方应有的权益。知识产权法凸显了公益的目标，同时维护私权，更应接纳利益平衡的调控及指引[1]。为此，有必要明晰利益平衡特有的现实运用，探析应用路径。

关键词：知识产权法　利益平衡原则　应用探析

经济学视角下对知识资产的产权界定问题之初步思考

薛可懿

（宁波大学民商法研究生）

摘要：在知识产权应用领域之中，往往存在着知识产权权利人与社会公众之间利益的博弈，其归根结底是知识产权权利人与其他社会成员之间权利和义务的再分配，利用经济学的方法研究知识产权权利人与社会公众之间利益分配的边界所在，把效益作为分配权利和义务的基本标准，适应了这种权利义务关系，有利于使这种权利和义务及其界限最优化，以最大限度提高经济效益，从而催生出适应经济发展的知识资产产权界定标准。

关键词：知识产权;知识资产;产权界定;经济学;成本与收益

Research on Knowledge Assets Property Rights from the Perspective of Economics

Abstract: There are so much conflict of interest between the social public and the oblige in the field of intellectual property. To make an economic analysis to establish the rational system of intellectual property can liberate the productive forces and arouse labor's enthusiasm and creativity and promote the development of economy and social stability.

Key Word: Intellectual Property; knowledge Assets; Property Rights; Economics; Cost and Benefit.

论新媒体诚信的制度逻辑

周静

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摘要：制度是新媒体诚信建设的基础，它是维系新媒体经济秩序的根本保证、降低新媒体交往成本的内在需求、延长新媒体生命周期的必然选择。当前新媒体在新闻领域、经济领域、人际交往领域、知识产权领域等存在严重的诚信缺失，究其根源在于法律等正式制度的不完善和道德等非正式制度的约束不力。因此，应该从健全新媒体诚信的法律法规、完善新媒体道德的内在规约、建立新媒体诚信的管理机制、加强新媒体诚信的技术保障等路径构建起新媒体诚信制度体系，才能有针对性地治理新媒体失信行为，保障新媒体事业的健康可持续发展。

关键词：新媒体　诚信　制度　保障

On the Institutional Logic of New Media Integrity

Zhou　Jing

Abstract : The system is the basis for the construction of new media integrity. It is the fundamental guarantee for maintaining the new media economic order, the internal demand for reducing the new media communication costs, and the inevitable choice for prolonging the life cycle of the new media. Currently, there are serious lacks of honesty and credibility in the new media in the fields of news, economics, interpersonal communication, and intellectual property. The root causes lie in the incompleteness of formal systems such as laws and the inflexibility of informal systems such as ethics. Therefore, a new media integrity system should be established from the perspectives of improving the integrity of new media laws and regulations, perfecting the internal statutes of new media ethics, establishing a management mechanism for the integrity of new media, and strengthening the technical guarantees for the integrity of new media. Manage the lack of integrity in new media and ensure the healthy and sustainable development of the new media business.

Keywords: new media; integrity; system ; protection

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自贸区知识产权纠纷多元化解决机制探析

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摘要：自贸区知识产权纠纷具有涵摄场域国际性与多元性、专业综合性与技术交叉性、利益保护隐秘性与紧迫性等特点，要妥善解决自贸区知识产权纠纷，需要厘清自贸区知识产权纠纷解决的价值导向，合理选择纠纷解决机制，提高纠纷解决效率，推动自贸区经济健康发展。

关键词：自贸区　知识产权　纠纷解决机制

二、“一带一路”倡议与国际知识产权

晚近国际知识产权发展态势与我国的应对方略*

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摘要：随着知识产权战略的深入实施和知识产权强国进程的快速推进，参与国际知识产权秩序构建已经成为我们面临的一项重大课题。国际层面，后 TRIPS 时代的国际知识产权立法步履维艰、博弈更趋复杂，国际知识产权呈现一些新的发展态势，这既给我国参与国际知识产权秩序构建带来了良好机遇，也带来的严峻挑战。在新的国内国际背景下，我国应当进一步加强对知识产权法律全球化的研究、制定国际知识产权战略、构建知识产权理念和话语体系、完善国内立法、处理好与各种类型国家的关系、实现多重机制互动，为国际知识产权秩序构建贡献中国方案。

关键词：国际知识产权秩序；发展态势；应对方略

The development trend of international intellectual property rights and China's Countermeasures

Abstract: With the in-depth implementation of the intellectual property strategy and the rapid progress of building intellectual property power, it has become a major issue for us to participate in the construction of international intellectual property order. At the international level, the international intellectual property rights legislation in the post TRIPS era is difficult, the game is more complex, and the international intellectual property right presents some new developments, which not only brings good opportunities for China to participate in the construction of international intellectual property order, but also brings serious challenges. Under the new domestic and international background, China should further strengthen the

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research on the globalization of intellectual property law, formulate the international intellectual property strategy, construct the concept and discourse system of intellectual property, perfect the domestic legislation, deal with the relations with various types of countries, and realize the interaction of multiple machine system.

Keywords: International intellectual property order; Development trend; Countermeasures

“一带一路”倡议背景下知识产权犯罪数额认定标准选择

——以 Q 市近五年审理的假冒注册商标罪为研究样本

陈琳

（福建省泉州市中级人民法院）

摘要：自《最高人民法院、最高人民检察院关于办理侵犯知识产权刑事案件具体应用法律若干问题的解释》颁布实施至今已 14 年，司法实践中积累了诸多假冒注册商标罪数额认定上引发的同案不同判的量刑失衡、合法不合理的民众争议，及司法实务者众口一词认为需要对现行司法解释进行修改的必要等问题，尽管期间偶有争论却未获重视。在“一带一路”倡议背景下，在加强知识产权保护力度政策下，问题亟待解决。为确保所反映问题的客观、真实和全面，本文以 419 份同类犯罪判决为数据分析和考察基础，结合对检察员、法官、律师、被告人等亲历者的访谈调查，力图准确、全面、直观的呈现司法实务的迫切——结束本意良好、设计周全却在实践中问题颇多的原有司法解释的多层次认定标准，改用更加符合社会需要和实务需要的，统一由客观中立的鉴定机构作出的鉴定价为认定标准的建议，及配套修改方案。

关键词：假冒注册商标罪　犯罪数额　认定标准

“一带一路”倡议下权利用尽的发展问题

范桂荣*

（铁力市人民法院法官助理）

摘要：“一带一路”倡议的实施涉及 65 个国家和地区，但不同国家的知识产权保护和科技创新能力不尽相同。同时，由于知识产权权利用尽（又称权利穷竭）原则在国际范围内还未得到普遍使用，这就使得一带一路沿线国家在知识产权建设方面呈现两极分化的情况。随着一带一路沿线国家的贸易往来日益繁多，贸易合同的数量也不断增多，为了交易的顺利达成，促进沿线国家贸易的自由发展，避免纠纷发生对贸易达成的影响，权利用尽原则无疑会发挥良好的作用。支持知识产权国际用尽原则的主张，即是站在保护贸易的自由流转的立场上，对促进沿线国家知识产权合作发挥重要作用。相反，不允许该原则的适用将产生一种新形式的非关税壁垒，一定会对商品在沿线国家，甚至国际市场上的自由流通产生阻碍作用。笔者以专利领域的权利用尽原则适用为例，论证“一带一路”倡议下权利用尽的发展问题。值得肯定的，我国专利法扩大了权利用尽的适用范围，并承认了专利产品（尤其是专利药品）平行进口在国际货物贸易中的合法性，有效缓解了知识产权私人权利范围的扩张化与人权、健康权发生的冲突。

关键词：一带一路　权利用尽　平行进口

Abstract: The Belt and Road Initiative concerns about 65 countries and districts in which IPR protection and innovation modes vary differently. IPR Protection has not become a consensus of countries in the world which makes some conflicts between the belt and road countries. An increasing trend of international goods trade and international contracts brings more challenges to free trade and ways of resolution to the international disputes. There is no doubt that the principle of IPR Exhaustion plays a big role between the belt and road countries. The supporters of IPR Exhaustion based on the protection of the freedom of international trade mean to encourage more IPR cooperation. On the other side, no

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permission of IPR Exhaustion makes a new form of non-tariff barrier which will prevent free trade between the belt and road countries and even in the international market. The author taking IPR Exhaustion in patent area as an example means to demonstrate the application of IPR in the belt and road initiative. To be worth raising, Chinese Patent Law taking effect in October 2009 has clearly formulated extension of patent exhaustion, and has made patent products (especially patent pharmaceuticals) parallel import legal. All these legislative changes alleviate the contradiction between amplification of private rights and public health.

企业涉外知识产权维权国际问题探析

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摘要：当前，在新一轮高技术革命浪潮及“一带一路”倡议的推动下，全球经济竞争格局和产业布局态势正在发生深层次的结构性变化，经济全球化不断深入，知识经济快速发展，企业走出去步伐加快，国家综合竞争实力的增强越来越依靠创新驱动。但是“走出去”的企业如何适应国外的知识产权环境，维护自身利益显得格外重要。美国总统特朗普于 2017 年 8 月在白宫签署行政备忘录，指示美国贸易代表莱特希泽针对所谓“中国不公平贸易行为”发起调查，以确保美国的知识产权和技术得到保护，成为国外发达国家向我国迅速发展的高科技企业发难和打压的又一标志性热点。为此,对于企业涉外知识产权维权问题，当引起高度重视。本文将对中国走出去企业涉外知识产权维权问题进行探讨。

关键词：知识产权；涉外；企业；维权

An analysis of international issues concerning intellectual property rights protection of enterprises

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Abstract: At present, under the impetus of the new wave of high technology revolution and the "one belt and one road" initiative, the global economic competition and industrial layout situation is undergoing structural changes deeply, the deepening of economic globalization, the rapid development of knowledge economy, enterprises going out to accelerate the pace of

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increase more and more rely on innovation driven national comprehensive competitive strength. But the "going out" enterprise how to adapt to the foreign intellectual property environment and maintain its own interests is particularly important. The United States President Trump signed an executive memorandum at the White House in August 2017, indicating the U. S. trade representative Wright chize to the so-called "Chinese unfair trade practices" initiated the investigation, to ensure that U.S. intellectual property and technology protection, has become a symbol of the focus of foreign developed countries to China's rapid development of high-tech enterprises and to suppress the revolt. To this end, the issue of intellectual property rights protection of foreign-related enterprises should be paid great attention. This article will discuss the right to protect the rights of foreign intellectual property rights in China.

Keywords: Intellectual property rights; Foreign affairs; Enterprises; Safeguarding rights

完善“一带一路”建设中的国际知识产权保护机制

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摘要：“一带一路”的倡议得到越来越多国家认同和参与，为适应创新驱动战略、健全法律制度框架、打响知识产权品牌的需要，发挥区域优势和潜力，完善区域国际知识产权保护机制，推进知识产权保护区域一体化，有助于提高我国的自主创新能力，营造更好的国际营商环境，为构建命运共同体保驾护航。

关键词：一带一路 国际知识产权保护 命运共同体

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我国涉外知识产权侵权案件的法律适用

——《中华人民共和国涉外民事关系法律适用法》第 50 条评析

贠雪妍

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摘要：知识产权是具有地域性特点的民事权利，通常仅在对其授权的地域范围内受到保护，但随着经济全球化的发展，跨国贸易也得到了高速发展，同时也产生了涉外知识产权问题。笔者在北大法宝网站以《中华人民共和国涉外民事关系法律适用法》第 50 条为关键词搜索，发现司法实践中大量案件审判均以被请求保护地在中国为由直接适用中国法。因此，笔者在本文中简略分析了该现象，概述了被请求保护地的认定标准，并对该法条进行了简略评析。

关键词：涉外知识产权；侵权责任；法律适用

Abstract: Intellectual property rights are civil rights with regional characteristics and are usually protected only within the geographical scope of their authorization. However, with the development of economic globalization, cross-border trade has also developed at a high speed, and foreign-related intellectual property issues have also arisen. On the website of Peking University, the author searched for the 50th article of the Law of the People's Republic of China on the Application of Foreign-related Civil Relations Law, and found that a large number of trials in judicial practice directly applied Chinese law on the grounds of the requested protection in China. Therefore, the author briefly analyzes the phenomenon in this paper, outlines the criteria for the identification of the protected land, and makes a brief evaluation of the law.

Keywords: Foreign-related intellectual property rights; Tort liability; Legal application

知识产权国际保护制度

魏金玉

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摘要：在西方社会资本垄断主义的形成以及国际经济技术的交流不断发展的情况下，导致知识产权具有严格地域性的国内法已经满足不了各国的实际需求。各国经济、技术迅速发展，互联网领域带给社会无限的前景，各个国家在技术、资本等方面相互融汇贯通，以谋求更好的发展，因此知识类的产品流通各个国家，这也使知识产权国际化保护显得更为重要和必要。本文对知识产权国际保护制度作了深入的研究，包括知识产权保护制度的发展、法律适用、特征、改革四个方面。

关键词：知识产权保护制度；法律适用；地域性；创新

越南知识产权立法及演变

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摘　要：越南的知识产权立法演变与其国内社会经济改革需要及对外贸易的快速发展密切相关。“1995 民法典”中独立的“知识产权编”结束了该国知识产权零散立法的格局，开启了高位阶的统一立法模式；2005 年，伴随专门《知识产权法》出台，该国“2005 民法典”中的“知识产权编”条文数量大幅缩减；“2015 民法典”则将“知识产权编”完全剥离，与此同时，该国《知识产权法》历经 2009 年、2013 年两次修订，并针对其中专门内容的适用出台相关实施办法。

关键词：越南；知识产权；立法演变

Abstract: The evolution of intellectual property legislation in Vietnam is closely related to the needs of domestic social and economic reform and the rapid development of foreign trade. Independent "Intellectual Property Code" in the "1995 Civil Code" ended the pattern of fragmentary legislation on intellectual property rights in the country, and opened a high-level unified legislative model; in 2005, with the introduction of a special "Intellectual Property Law", the number of "Intellectual Property Code" provisions in the country's "2005 Civil Code" significantly reduced; "Civil Code 2015" rules At the same time, the country's Intellectual Property Law has been revised twice in 2009 and 2013, and relevant implementation measures have been introduced for the application of the specific content.

Key words: Vietnam; Intellectual property rights; Legislative evolution

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三、商标与反不正当竞争

构建清理闲置注册商标的制度研究[①]

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摘要：商标恶意抢注行为、商标专用权人对商标使用的忽视，以及商标专用权人未能主动对无使用需求的注册商标进行注销等原因，导致我国大量闲置注册商标的产生，闲置注册商标既浪费了有限的商标资源，也阻碍了对商标有真正使用需求的市场经营者对注册商标的使用。因此，对闲置注册商标的清理有助于发挥商标价值、净化商标市场环境。为了有效地清理闲置注册商标，建议构建以商标行政机关为主导、第三方机构为辅的清理闲置注册商标的制度。由商标局依职权清理无主商标和撤销连续不使用商标，由商标局领导并与第三方互联网企业合作搭建闲置商标档案和数据库，通过第三方商标交易平台，推进对闲置注册商标的转让和许可，盘活商标资源。

关键词：商标专用权；恶意抢注；闲置商标；商标行政管理

Abstract: Due to the influence of trademark preemptive registration in bad faith, trademark right holders' neglect of trademark use, and the fact that trademark right holders would not actively cancel their registered trademark when they don't have plan to use certain registered trademarks, there are a lot of unused registered trademarks in China. Unused registered trademark is a waste of limited trademark sources, which hinders entities that have intention to use certain registered trademarks to apply and use the trademarks. Therefore, it is necessary to clear up such unused registered trademarks, which would improve the value of registered trademarks and optimize the entire trademark market. Our recommendation is to establish a system to clear up all unused registered trademarks, and such system should be led by trademark office with the help of third entities. Trademark office shall clear up and cancel unused trademarks ex officio, and cooperate with third-party internet enterprises to create a database of unused registered trademarks. Third-party trademark transaction platform shall also be involved in this system by promoting the transfer and license of unused trademarks, which would bring unused registered trademarks back into active use.

Key Words: Trademark Exclusive Right; Trademark Preemptive Registration in Bad Faith; Unused Trademark; Trademark Administration

本文是上海市哲学社会科学规划课题《商标恶意抢注法律规制研究》（项目编号：2017BFX005）的阶段性研究成果。

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中国知识产权法学研究会 2018 年年会

互联网不正当竞争行为的法律规制探析

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摘要：互联网技术高速发展的今天，它不仅改变了我们的生活，同时也为经济社会发展注入了新的活力。但是，由于互联网行业竞争规则的缺失，我国的互联网行行业存在着竞争失序的现象。本文通过对不正当竞争行为的叹息来加深对互联网专条的理解，以此来规制互联网不正当竞争行为。

关键词：互联网；不正当竞争行为；反不正当竞争法

Abstract: Nowadays, the rapid development of internet technology not only changes our life but also injects fresh vigor in the economic and social development. However, the internet industry in our country is disordered in competition for the lack of rules. This article provided close understanding of the internet by analyzing the unfair acts of competition in order to be applied to the regulation of such acts in the internet industry.

Keywords: Internet; unfair acts of competition; Countering Unfair Competition

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**北京工业大学文法学部 2017 级社会工作专业硕士，研究方向为知识产权。

商业标识的演进逻辑与我国商业标识法完善的路径

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摘要：商业标识是现代商品经济极为重要的商事符号与标记，是商主体知识财产的重要类型。构建相关法律制度，保护商主体对其商业标识的财产权益，是促进商品经济可持续发展的制度基础。在商业实践中，商业标识的演进表现为从现代性商业标识独大发展到现代性与传统性商业标识兼容、从个体性商业标识独尊发展到个体性与集体性商业标识并存、从现实性商业标识独强发展到现实性与虚拟性商业标识共荣的逻辑进路。商业标识涵盖现代性与传统性商业标识、个体性与集体性商业标识、现实性与虚拟性商业标识三对逻辑范畴。我国商业标识立法，在理念上偏重保护现代性、个体性、现实性商业标识，而忽视传统性、集体性与虚拟性商业标识的保护。为此，我国应当调整商业标识法立法理念，制定统一的商业标识法，配以相关商业标识保护条例，对所有商业标识提供保护。

关键词：商标；传统名号；地区工业品标识；货源标记；域名

Involved Logic about Business Marks and the Improved Paths about Our Business Marks Law

Abstract: Business marks are the important trade symbols and signs in the modern commodity economy, and one of the important intellectual property. To protect traders property on its business marks by law is the institution's base to promote the modern commodity economy development. There are three logic paths about the progress of business marks, from strong modern, individual and real trade symbols and signs to all strong modern and traditional, individual and collective, real and fictitious business marks. Business marks

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include three pairs of logic concepts, id est modern and traditional, individual and collective, real and fictitious business marks. Our law about business marks lay particular stress on modern, individual and real business marks in principles, but ignore the protection of traditional, collective and fictitious business marks. So we shall revise guiding principles about business marks law, enact a uniform business marks law, accompanied by some regulations relevant to some business marks, and protect aforementioned all business mark.

Key words: business marks; traditional names and symbols; local marks of industrial product; indication of sources; domain name

论商标先用抗辩的司法适用前提

——商标注册者主观状态之考察

张秀玲

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摘要：在注册商标侵权纠纷司法实践中，被诉侵权人依据商标法 59 条第 3 款提出在先使用抗辩时，法院如何理解把握好具体的适用要件，事关公平正义及立法目的的实现。商标先用抗辩规则应是基于平衡一定影响的商标先用人和善意抢注者的利益关系而设置的；但对恶意抢注者,可参照刑法中“举轻以明重”原则，允许被诉侵权人在不提无效宣告请求的前提下，直接要求适用第 59 条第 3 款主张先用权抗辩，而非简单的对被告的抗辩主张不予采纳或避而不谈，且此时原告无权要求加注区别标识。

关键词：商标先用抗辩；恶意抢注；善意抢注

On the Premise of Judicial Application of the Defense Right of the Trademark Prior User——Investigation on the subjective state of trademark registrants

Abstract: In a registered trademark right infringement dispute judicature practice, it is important whether a court can apply section 3 of Article 59 of the Trademark Law properly or not, which will be concerned realization of fair justice and legislation goal. Although this system is set up for the balance of right between the prior user of certain influence trademark and unmalicious preemptive registrant. But when plaintiff is a malicious registrant, defendant should be allowed to take a plea according to above term of the trademark law rather than be refused or ignored. What's more, plaintiff has no right to request defendant to add different mark.

Key words: defense of the trademark prior use; preemptive registrant; unmalicious registrant

商标侵权中“商标性使用”地位研究

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摘要：商标性使用与混淆可能性是两个不同的判断标准，商标性使用属于行为要件，混淆可能性则属于结果要件，两者并不存在包含与被包含的关系。在判断商标侵权时，商标性使用是商标侵权判断的前提条件，只有被诉侵权人的使用行为构成了商标性使用，该行为才可能构成商标侵权。

关键词：商标性使用，混淆可能性，描述性商标使用，商标地域性

Abstract: Trademark use and confusion possibility are two different criterion. The trademark use belongs to the behavior element, the confusion possibility belongs to the result element. There is no inclusive relationship between the two. In judging trademark infringement, trademark use is the prerequisite . Only if the action of the infringer belongs to the trademark use, can the act constitute trademark infringement.

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商标资产界定研究

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摘要：目前学界将商标资产界定为“一种能够为企业带来额外收益的顾客关系”或“超越商标功能目的的附加价值或附加利益”的观点，并不准确。商标资产，应表现为一种价值或利益，其与商标密不可分，且需对其外延加以限缩，应是指“依附于商标而形成的，反映商标功能价值、内在吸引价值、外在转化价值，并能够为权利主体带来超越产品或服务本身利益之外预期的未来经济利益”。

关键词：商标；商标资产；附加价值；附加利益

Abstract: The current definitions of trademark equity include “customer relationship bringing additional benefits to the company” or “additional value or benefits beyond the purpose of trademark function” but they are all inaccurate. Trademark equity shall be expressed as value or interest which is inextricably attached to trademarks and the definition extention of trademark equity shall be narrowed down. The definition of trademark equity shall be “expectable future economic benefits beyond the inherent value of goods or services brought to the right owner which is attached to the trademark and reflecting the functional value, inherent value and external transformation value of the trademark”.

Key words: Trademark; Trademark Equity; Additional Value; Additional Benefits

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流量劫持不正当竞争行为的司法规制*

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摘要：依据流量劫持的不正当性的严重程度可以将流量劫持分为黑色流量劫持和灰色流量劫持。认定流量劫持行为是否具有正当性应当在综合考虑多种因素并进行利益衡量和价值比较的基础上进行。首先“将得流量”是认定流量劫持的前提。认定“将得流量”时，要考虑用户的使用习惯、心理预期以及互联网行业惯例等因素。其次，在客观上分析流量引导行为是否具有不正当性。在互联网竞争空间狭窄、依附巨头开展业务模式主导的情形下，对干扰不应做负面评价。通过考量正当技术接触的边界、是否具有区别对待、风险提示设置标准是否科学等因素认定流量引导行为的正当性。最终综合考察保护真正的技术创新、保护消费者的合法利益、具有良好的竞争效果等价值因素，对流量引导行为的正当性进行综合评价。

关键词：流量劫持 互联网 不正当竞争 竞争机制

Abstract: Identification of traffic hijacking is justified or not should be determined on the basis of comprehensive consideration of various factors, benefit measurement and value comparison. Firstly, the "coming traffic" is the premise of traffic hijacking. Secondly, objectively speaking, we should analyze whether the flow guidance behavior is unjustifiable. Finally, the paper makes a comprehensive evaluation of the legitimacy of the flow guidance behavior by investigating the value factors such as protecting the real technological innovation, protecting the legitimate interests of consumers, and having a good competitive effect.

* 本文系最高人民法院2017年度司法案例研究课题“互联网新型不正当竞争法律规制案例研究”的阶段性成果；本文受 2017 年中国政法大学博士创新实践项目资助（项目编号2017BSCX13）。

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“通知-取下”规则背景下权利人的滥用取下通知责任

—从美国 Lenz v. Universal Music Corp.一案切入

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摘要：为了回应数字网络技术的发展，美国于 1998 年签署《数字千年法案》，以限制网络服务提供者责任，并平衡各相关方利益。该法案创设了限制网络服务提供者责任的避风港制度。该制度被包括我国在内的很多国家版权立法仿效。“通知—取下”规则构成避风港制度的核心。根据该规则，如果权利人滥用取下通知，则需承担赔偿责任。权利人“取下通知”必须包含的内容之一是要有这样的陈述，即：权利人善意地相信对被控侵权材料的使用系未经许可的使用。同时，根据该法案，如果权利人故意作出侵权的虚假陈述，则其应就由此造成的损失承担责任。然而，该法案对权利人的“善意相信”究竟属于客观善意还是主观善意并未做出明确规定。这给权利人滥用取下通知责任制度的司法适用带来很大不确定性。美国法院关于“善意相信”的标准存在分歧。美国第九巡回法院于 2015 年在 Lenz v. Universal Music Corp.一案中对该问题进行了系统阐述。该案判决后引起了广泛讨论。

我国关于权利人滥用取下通知责任制度主要体现在《信息网络传播权保护条例》第 24 条。该条规定了滥用取下通知权利人的严格责任。这种严格责任既不合理，也不必要。我国有必要从 Lenz 一案中吸取经验教训，将权利人的责任由严格责任转向过错责任。

关键词：“通知—取下”规则　滥用取下通知　严格责任　过错责任

Abstract: As the response to the development of the digital network technologies the

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US enacted the Digital Millennium Copyright Act (DMCA) in 1998 to limit the liability of internet service providers (ISP) and balance the interests of related parties. DMCA established safe habor regime to limit ISP liability, which was followed by legislations in many countries including China.The "Notice and takedown" rule plays the key role in the safe habor regime. According to this rule, if the right holder misuses the takedown notice, he shall be liabile for damages incurred to receiver of takedown notice. The notice must includes a statement that the complaining party has a good faith belief that use of the material in the manner complained of is not authorized. DMCA also provides that the notice sender knowingly materially misrepresents shall be liable for the damages incurred by him. However, the Act is not clear with respect to whether "good faith belief" is subjective or objective.This ambiguity causes great uncertainty of judicial application of liability regime for misuse of takedown notice. There is divergence among the US courts in terms of the standard of "good faith belief". The ninth circuit elaborated on this issue in Lenz v. Universal Music Corp. in 2015 which brought about much debate.

The notice sender liability regime in our country embodies in Article 24 of Regulation on the Protection of the Right to Communicate Works to the Public over Information Networks. This Article provides the strict liability for misuse of takedown notice. This strict liability is neither reasonable nor indispensable. It's necessary for China to establish fault liability instead of strict liability.

Keywords: Notice-and-Takedown rule misuse of takedown nitice strict liability fault liability

电商平台商标侵权中避风港规则的适用研究

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摘要：随着电商平台运营技术水平的提高、运营模式的不断成熟与多样化，现行避风港规则在处理我国电商平台商标侵权问题上的局限性日益凸显。适用于避风港规则的电商平台范围模糊，无法区分不同运营模式下避风港规则的适用主体。此外，"知道"、"必要措施"以及"红旗规则"与电商平台主观过错有关的认定标准存在缺陷。完善避风港规则的适用规范应综合考虑电商行业发展现状，在明确适用避风港规则的电商平台范围的基础上，既要健全电商平台商标侵权投诉机制，又要适当提高电商平台合理注意义务，还应鼓励电商平台与商标权人共同建立预防性过滤系统。

关键词：电商平台；商标侵权；避风港规则

Abstract: With the improvement of the operation technology level of e-commerce platform and the continuous maturity and diversification of the operation mode, the limitations of the existing safe harbor rules in dealing with the trademark infringement of China's E-commerce platform are highlighted. The subject scope of current safe harbor rules is ambiguous, which fails to distinguish the E-commerce platforms of different operating modes. The identification standards of e-commerce platforms' subjective fault are insufficient, including the identification standards of "knowing", "necessary measures" and "red flag rules". The way to perfect safe harbor rules including making the subject scope under the new situation clearly, improving the E-commerce platform trademark infringement complaints mechanism, raising the E-commerce platform for the reasonable duty of care, and encouraging the

E-commerce platform to establish preventive filtration system together with the trademark holder.

Key words: E-commerce platform; trademark infringement; safe harbor rule

商标法“不良影响”条款司法适用之规范分析

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摘要：《商标法》第 10 条第 1 款第（8）项中的“其他不良影响”条款维护的是社会公共利益，是公序良俗的守卫者。经分析显示：“不良影响”条款在司法适用中缺少统一的参考标准和保护法益僭越至私益的问题使其异化。以确立“不良影响”条款保护公益而非私益与分类区分商标是否具有不良影响的适用规则和类型化的方式，明晰“其他不良影响”条款的适用，以期促进商标注册与保护制度的完善。
关键词：不良影响；公共利益；类型化

Abstract: The "adverse effects" clause in item 1th of article 10th (8) of the trademark law upholds the public interest of society and is the guardian of public order or good morals.The analysis shows that the "adverse effect" clause lacks the unified reference standard and the protection law benefits offside to the private benefit in the judicial application. To establish the "adverse impact" clause to protect public interest rather than private interests and classify whether the trademark has adverse effects of the applicable rules and type of manner, clear "other adverse effects" of the application of the provisions, in order to promote the registration of trademarks and protection system to improve.

网络游戏的反不正当竞争法规制：批判与反思

刘晓

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摘要：对于利用他人游戏规则的行为和转播他人游戏画面的行为，法院认为可以分别考察著作权法和反不正当竞争法，并不存在适用上的冲突。根据《反不正当竞争法》第 2 条认定被告构成不正当竞争，所采用的基本规则是付出劳动产生成果的主体，可以禁止他人未经许可利用该劳动成果。最高人民法院在司法政策中反复指出，凡是《著作权法》已作穷尽性规定的领域，《反不正当竞争法》原则上不再提供附加保护。其合理性在于，反不正当竞争法规制会与著作权法规制产生冲突，因为《著作权法》和《反不正当竞争法》在权利客体和权利内容上的差异，使得《反不正当竞争法》的保护范围可以完全涵盖《著作权法》的保护范围，并拥有更大的保护范围，会使《著作权法》的各种具体制度都失去作用，并阻碍《著作权法》立法目的的实现。解决之道是加强对著作权法本身的研究，反思如何在网络游戏案件中，更好地解释适用思想表达二分法、作品定性、网络转播权等《著作权法》的规定，而不是向《反不正当竞争法》的一般条款逃逸。

关键词：网络游戏 游戏规则 游戏画面 不正当竞争 著作权

Abstract: For the act of using the rules of other people's games and rebroadcasting other people's game screens, the courts held that Copyright Law and Anti-unfair Competition Law can be separately examined, and there is no conflict of application. When the defendant is determined to constitute unfair competition according to Article 2 of Anti-unfair Competition Law, the basic rule adopted is that people who pay the labor to produce the result may prohibit others from using the labor result without permission. The Supreme People's Court repeatedly pointed out in the judicial

policy that in the field where Copyright Law provides rules, Anti-Unfair Competition Law no longer provides additional protection in principle. The rationality is that Anti-unfair Competition Law will conflict with Copyright Law, because the difference between Copyright Law and Unfair Competition Law in the object of rights and the content of rights makes the scope of protection of Unfair Competition Law can completely cover the scope of protection of Copyright Law, and has a greater scope of protection, which will make various specific rules of Copyright Law useless and hinder the realization of the legislative purpose of Copyright Law. The solution is to strengthen the study of Copyright Law itself, and reflect on how to better explain the provisions of Copyright Law in online game cases, such as the dichotomy of idea and expression, the nature of works, and the rights of network broadcasting, instead of escaping to adopt the general term of Unfair Competition Law.

Key words: online game; game rule; game screen; unfair competition; copyright

互联网不正当竞争行为规制的类型化分析

毕文轩

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摘要：《反不正当竞争法》一般性条款因为过于抽象和概括，难以公平解决互联网领域层出不穷的法律行为，而新修订的“互联网条款”由于自身周延性不足也不宜被广泛适用于调整互联网不正当竞争。类型化的方法是破解互联网无序竞争乱局的绝佳选择，其在很大程度上可以防止一般条款被滥用的风险，同时也对司法的自由裁量与日后类型的整理与规范起到积极作用。以司法案例为基础，在研究司法实践对竞争关系、主观过错、商业道德以及损害后果等因素的具体考量后，分别从侵害竞争者利益、侵害消费者利益与侵害公共利益三个角度入手，将有悖于互联网不正当的行为归纳为基于真实事实贬低商誉、不正当模仿他人成果、阻碍他人正常竞争、违背特定合同义务或附随义务、侵害消费者选择自由、误导消费者、违法行为以及阻碍行业市场的整体发展等八个类型。

关键词：互联网　不正当竞争　类型化　实证研究

Abstract: The general provisions of the Anti-Unfair Competition Law are too abstract and generalized to fairly solve the endless legal acts in the field of the Internet, and the newly revised "Internet Clauses" are not suitable to be widely applied to adjust the Internet unfair competition because of their lack of perimeter. Typical methods are the best choice to break the chaos of disorderly competition on the Internet, which can largely prevent the risk of abuse of general terms, but also to judicial discretion and future types of collation and regulation play a positive role. On the basis of judicial cases, after studying the specific considerations of competition, subjective faults, business ethics and damage consequences in judicial practice, from three perspectives

of infringing on competitors'interests, infringing on consumers' interests and infringing on public interests, this paper concludes that acts contrary to the Internet improper are based on reality. Facts belittle goodwill, improperly imitate others'achievements, hinder others' normal competition, violate specific contractual obligations or collateral obligations, infringe on consumers'freedom of choice, mislead consumers, illegal acts and hinder the overall development of the industry market.

商业标识结合物的保护路径探析

——以广药集团与加多宝公司包装装潢案为例

习舜

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摘要：不同商业标识或者劳动结合后产生的冲突纠纷较为频繁，我国现行的法律规则却未对此提供有效的指引，以致于在司法实践中出现了诸如广药集团与加多宝公司包装装潢案法律适用的困境。现有的保护路径或是倾向于片面地保护特定主体的权益而导致利益失衡，亦或是将商业标识产生的权益交由各方主体共有但又不利于商业标识的后续动态流转。为了解决这些弊端，在民法典编撰的背景下，通过链接式的立法模式运用准用性规范引入传统物权的添附规则是必要的，遵循当事人约定优先的任意性法律规范，并以“转换化测试标准”为主“价值差异测试标准”为辅判断其是否形成了商业标识的添附物，再根据贡献较大的一方取得商业标识的专有权，并弥补另一方相应的投入与收益。

关键词：添附；商业标识；包装装潢；利益平衡

Abstract: Conflicts and disputes arise frequently after the combination of different commercial marks or labour with commercial marks, however, China's current legal rules fail to provide effective guidance, so that in the judicial practice the plights of application of law have appeared, such as the case of package and decoration between GPHL and JDB corp.The existing protective paths tend to the one-sided protection of the rights and interests of a particular subject resulting in imbalances of interest or share the rights and interests of commercial marks by the parties would not conducive to its subsequent dynamic transfer. To solve these problem, under the background of compiling the Civil Code, it is essential to introduce the accession rules which usually

used in the traditional tangible property law into the intellectual property law through the referential norm under the linked model between the Civil Code and the intellectual property law. Following the arbitrary norms that the parties' agreements are prioritized, mainly basing on the transformation test and partially basing on the disparity-of-value test to decide whether the accession things have been formed, then the party who makes a greater contribution owns the exclusive rights of the commercial marks, and the party shall make up for the other party's corresponding input and income.

Keywords:accession rules;commercial marks;package and decoration;balance of interests

商标侵权判定中相关公众的界定因素

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摘要：相关公众的界定是商标侵权判定中的重要命题。相关公众范围的界定需结合个案情况进行分析。相关公众范围的界定可参考商标标识的商品服务的自身性质和其覆盖范围。考察商品服务的自身性质可着重考察商品服务类别，根据具体类别确定消费者、经营者范围。考察商品服务的覆盖范围需考察其所处地域及宣传范围，综合分析其相关公众范围。最后，需对上述考量因素加以整体性、综合性分析，以最终确定相关公众的范围。

关键词：相关公众；商标侵权；界定因素

Abstract: The definition of relevant public is an important proposition in trademark infringement judgment. It should be analyzed in specific cases. The definition of relevant public scope should be refered to the nature and characteristics of goods and services marked by trademarks. To inspect the nature of goods and services, we should focus on the categories of goods and services and determine the scope of consumers and operators according to the specific categories. To investigate the coverage of goods and services, we need to examine the area and scope of publicity, and comprehensively analyze the scope of relevant public. Finally, it is necessary to make a comprehensive analysis of the above factors to determine the scope of the relevant public.

Key words: relevant public; trademark infringement; factors of definition

驰名商标跨类保护的品牌学分析：理论解释与规范设计

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摘要：我国《商标法》的第四次修改日前已经启动并正在热议，驰名商标保护问题是本次修法的重要议题。我国驰名商标保护制度在法条规定、司法解释以及实际适用中仍存在诸多问题与误区，争论与质疑源于理论解释的不扎实与制度设计的不明确。在当今品牌经济与消费社会的时代背景下，运用品牌学的跨学科分析方法可为其研究带来新思路。随着品牌发展与消费升级，商标中无形的精神、价值、文化内涵愈加重要，这意味着这些符号价值或者品牌价值具有独立的意义，由此可以延伸或者迁移使用到其他商品类别上，对驰名商标进行跨类保护实质上是对其进行品牌延伸的利益的保护，同时也是对消费者符号表彰利益的保护。在规范设计层面，驰名商标的认定可尝试运用品牌资产的评估作为重要考虑因素，驰名商标跨类保护范围则可通过品牌经营领域进行定性界定，通过消费者模拟选择法、消费者辅助性回忆法、消费者实验法等品牌量化研究方法进行量化界定。

关键词：驰名商标；跨类保护；商标淡化；品牌学；商标法修改

Abstract: The fourth revision of China's Trademark Law has been launched and is being discussed hotly. The issue of well-known trademark protection is an important issue in this revision. There are still many problems and misunderstandings in China's well-known trademark protection system in the provisions of the law, judicial interpretation and practical application. The arguments and doubts stem from the lack of solid theoretical explanation and the unclear system design. In the context of

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today's brand economy and consumer society, the use of interdisciplinary analysis of branding can bring new ideas to its research. With the development of brands and consumption upgrades, the intangible spirit, value and cultural connotation of trademarks become more and more important, which means that these symbolic values or brand values have independent meanings, which can be extended or migrated to other commodity categories. The cross-class protection of trademarks is essentially the protection of the interests of brand extension, and it is also the protection of consumer symbol recognition benefits. At the normative design level, the recognition of well-known trademarks can try to use the evaluation of brand equity as an important consideration. The cross-class protection scope of well-known trademarks can be qualitatively defined through the brand management field, and, can be defined through brand quantitative research methods, such as simulated choice method, aided recall method and experimental method.

Keywords: Well-known Trademarks; Cross-class Protection; Trademark Dilution; Brand Theory; Revision of China's Trademark Law

论声音商标的显著性

——以腾讯 QQ 消息提示音声音商标案为视角

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摘要：商标显著性是商标实质性审查中的核心要件，声音商标作为 2014 年商标法修订后新增的非传统商标，其显著性的认定存在立法缺位问题，腾讯 QQ 消息提示音一案对于声音商标的显著性提出了司法考量。声音商标与传统商标一样同样具有固有显著性和获得显著性，所申请注册为商标的声音不因以简单和过于常见为由被认定为必然失去固有显著性，且独创性要求也不应作为条件加入到声音商标审查要件中。通用性和功能性声音在取得了第二含义后应当认为具有了获得显著性而被允许注册为商标。在分析审查问题后提出我国的声音商标注册审查固有显著性和获得显著性上应实施更为具体的标准。

关键词：声音商标；腾讯 QQ 案；显著性；注册审查标准

Abstract: Trademark salience is the core element in the substantive examination of trademarks. As a new non-traditional trademark after the revision of the Trademark Law in 2014, the distinctiveness of the trademark is a lack of legislation. The case of Tencent QQ News is for the sound trademark. The significance of the proposed judicial considerations. Sound trademarks are as inherently distinctive and distinctive as traditional trademarks. The sound of the application for registration as a trademark is not necessarily intrinsically lost due to simplicity and over-commonity, and the originality requirement should not be used as a condition. Join the sound mark review

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requirements. General and functional sounds should be considered to be distinctive and allowed to be registered as trademarks after achieving the second meaning. After analyzing the review issues, it is proposed that China's voice trademark registration review should be more specific and inherently more specific.

Key words: Sound mark; Case of Tencent QQ's sound trademark; Distinctiveness; Registration review criteria

论地理标志保护模式之商标法

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摘要：地理标志的保护不仅涉及到标记传达的交流含义，更要关注以标记为符号和象征的特殊产品本身，而其保护模式的选择则从意识形态和具体规则上影响着地理标志的保护。关注商业标记交流含义、建立在消费者保护理论基础上的商标法从理论、意识形态到具体规则都不适合地理标志的保护。虽然只有满足地理标志含义的标记才能在我国地理标志集体商标和地理标志证明商标体系下获得保护，但是该体系仍未承认地理标志是一类不同于商标的知识产权的地位，以商标保护规则限制着地理标志的保护，不符合地理标志保护的理论基础。

关键词：地理标志　保护模式　商标法　专门保护体系

Abstract: The protection of geographical indications (GIs) concerns not only the sign from the point of view of communicative logic, but also the specificity of the underlying product with the sign as a proxy. The choice of models affects GI protection from the aspects of ideology and rules. Trade mark law based on consumer protection focusing on the sign in its communicative content is not suitable to protect GIs in dimensions of theory, ideology and rules. Although signs meeting the definition of GIs can be protected as GI-certification or GI-collective marks in China, the system still does not recognise the status of GIs as a separate type of intellectual property, constraining GI protection within the framework of trade mark law, which is not coherent with the theoretical rationales of GI protection.

Key words: geographical indication　model of protection　trade mark law　*sui generis* system

论企业名称权的法律定位

——兼论“老字号”传承的保护

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（扬州大学法学院）

摘要：“老字号”在国际频频吃亏，在国内也经常受到商标恶意抢注的侵犯。通过研究发现，多存在于企业名称权与商标权的冲突当中，笔者认为解决的关键在于准确为企业名称权进行法律上的定位，从而明确其权利归属的优先层级。通过指导性案例的梳理分析司法裁判对“老字号”传承的保护问题上的回应，笔者发现企业名称权的法律定位仍应回归人格权，知识产权的法律定位实难为司法实践中的难题提供理论支撑。企业名称权在性质上应该属于商号权，法律定位为人格权，与字号同属商号权的两部分，企业名称中的“字号”部分和个人合伙、个体工商户的字号具有鲜明的知识产权特征，应当另外归属知识产权的范畴。

关键词：企业名称权； 老字号； 商号； 人格权； 传承

The Legal Orientation of Enterprise's Name Right

--Also On the Protection of the Inheritance of "Old Brand"

CHEN Zhi-ying，HUANG Zi-mei

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Abstract:"Old Brand" frequently being suffered in the international, also often by the trademark malicious registration infringement in the domestic. Through the research in the domestic, it is found that many exist in the conflict between the right of

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enterprise name and trademark, the author thinks that the key of the solution lies in precisely the legal position of the enterprise's name right, so as to clarify the priority level of its attribution. Through the analysis of the guidance cases to analyze the judicial decisions on the protection of the inheritance of "old", the author found that the legal positioning of the enterprise name right should still return to the personality rights, the legal positioning of intellectual property rights is difficult to provide theoretical support for the problems of judicial practice. Enterprise name right in nature should belong to the trade names right, the legal position is the personality right, it is part of the trade names as the other part is type size. "Type size" part in the enterprise names and individual partnership, industrial and commercial enterprises of the "type size" has a distinct intellectual property characteristics, should be another attribution of intellectual.

Keywords: right of enterprise names ; old brand ; trade names ; personality rights ; inheritance

企业名称权与注册商标权的合理界限分析

——以司法裁判实务为视角

高鹏友*
( )

摘要：基于授权机关不同，性质不同，但功能作用存在相同或者近似，导致企业名称权与注册商标权在商业活动中容易出现“竞合”，由此引发了诸多的商标侵权诉讼和不正当竞争诉讼。对涉案权利的界限划分是法院作出裁判的前提，但权利界限并不是泾渭分明的，往往是含混不清的。如何进行界定司法界和实务界已经作了诸多尝试，但仍然争议不断。虽然无法对企业名称与商标使用的合理界限进行明确的界定，但是通过考察相关因素更有助于判断是否构成侵权或者合理使用。

关键词：企业名称权；商标权；权利冲突

Analysis of the Reasonable Limits of Enterprise Name Rights and Registered Trademark Rights——From the perspective of judicial practice

Abstract: Although the authority and the nature are different, the functional roles are the same or similar, which leads to the ‘competition’ of enterprise name rights and registered trademark rights in commercial activities and led to many trademark infringement lawsuits and unfair competition lawsuits. The division of the boundaries of the rights involved is the premise of the court's decision, but It is not clear but ambiguous. Practitioners and theorists have been many attempts to find the Boundary of right, but they are still controversial. Although it is not possible to clearly define the reasonable boundaries between the right of the company name and the trademark, it is more helpful to judge whether it constitutes infringement or reasonable use by examining relevant factors.

Keywords: Enterprise name rights; Trademark rights; Rights conflict

论《反不正当竞争法》一般条款的司法适用

——以类型化为视角

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摘要：当前，学界对于《反不正当竞争法》一般条款的定义、本质、功能、地位等基本理论问题的研究可谓不胜枚举，由于现行研究的出发点主要集中于从规范论角度，使得有关一般条款的司法适用及其在法学方法论上的研究乏善可陈。因一般条款是一个开放性概念，具有语境敏感性，故对其把握，与其予以界定，毋宁探究其适用。因此，笔者建议对一般条款的研究应深入到司法实践领域和具体个案中，以我国的民事裁判为基础，从类型化的角度给予法学方法论的纵深，以规范法官适用一般条款的自由裁量权，从而维护法律的安定性和可预期性。

关键词：反不正当竞争法 一般条款 司法适用 类型化

On judicial application of the principle article in anti-unfair competition law

——from the perspective of the typology

Abstract: The concept, essence, function and status of the principle article have received a great deal of attention by the scholars. This is mainly from the perspective of rules. However, its judicial application and methodology is short of scholars' attention. As we know, the principle article is an open conception and has contextual sensitivity. Therefore, as far as the principle article is concerned, it is more vital to explore its judicial application than to define it. What's more, the research of the principle article should enter into judicial, which is based on judicial adjudication and from the perspective of typology and jurisprudential methodology. Only this can the discretion be regulated when apply the principle article, thus maintain the stability and predictability of law.

KEY WORD: Anti-unfair competition law ; The principle article ; Judicial application; typology

合同纠纷还是侵权纠纷？——评广药集团诉“加多宝”公司“王老吉”商标侵权案

周详[1]　王涛[2]
（1, 安泰涅瓦兹技术集团（俄）涉华事务知识产权顾问；2, 北京康隆律师事务所商标代理人）

摘要：在商标许可使用合同被仲裁机构已生效的裁决认定无效的情况下，被许可人在所述裁决生效前依据该无效合同使用注册商标的行为虽然缺乏法律依据，但是，该行为与未经商标注册人许可使用其注册商标的行为毕竟是是两种性质不同的行为，前者引起的纠纷属于合同纠纷，而后者引起的纠纷属于侵权纠纷。广药集团与鸿道集团之间的、关于许可使用“王老吉”商标的两份补充协议因双方负责人在代表各自所在单位订立这两份补充协议的过程中存在行贿、受贿行为而被裁决无效，从而导致鸿道集团旗下的“加多宝”公司在 2010 年 5 月 2 日至 2012 年 5 月 19 日期间使用“王老吉”商标的行为缺乏法律依据，但即便如此，也不应认定“加多宝”公司在此期间使用“王老吉”商标的行为侵犯了广药集团的“王老吉”商标专用权。由于仲裁机构认定前述两份补充协议无效的理由是双方“恶意串通，损害国家利益”，根据《合同法》第五十九条的规定，应当将双方取得的财产收归国家所有，亦即将“加多宝”公司在此期间因使用“王老吉”商标而获得的利益以及广药集团所收取的商标许可使用费收归国家所有，而不是由广药集团向“加多宝”公司主张所谓的损害赔偿。客观地说，双方“恶意串通”属实，双方“损害国家利益”为虚，将双方取得的财产收归国家所有并不合理。此外，由于广药集团和鸿道集团均对前述两份补充协议的无效负有责任，且这两份补充协议的无效也会使广药集团和鸿道集团旗下的“加多宝”公司蒙受因合同无效而造成的损失，广药集团和鸿道集团还应各自承担相应的责任。广东省高级人民法院针对广药集团诉“加多宝”公司“王老吉”商标侵权案的一审判决值得商榷。

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[2] 北京康隆律师事务所商标代理人。

关键词：商标许可使用；“王老吉”商标；合同无效；合同纠纷；侵权纠纷

A contract dispute or a tort dispute?——Comment on Guangzhou Pharmaceuticals Corporation V.S. JDB Company for infringement on trademark “WONG LO KAT”

Zhouxiang　Wangtao

Abstract: In the circumstances a trademark licensing agreement has been ruled invalid by an effective arbitral decision, the prior trademark use based on the aforesaid licensing agreement, before the arbitral decision takes effect, should lack legal basis. However, after all, such an act is different from using registered trademark without any authorization from registrant. The former should be a contract dispute, while the latter a tort dispute. The two supplementary agreements to license using trademark “WONG LO KAT”, concluded between Guangzhou Pharmaceuticals Corporation and HK HONGDAO Group, has been ruled by authorities as invalid, due to existing bribery in the course of concluding the agreements by representatives on behalf of each party. The invalidation of agreements has led to use of “WONG LO KAT” (from 2 May 2010 to 19 May 2012) by JDB Company (a subordinate of HK HONGDAO Group) lacking legal basis. That said, JDB Company’s use “WONG LO KAT” in the period should not be determined as infringement on trademark right of “WONG LO KAT”. The grounds based on which the arbitration institute found the two supplementary agreements invalid are “two sides have conspired maliciously to damage the State’s interest”. Thus, in accordance with Article 50 of China Contract Law, the benefits obtained from using of trademark “WONG LO KAT” in the period, and the licensing royalties received by Guangzhou Pharmaceuticals Corporation

should be returned over to the State rather than as the so-called damages claimed by Guangzhou Pharmaceuticals Corporation from JDB Company. Besides, since both Guangzhou Pharmaceuticals Corporation and HK HONGDAO Group should bear liabilities for the invalidation of the two supplementary agreements, and the invalidation of the two agreements also has caused damage to Guangzhou Pharmaceuticals Corporation and HK HONGDAO Group's subordinate company i.e. JDB Company, the two parties should bear their respective liabilities. Therefore, it worth discussing for the first-instance judgment rendered by Guangdong High Court regarding Guangzhou Pharmaceuticals Corporation V.S. JDB Company for infringement on trademark "WONG LO KAT".

Key words: Trademark Licensing; Trademark "WONG LO KAT"; Contract Invalidation; Contract Dispute; Tort Dispute

符号学视角下商标俗称的法律保护

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摘要：作为一种商业符号，商标的本质是商标标志与商誉之间稳定一致的意指关系，第三人抢注商标俗称破坏了俗称与特定经营者商誉之间的意指关系，而非原商标与特定经营者商誉之间的意指关系，因此俗称不是原商标的近似商标，抢注俗称没有侵犯原商标的商标权。商标俗称是特定经营者的在先使用商标，将俗称权益赋予经营者符合制造商激励理论，经营者自己使用并非使用取得商标权益的必要条件，因此经营者对其商标俗称享有民事权益具有正当性。

关键词]：商标俗称　符号学　意指关系　近似商标　在先使用

Abstract： As a kind of commercial symbol, the essence of trademark is the stable and consistent meaning relationship between trademark mark and goodwill. The third person squatting trademark common name destroys the meaning relationship between common name and the goodwill of a specific operator. It is not the meaning relationship between the original trademark and the goodwill of the specific operator. Therefore, it is not the approximate trademark of the original trademark. The squatting is not to infrimge the trademark right of the original trademark. The trademark is commonly used as the prior use of the trademark by the specific operator. The common name is given to the operator in accordance with the manufacturer's incentive theory. The operator's own use is not a necessary condition for obtaining the trademark interest. Therefore, the operator has the legitimacy of the civil rights and interests of the trademark. .

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Keywords： Trademark nickname Semiotics Meaning relationship Relationship Approximate trademark Previous use

商标许可使用合同的无效及其产生的法律责任

——广药集团诉加多宝“王老吉”商标侵权案引发的法律思考

罗军[1]

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摘要：虽然广州医药集团与香港鸿道集团订立的、有关许可香港鸿道集团旗下的“加多宝”公司在 2010 年 5 月以后继续使用“王老吉”商标的两份补充协议被已生效的裁决认定无效，并且无效的商标许可使用合同自始没有法律约束力，但是，依据没有法律约束力的“许可合同”使用他人注册商标的行为与“未经许可” 使用他人注册商标的行为是两种性质完全不同的行为，不能因上述两份补充协议被生效的裁决认定无效，就认定“加多宝”公司在 2010 年 5 月 2 日到 2012 年 5 月 19 日期间使用“王老吉”商标的行为构成侵权。由于所述补充协议是以“双方恶意串通损害国家利益”为由被裁决无效的，因此，对于因“加多宝”公司在 2010 年 5 月 2 日到 2012 年 5 月 19 日期间使用“王老吉”商标而产生的所谓“商标侵权纠纷”，应按照无效合同的有关规定处理。根据《合同法》第五十九条的规定，应当将双方取得的财产——“加多宝”公司因使用“王老吉”商标而获得的利益以及广州医药集团所收取的商标许可使用费——收归国家所有，而不是由广州医药集团向“加多宝”公司主张所谓的损害赔偿。另需说明的是，中国国际经济贸易仲裁委员会针对广州医药集团与香港鸿道集团之间的、关于许可“加多宝”公司在 2010 年 5 月 1 日之后以后继续使用“王老吉”商标的两份补充协议所作出的、认定这两份补充协议无效的裁决是值得商榷的。

关键词：商标许可使用；合同无效；“王老吉”商标；无效合同的处理

Abstract: Although two supplementary agreement of licensing “Jiaduobao”

[1]上海市海华永泰（长沙）律师事务所律师、专利代理人。笔者在撰写本文的过程中，曾就商标许可使用合同的无效及其法律责任问题与周详先生讨论，并部分采纳了周详先生的意见。

Company of Hong Kong Hongtao Group to continue to use "Wanglaoji" trademark after May 2010 drawn and signed by Guangzhou Pharmaceutical Group and Hong Kong Hongtao Group are affirmed as invalid after an effective arbitration, and the invalid trademark licensing use contract is not legally binding from the beginning, however, behavior of using a registered trademark of others on the basis of the "licensing contract" without legally binding and behavior of using a registered trademark of others "without permission" are two kinds of behaviour with completely different nature, the behaviour of "Jiaduobao" Company using "Wanglaoji" trademark from May 2nd, 2010 to May 19th, 2012 can not be determined as infringement because of the above two supplementary agreement are affirmed as invalid after an effective arbitration. Since the described supplementary agreement are affirmed as invalid based on " malicious collusion of harming national interest by both sides," therefore, the so called " trademark infringement " generated by the act that "Jiaduobao" Company using "Wanglaoji" trademark from May 2nd, 2010 to May 19th, 2012 should be handled in accordance with the relevant provisions of the invalid contract. According to the provisions of article 59 of "Contract Law", the property of two sides- interests of "Jiaduobao" company gained from the use of "Wanglaoji" trademark and trademark licensing fee charged by the Guangzhou Pharmaceutical Group should be reverted into the state, rather than the so-called damage claimed by Guangzhou Pharmaceutical Group to "Jiaduobao" company. Additionally, the arbitration of affirming the invalidation of two supplementary agreement about licensing "Jiaduobao" Company of Hong Kong Hongtao Group to continue to use "Wanglaoji" trademark after May 2010 between Guangzhou Pharmaceutical Group and Hong Kong Hongtao Group made by China International Economic and Trade

Arbitration Commission is questionable.

Keywords: Trademark license; Invalid contract; "Wang Lao Ji" trademark; Handling of invalid contracts

论《商标法》第 57 条“近似商标”的理解与适用

——从“庆丰包子案”说起

王琳

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摘要：我国知识产权发展日益跟上发达国家的脚步，对商标的保护和重视程度日益增大。近似商标的明晰界定有助于保护商标所有权人的利于，还有助于促进公平竞争和自由竞争之间的平衡。本文从“庆丰包子案”入手，明确认定近似商标的基准商标的范围，再进一步明确认定近似商标的标准，给实践提供一定程度的明晰有逻辑力的指引。

关键词：近似商标　基准商标 知名度 混淆可能性

我国规制商标恶意抢注、囤积行为的问题研究

严尼鹂　李春芳[1]

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摘要：在 2018 年 6 月 28 日中国商标五十人论坛第二次会议上，众多专家认为《商标法》第四次修改势在必行，围绕此次修改专家们提出了自己的意见和建议，继续加大对商标全链条保护力度。其中，目前出现的恶意抢注、囤积商标的问题成为了与会的讨论焦点，《商标法》第四次修改亟需解决这些日益突出的问题。为此，本文将对恶意抢注、囤积商标的行为进行分析，并提出法律规制的建议，期望能为《商标法》第四次修改提供一些完善的建议。

关键词：恶意抢注；囤积商标；《商标法》修改；诚实信用原则

Research on the regulation of trademark registration and hoarding in China

Abstract: At the second meeting of BBS, China's trademark 50 people on June 28, 2018, many experts believed that the fourth amendment to the trademark law was imperative. They put forward their own opinions and Suggestions regarding the revision, and continued to strengthen the protection of the entire trademark chain. Among them, the current issue of false registration and trademark hoarding became the focus of discussion, and the fourth amendment of the trademark law urgently needed to solve these increasingly prominent problems. Therefore, this paper will analyze the malicious registration and hoarding of trademarks, and put forward Suggestions on legal regulation, hoping to provide some perfect Suggestions for the fourth amendment of trademark law.

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Keywords: malicious registration; trademark hoarding; the trademark law is being amended; principle of good faith;

有一定影响的包装装潢跨类混淆之法律质疑

张爱

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摘要：我国最新修订的《反不正当竞争法》删除了禁止假冒注册商标的规定，修改了“知名商品特有名称、包装、装潢”的表述，进一步明确了《反不正当竞争法》在知识产权法中的独立地位。本文分析了包装装潢权与其他知识产权权利的区分、与商标权的重叠关系以及保护范围，并试图从法律体系与立法目的角度厘清《反不正当竞争法》与《商标法》的区别。在此前提下，对于在商业活动中出现的有一定影响的包装装潢跨类混淆的行为，提出两点法律质疑并作出建议。

关键词：包装装潢权；商标权；跨类混淆；法律质疑

Legal Challenges on the Cross-category Confusion of Packaging Decoration with Certain Influence

Abstract: China's latest revision of anti-unfair competitipon law deletes the stipulation of *counterfeiting a registered trademark of another person*, modifies the statement of *a unique name, package, or decoration similar to that of another's famous commoditiy*, which further clears anti-unfair competition law's independent status in the IP law. In this article, the author analyzes the packaging decoration right's distinction with other intellectual property rights, the overlapping relationship with trademark right and the scope of proction, and attepmts to clairfy the difference between anti-unfair competitipon law and trademark law from the perspective of jurisprudence and legislative goal. Under these disscusion, for the business behavior of packaging decoration's croess-category confusion, the author raises up two leagal questions and provides with relevant suggestions.

Keywords: packaging-decoration right; trademark right; corss-category confusion;

legal challenges

四、著作权及相关权利

关于演绎作品制度的几点理论思考

——以“红色娘子军”著作权纠纷案为分析起点

孙新强* 梁晓元*

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摘要： 学界通说认为，思想与表达密不可分。但是，本文对演绎作品制度的考察显示：思想与表达并非须臾不可分离，问题在于人们缺乏对表达本身的深入研究。事实上，作品与作品的关系在于表达与表达的关系。因此，既要运用思想与表达的划分方法，也要使用表达与表达的划分方法。所以二分法不足以解决作品与作品之间的关系。对此，本文以为，可以通过立法目的进行限制，同时结合表达的划分方法，作为思想／表达二分法原则的有益补充，以此保障版权法的良性发展，避免版权制度乃至整个知识产权制度被无意中推向绝境。

关键词：演绎作品；演绎权；思想；表达

保护作品完整权的反思及完善——以 76 个案例数据为基础

张玲*

（南开大学法学院教授）

摘要：研读我国保护作品完整权的判决书后发现，法官的裁判标准各异，存在同案异判现象。权利规则需要在反思后予以完善。作者声誉不属于著作权保护的精神利益，应回归人格权保护范畴；权利的体系价值在于：确保作品的同一性，即表达信息的完整性和思想表达的一致性；取消修改权，将误读的含义归还保护作品完整权；侵权行为方式包括：作品文本的改动和作品文本之外的改动；侵权判定标准的基点由作者声誉回归作品本体，并以社会公众作为判断主体。

关键词：保护作品完整权；作者声誉；作品同一性；修改权

The consideration and improvement of the right of integrity

Abstract: After judgements research, it is found that similar cases concerning the right of integrity are resulted in diverse judgments because judges have different standards. The rules on the right of integrity need to be refined after reflection. The author's reputation should be part of personality rights, instead of the spiritual interests of copyright. The value of the right system is to ensure the identity of works, which means the consistency between the integrity of expressed information and expressed thoughts. The right of alternation should be cancelled and the concept of misunderstanding should be part of the right of integrity. The changes inside and outside the text are infringement. The infringement judgement standard should be based on the work rather than the author's reputation, which should be judged by the public.

* 本文系作者主持的南开大学亚洲研究中心资助项目“著作人身权及其归属规则研究”（AS1601）、南开大学重点学科骨干人才资助项目“知识产权侵权损害赔偿救济制度研究”的阶段性研究成果。课题组成员方芳同学协助采集案例数据。在此表示感谢。

Key words: right of integrity; author's reputation; identity of works; right of alternation;

试论企业标准版权化的必要性

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摘要：根据我国著作权法的规定，企业标准具备作品要求的必要条件，应该具有版权。企业标准的版权化是由国内外标准化发展环境和需求所决定。实现企业标准版权化可以提高我国企业自主创新能力，加强我国对外的国际标准化合作，促进我国市场自主标准向国际化标准发展，并推进我国标准化体系建设。

关键词： 标准版权化；企业标准；国际化标准；市场主体

On the necessity of copyrightization of enterprise standards

Wang Xinhua Wan Yu Long

Abstract]： According to the provisions of China's Copyright Law, enterprise standards should be copyrighted if they meet the requirements of works. The copyright of enterprise standards is determined by the development environment and demand of standardization at home and abroad. Implementing copyright of enterprise standards can improve the independent innovation ability of Chinese enterprises, strengthen international standardization cooperation with foreign countries, promote the development of Chinese market independent standards to international standards, and promote the construction of China's standardization system.

Key words： standard copyright; enterprise standards; international standards; market players.

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视听作品著作权的立法缺陷与修法建议

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摘要：我国《著作权法》自 1990 年颁布、1991 年 6 月 1 日实施以来，经历了 2001 年第一次修正和 2010 年第二次修正。随着大众传播技术的不断创新与广泛应用，著作权传统保护制度面临着新的挑战。2012 年国家版权局启动了《著作权法》第三次修改工作，2014 年 6 月国务院法制办公布了《著作权法（修订草案送审稿）》，并通过网络公开征求社会各界意见。四年来这个修订草案尚未送达国家立法机关审议通过，盖因社会争议颇多，尤其“视听作品”规范方面。本文就现行法律以及修订草案有关“视听作品著作权”规范存在的问题，提出相应的修改建议：（1）保留 14 法草案提出的“视听作品”概念，删除“以及类似制作电影的方法创作的作品”释义；（2）保留 01/10 法关于视听作品著作权归属的规定。基于视听作品包括电影片、录像片、电视剧、网络剧、动漫游戏、综艺节目等类型，建议将现行法定的“制片者”称谓扩展修订为“制作者”概念；（3）保留 01/10 法关于视听作品的“放映权”权项；（4）保留 01/10 法关于视听作品的“摄制权”权项。但建议将“摄制权”称谓修订为“制作权”，以适应通过电子计算机制作出的视听作品的权利需求；（5）以“传播权”项取代 01/10 法设定的“广播权”（14 法草案“播放权”）和“信息网络传播权”两个权项。

关键词：著作权法 视听作品 制作者 传播权 修法建议

Abstract: Since the copyright law was promulgated in 1990 and implemented in June 1, 1991, it has undergone the first amendment in 2001 and the second amendment in 2010. With the continuous innovation and wide application of mass media technology, the traditional copyright protection system is facing new challenges. In 2012, the State Copyright Bureau launched the third revision of the copyright law. In June 2014, the legal office of the State Council published the copyright law (the revised draft was sent to the manuscript) and sought public opinion through the network. In the past four years, this revised bill has not yet been passed to the national legislature for deliberation and approval. In this paper, the existing law and the revised draft on the "audio-visual works copyright" standard existing problems, and put forward the corresponding amendment suggestions: (1) Retain the concept of "audio-visual works" proposed by the 14 draft law, delete "and the method of making films similar to the production of works" interpretation; (2) Retain the 01/10 method of audio-visual works about the provisions of the ownership of the right to work. Based on audio-visual works including films, videos, TV dramas, Internet plays, Anime Games, and variety shows, it is suggested that the current statutory "producer" appellation be expanded into the concept of "producer"; (3) Retain the "right of projection" on audio-visual works by 01/10, and (4) Retain the 01/10 act on audio-visual works The right of "the right of filming". However, it is suggested that the title of "right of filming" be revised as "right of production" to adapt to the right demand of audio-visual works produced by electronic computer; (5) The "right to broadcast" ("right to play" in the 14 draft) and the two rights of "the right of communication of information network", set by the "right of communication", are replaced by the term "right of communication".

Keywords: copyright law, audio-visual works, producer's right to propagate, suggestions for amendment

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中国知识产权法学研究会 2018 年年会

欧盟版权规则的现代化：目标、实现路径与意义

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摘要：为应对数字与网络技术对内容生产、传播与获取的挑战，欧盟提出版权规则的现代化动议，其目标在于更多跨越国界的方式获取内容，具有良好运行的版权市场在教育，以及研究与文化传承等活动中有更多使用版权材料的机会，其在制度上通过延伸性集体管理、创建新的版权限制与例外以及良好运行的版权市场机制。我国正在修订《著作权法》应该重新考虑对应的相关问题。

关键词：数字与网络技术；欧盟版权规则；现代化

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论著作权法对剽窃行为的独立规制

王国柱*

（吉林大学法学院）

摘要：剽窃是将他人作品当作自己作品进行发表、复制、传播的行为。剽窃侵权具有复合性的特征，但“将他人作品当作自己作品”的核心涵义将剽窃整合为一个整体行为，著作权法可以对剽窃行为进行独立规制。剽窃具有天然的“故意”侵权属性，剽窃的“故意”不受作品“质”与“量”的影响，故意程度高于一般故意侵权，剽窃故意支配下的侵权行为对著作权的侵害程度更高并且导致欺诈作品受众的后果，因此，以惩罚性赔偿责任应对剽窃“故意”具有正当性。独立规制剽窃侵权有利于真实反映实践中的侵权形态，全面回应权利人的诉求，明晰剽窃行为的行为特征，提高侵权救济机制的运行效果，也有利于惩戒和预防剽窃行为。我国未来的《著作权法》应当设立专门的条文对“剽窃”的涵义、惩罚性赔偿的适用等内容进行规定。

关键词：剽窃；著作权法；独立规制；故意侵权；惩罚性赔偿

On the independent regulation of copyright law to plagiarism

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Abstract: Plagiarism is the act of taking others' works as their own works to publish, copy and transmit. Plagiarism tort has a character of complex , but the core meaning of "taking others' works as their own works" integrates plagiarism into a whole behavior. Copyright Law can regulate plagiarism independently. Plagiarism has the nature of "intentional". The "intentional" of plagiarism is not affected by the "quality" and "quantity" of the work. The degree of intentional of plagiarism is higher than the general intentional infringement. The tort under the control of intentional has

a higher degree of damage on copyright and causing fraud to the audience of works. Therefore, punitive damages should be taken to deal with plagiarism. Independent regulation of plagiarism is conducive to truly reflect the tort form in practice, fully respond to the obligee's demands, clarify the behavior characteristics of plagiarism, improve the operation effect of the relief mechanism, but also conducive to punishing and preventing plagiarism. China's future Copyright Law should set up special provisions on the meaning of "plagiarism" and the application of punitive damages.

Key words: plagiarism; copyright law; independent regulation; intentional tort; punitive damages.

作品的独创性：制度功能与概念意义

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摘要：法律概念的确切意义只能在当下的制度实践中去探寻，并由法律概念在当下的制度实践中所发挥的功能所决定；关于独创性概念的意义，存在“双重要素说”、“创造性说”与“独立完成说”三种观点；考察司法实践，独创性概念在我国著作权制度中具有三项主要功能，即正当化功能、筛选功能与区分功能；基于正当化功能，独创性概念的意义更侧重于“创造性”；基于筛选功能，不宜把独创性概念的意义限定为“独立完成”，“创造性说”或“双重要素说”更为妥当；基于区分功能，独创性概念的意义采纳“独立完成说”、“创造性说”与“双重要素说”皆存在不周延的逻辑问题，可从“创造性”、“独立完成”两个内涵项中选择其一作为独创性概念的一般性内涵，另一内涵项则作为必要的例外情形下的选择。

关键词：独创性；意义；正当化功能；筛选功能；区分功能

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本论文是笔者主持的中央高校基本科研业务费资助项目的阶段性成果，并得到南开大学亚洲研究中心资助。

保护作品完整权侵权判定标准之重新审视

——区分对待原则之下的思想表达损害标准与声誉损害标准

陶乾[1]

（中国政法大学法律硕士学院副教授）

摘要：在比较法视野下，对于保护作品完整权的权利内容存在主观主义、客观主义和混合模式三种不同的立法例。我国《著作权法》仅规定了作者享有保护作品不受歪曲、篡改的权利，但是目前司法实务中对于保护作品完整权的侵权判定，存在主观标准与客观标准适用混乱的局面。本文提出，应当区分对作品的复制性使用与演绎性使用两种方式，作品的使用方式，对于复制性使用他人作品引发的保护作品完整权纠纷，应采思想表达损害标准。对于演绎性使用他人作品引发的保护作品完整权纠纷，应合理的考虑到演绎者的创作自由，采用声誉损害标准。

关键词 ：保护作品完整权 思想表达损害标准 声誉损害标准

Abstract ：There are three approaches to the legislation of right to integrity of authors in different jurisdictions, subjective standard, objective standard and mix standard. The Chinese Copyright Law provides that the author has the right to protect one's work against distortion and mutilation, In legal practice, in terms of the examination of infringement of right to integrity, some courts adopt the subjective standard, and others adopt the objective standard. This paper proposes that we should distinguish different ways of using the works. On one hand, for disputes about reproduction of works, courts should examine whether the idea that the author expresses is damaged by the alleging distortion or mutilation; on the other hands, for disputes about derivation of works, courts should examine whether the reputation of authors is damaged and in such case the freedom of creation of the author of derivative works

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should be taken into consideration.

著作财产权的类型化及其运用

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摘要：类型化是以事物的根本特征为标准对研究对象的类属进行的划分的科学研究方法，类型化理论的价值在于掌握法律资料和对法律漏洞进行“类推适用”。我国现有的著作财产权类型较为分散零碎，引发了许多问题；与此同时，不论是著作权法国际公约还是各国著作权法的规定均体现出著作财产权类型化的趋势，因此对我国著作财产权进行类型化十分必要。应在著作财产权类型化中体现民法思维，通过构建复制权、发行权、传播权和演绎权四大权利束对著作财产权进行类型化，并保持著作财产权体系的开放性。著作财产权类型化本身不是目的，目的在于更好地在著作权权利许可及侵权判断中利用类型管理法律资料、发现并填补法律漏洞。

关键词：类型化　著作财产权　法律漏洞　权利束　体系开放性

Protection Scope and Infringement Determination of Adaptation Right: One Application Interpretation in Dualistic-Systems Explanation Method

Li Yang

Abstract: Adaptation right is an important economic right of copyright. In understanding and defining the protection scope of adaptation right, it is necessary to build one “ behavior - works ” dualistic-systems explanation method. It not only constitutes the dual cognitive system for protection scope of adaptation right, but also is very important mutual recognition factor to the infringement determination. From the perspective of works, the requirements of adaptation behavior include the creative alteration and appropriation the basic expression of prior works. In the basic rules of

infringement determination, we should pay more attention to the double meanings of similarity in the source-relations fact and infringement value judgment and also to the distinction between probative similarity and substantial similarity. In methods and steps to identify the infringement of adaptation right, the new three-step method of “source identification of fact - interlayer analysis - infringement value judgment” is one theoretical method and positive guiding function to solve the problem of adaptation infringement.

Key words: adaptation right; behavior; works; general expression; similarity

改编权的保护范围与侵权认定问题

李杨*

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摘要：改编权是一项重要的著作财产权。在理解和界定改编权的保护范围时，有必要构建一种“行为—作品”范畴的二元解释方法。二者共同构成改编权保护范围的双重认知体系，同时也是侵权认定中彼此联系、互为印证的重要因素。从二元范畴来看，改编是具备一定独创性且保留作品基本内容的改动行为。在改编侵权认定的基本规则上，应重视“相似性”在改编来源事实和侵权价值判断中的双重内涵，区分“证据性相似”与“实质性相似”。在改编权的侵权认定方法与步骤方面，“来源事实认定—对接层分析—侵权价值判断”的新三步法既是解决改编侵权认定问题的一种理论尝试，同时对司法实践也具有积极的借鉴参考价值。

关键词：改编权；行为；作品；综合性表达；相似性

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摘要作品著作权限制研究——以文献检索现代化为视角

许辉猛

（河南财经政法大学副教授）

摘要：鉴于摘要作品在文献检索中的特殊性，有必要限制其著作权。目前我国著作权法主要通过报刊摘编转载法定许可规则处理摘要作品的使用问题，但是无法拓展至网络领域，造成文献数据库使用摘要作品的侵权风险。伯尔尼公约以及不少域外立法例将使用摘要作品规定为合理使用，我国有必要予以借鉴。我国著作权法应该将合理引用规则作为摘要作品著作权限制的主要法律依据，并化解其与报刊摘编转载法定许可规则的冲突。在著作权法第三次修改中，有必要移除合理引用规则的“在作品中引用”的限制性条件，引入合理使用开放性条款，同时允许著作权人以经过认证的许可方案部分代替合理引用规则以促进著作权人与文献服务商之间的合作。

关键词：摘要作品；文献检索；著作权限制；报刊摘编转载法定许可；合理引用

Copyright Restriction of Abstract from the Perspective of Literature Retrieval Modernization

Abstract: Abstract copyright should be limited on the basis of it's literature retrieval function. Statutory license on reprint and excerpt by the press according to article 33 of China's copyright law can't be applied in the network environment. As a result, literature databases face copyright infringement risks which affect the development of literature retrieval service. In order to promote the implementation of the basic functions of abstract, the Berne convention and quite a few extraterritorial legislations expressly state that using the abstract constitutes fair use. It's necessary for us to learn from their good experience. At present, fair quotation rules of China's copyright law

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can be explained and expanded to deal with using abstract. So it's necessary to resolve the conflict between fair quotation rules and statutory license on reprint and excerpt by the press. At the third amendment on China's copyright law, it is necessary to suggest removing the restrictive condition "reference in the works", to Introduce the general terms of fair use, to allow copyright owners replace fair quotation rules with certified licensing scheme to promote cooperation between copyright owners and literature service providers.

Key words: Abstract; Literature Search; Copyright restriction; Statutory License on Reprint and Excerpt by the Press; Fair Quotation

传统文化艺术成果知识产权保护的困境及对策

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摘要：在经济快速发展的时代，传统文化艺术成果的保护不仅具有文化价值，同时也具有显著的经济价值。本论文通过对传统文化艺术成果与非物质文化遗产等相关概念的对比、知识产权性的分析以及对运用知识产权法制度保护传统文化艺术成果的困境的分析，提出当今传统文化艺术成果所面临的问题。并对山东潍坊风筝、高密剪纸的发展现状和苏州镇湖刺绣知识产权保护模式进行实证研究分析了我国传统手工业所面临的现实问题，对其他传统艺术成果提供了借鉴。通过国外传统文化艺术成果保护立法的介绍，提出了保护传统文化艺术的新的理念与立法模式，一是平衡传承、传播与创新三者之间的关系，一方面通过构建单独的立法体系，甚至引入公权力保护传统文化艺术的传承性，保护人类文化的多样性，保护原生态，防止民族文化灭失；另一方面需要构建充分开放的授权模式，以促进民间文学艺术的相关产业的繁荣，在传播和演绎的商业行为中弘扬民族文化；与此同时还要鼓励创新，运用现代高科技手段和当代文化理念对传统文化艺术进行改造，创新出更加完美的传统文化艺术成果，以知识产权法律制度做保障。

关键词： 传统文化艺术成果； 知识产权制度； 传承与保护

ABSTRACT： In the era of rapid economic development, the protection of traditional cultural and artistic achievements is not only of cultural value, but also of significant economic value. This paper based on the comparison of traditional culture and art achievements and non-material cultural heritage , intellectual property rights of the related concepts such as the analysis and the use of intellectual property law

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system to protect the traditional culture and art achievements of the analysis of the difficulties, put forward the problems facing today's traditional culture and art achievements. And the development status quo of Shandong Weifang kite and Zhenhu in Suzhou embroidery intellectual property rights protection model for empirical study analyzes the realistic problems in the traditional handicraft industry faces, provides the reference for other traditional art achievements. Through introducing the traditional culture and art achievements protection legislation abroad, puts forward the protection of traditional culture and art of the new idea and legislative model, one is the balance the relations between and among inheritance, spread and innovation, on the one hand, by building a separate legislation system, and even the introduction of public power to protect the inheritance of traditional culture and art, to protect the diversity of human culture, ecological protection, prevent the loss of national culture; On the other hand, we need to build a fully open authorization model to promote the prosperity of the related industries of folk literature and art, and promote the national culture in the dissemination and interpretation of business practices. At the same time but also encourage innovation, use of modern high-tech means and idea of traditional culture and art, contemporary culture innovation more perfect traditional culture and art achievements, in legal system of intellectual property protection.

KEY WORDS: Achievements Of Traditional Culture And Art,Intellectual Property System, Heredity and Protection

论“其他权利”的适用、扩张与消灭

——电子文献传递法律属性研究与著作权修法赋权思考

詹启智

（ ）

摘要：与交互式网络传播技术同时产生的非交互式网络传播技术的运用（互联网直播、电子文献传递），短期内适用并扩张了《著作权法》第 10 条第 17 项规定的“其他权利”，这是信息网络传播权和“其他权利”共同的尴尬。我国信息网络传播权立法与 WCT 的差距，是造成非交互式传播方式下我国理论与司法实践困境以及短期内“其他权利”的适用（互联网直播权）与扩张（电子文献传递权）的根源。借鉴国际经验，并与 WCT 接轨，履行国际义务，充分考虑我国著作权法立法与理论、司法实践，我国著作权法修法赋权方向应为，除根据复制技术的突破扩张复制权的内涵外，在现有传播权内涵保持不变基础上，以“向公众传播权”消灭信息网络传播权和“其他权利”，因应传播技术进步与运用带来的全部挑战，维护著作权法的稳定性和未来适用性。

关键词：著作权法；“其他权利”；互联网直播权；电子文献传递权；信息网络传播权；向公众传播权

On the Application, Expansion and Elimination of "Other Rights"

——Study on the Legal Attribute of Electronic Document Transmission and the Reflections on the Empowerment of Copyright Amendment Law

Abstract: The application of non interactive network communication technology which produced simultaneously with interactive network communication technology(this article is called Internet Live, electronic document delivery),and the application and expansion of "other rights" stipulated in Article 10 (17) of the copyright Law in a short period of time, are the common embarrassment of

information network communication right and the "other rights". The dilemma of the theory and judicial practice in China under the non-interactive Communication Mode and the application of "other rights" in the short term (Internet broadcast right) and the expansion (electronic document transfer right) are rooted in the gap between WCT and legislation of Information Network Communication right in China. We should draw lessons from international experience, integrate with WCT, fulfill international obligations, and fully consider the legislation, theory and judicial practice of China's copyright law. The direction of the empowerment of the amendment of copyright law in China should be: In addition to expanding the connotation of replication right according to the breakthrough of replication technology, on the basis of keeping the connotation of the existing communication right unchanged, the right of communication to the public should be applied to eliminate the information network communication right and “other rights”, So as to meet all the challenges brought by the progress and application of communication technology and maintain the stability and future applicability of copyright law.

Key words: copy right law;"other rights"; Internet broadcast right; electronic document transfer right; information network communication right; right of communication to the public

法人作品中创作者署名权保护的法教义学分析

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摘要：从文义解释的角度来看，法人作品的著作权归属规则排除了创作者的署名权，这种安排使得司法实践中出现了一种限制法人作品范围、扩张特殊职务作品范围以保护创作者署名权的倾向。对于此种排除创作者署名权所构成的法律漏洞，可以采取目的论限缩的解释方法，肯定法人作品规则并不排除创作者的署名权；从体系解释的角度认可法人的署名与创作者署名并不存在矛盾；并从当然解释的角度说明在特定情形下对创作者署名权进行限制的必要性。这样不但能够克服扩张特殊职务作品路径的不足，亦能够使得法人作品规则更加符合著作权法的基本原理和基本精神。

关键词：法人作品 创作者 署名权 法律解释

Abstract: According to the literal meaning of the text, the copyright ownership rules of the corporate works exclude the creator’s right to authorship. Such arrangement leads to a tendency to limit the scope of the corporate works and expand the scope of works in the course of employment in judicial practice, in order to protect the right of authorship of creators. Since the exclusion of creator’s authorship constitutes a legal loophole, it is possible to adopt a restrictively teleological interpretation method to affirm the rules of corporate works do not exclude creator’s right of authorship. From the perspective of systematical interpretation, there is no contradiction between corporate authorship and creator’s authorship. This article also explains the necessity

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of restricting the author's authorship in certain situation from the perspective of natural interpretation. Those interpretations can not only overcome the shortcomings of the way of expanding the scope of works in the course of employment, but also make the rules of corporate works more in line with the basic principles and spirit of the Copyright Law.

Keywords: corporate works; creator; the right of authorship; legal interpretation

论实用艺术作品的“美”和“艺术性”要件

--以适用路径的反思与重构为中心

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摘要：“美”和“艺术性”往往被视为实用艺术作品可版权性的“影子要件”。在我国，较为传统的适用路径是将其纳入独创性之“创”的判断中，并主要根据“审美意义”的判断直接界定艺术创作的范围。近年来出现的第二条路径则吸收国外的“独立可分离测试”理论，转为根据艺术／实用二分法间接界定艺术表达的范围。第二条路径的弊端在于古希腊式非此即彼二分法本质上是一种服务于演绎的逻辑思维工具，并不旨在对现实进行精确归纳，将其降格为具体的判断标准将造成经验型判断的滥用。简单地回归传统的第一条路径亦不可取，因为美感、审美意义等均与主体的审美经验密切相关，难以成为具有可操作性的法律要件。更好的解决办法是首先在法律语境下把“艺术创作”定性为智力表达成果采纳了客观的艺术形式，接着融合两条既有路径的合理之处，以合理垄断以及艺术／实用二分法作为可版权性的分析起点，最终落在艺术领域内独创性表达之有无的判断上。

关键词：实用艺术作品；审美意义；独创性；可分离测试；二分法

Abstract: “Beauty” and “artistry” are tending to be required as “shadow elements” for works of applied art. In China, the existing application could be classified into two approaches. The traditional approach integrates them into the judgment of originality, meanwhile directly defines the scope of “artistic creation” mainly by the judgment of “aesthetic effect”. A newly prevailing approach incorporates “separability test” theory

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and indirectly demarcates the scope of "artistic expression" by artistic/functional dichotomy. Nevertheless, the Greek style dichotomy essentially works as a logical tool that intentionally neglects the accuracy of induction. Thus, that dichotomy cannot be degraded as a concrete judgment standard and could lead to abuse of experimental judgment. The classical approach cannot be revived because both "aesthetic effect" and "aesthetic appeal" essentially link with aesthetic experience, thus lacking maneuverability and cannot be applied as a legal requirement. A better approach is advocated that the "creation within art" should be understood as "adoption of artistic form". Meanwhile the existing approaches could be merged into a new approach that starts from analyzing reasonable monopoly and the application of artistic/functional dichotomy, and ends at the judgment of originality within the field of art.

Key Words: works of applied art; aesthetic effect; originality; separability test; dichotomy

二次创作的限度

——"思想 / 表达"二分规则适用的批判[1]

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摘要：利用原作要素进行二次创作，已经成为互联网背景下的重要创作表现形式。借由知名原作或原作要素衍生开发演绎性作品，是当前作品权益实现的重要手段，并催生了文化产业资本市场上的 IP 概念。二者因二次创作自身所具有的特性，极易产生著作权侵权纠纷。相关裁判在侵权判定中，往往过度依赖"思想 / 表达"二分规则。一是将侵权判定中的"思想 / 表达"二分规则混淆为著作权客体范围上的"可版权性"判断。二是扩大化适用"思想 / 表达"二分在个案中确定的特定对象及其区分标准。这些误解极大压缩了二次创作的空间，因而有必要澄清侵权判定中"思想 / 表达"二分仅适用于"实质性相似"的判断。

关键词：二次创作 侵权判定 "思想 / 表达"二分

Abstract: Using the original elements for the secondary creation has become an important form of expression in the Internet context. The development of deductive works derived from well-known original works or elements of original works is an important means of realizing the rights and interests for current works, promoting the concept of IP in the capital market of cultural industry. Because of the characteristics of the secondary creation, the parties is very likely to have copyright infringement disputes. The relevant judicial decisions often rely heavily on the "thinking / expression" dichotomy in infringement judgment. Confusing the "thought/expression"

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dichotomy rule in the judgment of infringement with the "copyright" judgment in the scope of copyright object. Enlarging the application to the specific objects and their distinguishing criteria determined by the dichotomy of thought / expression. These misunderstandings have greatly reduced the space for secondary creation, so it is necessary to clarify that the "thought/expression" dichotomy in infringement judgment is only applicable to the "substantive similarity" judgment.

Keywords: secondary creation, infringement judgment, "thought/expression" dichotomy

著作权集体管理组织的内部机制建构

——基于代理人理论的分析

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摘要：著作权集体管理组织内部机制的科学性影响着其基本职能的实施，科学性的缺乏可能导致效率、透明性、可靠性等问题的出现。代理人理论可为集体管理组织建立更科学的内部机制提供理论支撑。集体管理组织的会员与理事之间构成了"委托人——代理人关系"，其代理人问题可能比一般公司更为严重。投票权合理的集中化是克服代理人问题的关键，既有经验为此提供了三条可供借鉴的路径。我国集体管理组织内部机制的完善，应在理念层面否定平均主义，并在现行法律框架下，通过会员分类制度实现投票权集中，同时控制管理者的来源。

关键词：著作权集体管理组织；内部治理；代理人问题；投票权集中化

Abstract: The scientificity of the internal mechanism of the copyright collective management organization affects the implementation of its basic functions. The lack of scientificity may lead to problems such as efficiency, transparency, and reliability. Agent theory can provide theoretical support for collective management organizations to establish more scientific internal mechanisms. The members and directors of the collective management organization constitute the "principal-agent relationship" and it may meet more serious agent problems. Reasonable centralization of voting rights is the key to overcoming the agent problems and there are three lessons that current experience can provide. The improvement of the internal mechanisms of collective management organizations in China should firstly negate egalitarianism at the

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conceptual level and, under the current legal framework, achieve the concentration of voting rights through the membership classification system and control the sources of managers.

Key words: Copyright Collective Management Organization; Internal Governance; Agent Problems; Centralization of Voting Rights

论手游玩法规则构成版权作品与否的认定标准

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摘要 在我国的司法实践中，法院对于手机游戏玩法规则能否得到著作权法的保护尚存争议。争议的焦点即为玩法规则是否构成著作权法意义上的作品。虽然《著作权法实施条例》规定了构成版权作品的条件，并且最高人民法院《关于审理著作权民事纠纷案件适用法律若干问题的解释》就作品构成条件之一的独创性进行了说明，但是手机游戏玩法规则构成版权作品与否的判定标准不明。本文旨在初步提出手机游戏玩法规则构成版权作品与否的认定标准，以期对司法审判实践有所裨益。

关键词 手游玩法规则　版权作品构成　判断标准

Abstract: In the judicial activities of China,there are still disputes between different courts on the protection of mobile game rules or not.The core issue is whether mobile game rules constitute works under <Copyright Law of the People's Republic of China>.Although <Regulation for the Implementation of the Copyright Law of the People's Republic of China>provides the conditions of copyright works,and the Supreme People's Court stipulates one of the conditions of copyright work-"originality"in the<Interpretation of the Supreme People's Court Concerning the Application of Laws in the Trial of Civil Disputes over Copyright>, the criteria of mobile game rules constituting copyrights works are not clear.Therefore this article initially put forward the criteria of judging whether mobile game rules constituting copyright works or not.

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Key words: Mobile game rules; Conditions of copyright works;Judging criteria

体育赛事转播权的法律保护路径研究

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摘要：体育赛事转播权不是一个严格的法律概念，它事实上存在不同权利属性的三个层次：体育赛事节目、体育赛事转播信号和体育赛事本身。其中，体育赛事是体育赛事转播权的基础和关键，也是引起体育赛事转播权法律保护争议的源头。体育赛事的权利属性定位涉及到归属问题、收益问题、垄断问题和公益问题，反映了赛事组织者、参赛者、传播者和社会公众之间的利益博弈。从这些利益博弈入手，妥善解决相关问题，才能找到最合理的体育赛事转播权法律保护路径。

关键词：体育赛事转播权；体育赛事；利益博弈；法律保护

Abstract: Strictly speaking, Sports Broadcasting Right is not a legal concept. It consists of three levels with different rights attributes: Sports program、Sports broadcasting signals and Sports events. Among them, Sports events is the basis and key of sports broadcasting rights, and also the source of controversy about the legal protection of sports broadcasting rights. The rights attribute of sports events related to ownership, income distribution, monopoly problems and public welfare issues; reflecting the interest game of sport event organizers, participants, communicators and the public. In order to find the most reasonable legal protection way of sports broadcasting right, we should study these interest games and solve the relevant issues.

Key words: Sports Broadcasting Right; Sports events; Interest game; Legal protection

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体育赛事直播节目性质的法律回归

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摘要：体育赛事和体育赛事直播节目是两个不同的概念，对体育赛事直播节目独创性的认定应该根据其特点设定判定标准，纳入其他作品的范围。基于我国著作权法的规定，不能为体育赛事直播节目组织者创设转播权，而从体育赛事直播节目市场价值角度，将体育赛事直播节目产生创造的市场利益纳入法律保护的民事权益范畴，作为著作权法修改之前的过度。

关键词：体育赛事　独创性　民事权益

Abstract ： Sports events and sports events program are two different concepts. The identification of the originality of sports events should be based on its ch-aracteristics and set into the criteria for inclusion in other works. Based onthe provisions of China's Copyright Law, it is not possible to create broadcasting rights for sports event program organizers, and from the perspectiveof the market value of sports events, the market interests created by sp-orts events are included in the legal protection of civil rights, as before the revision of the Copyright Law.

Keywords ： Sports events; originality; civil rights and interests

计算机字体软件，某些版权的童话

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摘要：字体知识产权保护，必须区分 3 个对象，即创作字体（typeface）、工具字体（font）、文字产成品（texts or 2D/3D glyph prducts）字体工具（font）是创作字体（typeface）的再现、复制手段，提供给用户，可使用户根据需要，挑选单字；字体软件是字体工具。外国字体业者认为自己出售的是软件，中国字体业者认为所有字体都是美术作品，除常见宋体、仿宋、楷体、黑体，出于对日常生活需要的考量外，其余一律不免费使用；凡商业使用者应付费使用，非仅指软件购买者，而是包括全体社会商家。实际上字体软件输出的文字产成品，只是普通产品没有版权，所谓“二次用字”收费权没有法律依据，将文字产成品视为美术作品，与版权法诸项规则严重冲突。

Summary：Copyright protection for font softwares in China, must pay attention to three basical norm: typeface, it is creativity work by it's author; font,it is tool for utilizing typeface eg. software font; text or 2D/3D glyph prduct，it's the output of software fonts or other font tools. Typefaces and fonts have protection of copyright law, but texts or 2D/3D glyph prducts outputed by software fonts, have no copyright protection,they are products, not copyrightable creative work. Some font software compnies created the “second time use”right for font software, it means not only they have the right to charge its computer software users(first time use), but also have the right to charge every business user in China, as long as they use any texts or 2D/3D glyph prducts outputed by the font softwares or other font tools(second time use). This kind of practice has greatly contradicted with history, reality and law.

论作品独创性的数学计算模型

杨敏锋

（北京君策知识产权发展中心研究室主任）

摘要：作品可看作由多个独立的意思表达单元“元素”组成的集合，其独创性等于该集合中元素排列组合数（$M!C_n^m$）与各元素的表达方式连续相乘（$\prod X_i$）的积（$M!C_n^m\prod X_i$）。不同类型的作品，独创性的外在表现不同本质上是因为不同作品中各元素的变化特点不同。裁判者在判断是否构成侵犯著作权时，只需计算在先作品和在后作品中相同部分的相对独创性数值，如该数值较高，则构成侵权。

关键词：独创性、计算、数学模型、排列组合、连乘

Mathematical Calculation Model on Calculating Originality of Works

Abstract: A work can be seen as a collection of elements each sharing independent meaning. The degree of originality of such work equals to continuous multiplication result of all elements' combination number（$M!C_n^m\prod X_i$）. Even though originality of different works may be showed in diversity, the degree of each work's originality can be calculated through this formula. To judge whether a work constitutes copyright infringement, one can simply comparing the calculated results showing degree of originality on shared part of two works. If the calculated number of a later formed work is larger than that of the former one, the later formed work constitutes copyright infringement.

Key Words: Originality; Calculations; Mathematical Models; Permutations and Combinations; Continuous Multiplication

作品深层链接行为的著作权法规制

尹庆*

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摘要：作品深层链接行为著作权定性的复杂性主要表现在作品深层链接行为的内涵模糊、标准理论混乱以及信息网络传播行为的法律解释不清晰三个方面。著作权法规制的深层链接应当是能够在网络用户的终端界面上链接网页中能够呈现作品的链接行为。著作权定性标准也应当从技术回归至法律事实层面，通过对理论适用标准的法律解释角度辨析，理清信息网络传播行为的认定思路，最终认定作品深层链接行为构成信息网络传播行为。而设链者在作品深层链接传播方式中角色定位的不同以及对被链接作品的控制程度的不同，也决定限缩了违法行为认定的范围以及承担损害赔偿责任的范围。

关键词：深层链接　提供行为　控制行为　终端作品呈现

The regulation of copyright law involved in hierarchy of links toward works

Abstract: There are some difficulties to define the copyright's nature involved in the hierarchy of links toward works,which are inflected from three aspects,including the vague concept of links, the chaotic theories and the different understandings of the law term “the right of communication through information network”. The hierarchy of links toward works regulated by the Copyright Law should make the works displayed on the linking webpage of users' terminal interfaces. While defining the nature of the hierarchy of links from technology to fait juridique, we can first differentiate and analyse the recent theories from the legitimate interpretation, second

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make out the identified logic of the communication behavior through information network, and finally get the conclusion that the hierarchy of links toward works constitutes the communication behavior. Otherwise, the judgement of the illegal act and the liability for damage depends on the different roles and the work-controlled degree established by the webpager through the hierarchy of links.

Key Words: the hierarchy of links the works offering the works controlling the works displaying on the terminals

论我国死者著作人身权保护的困境与出路

——由《民法总则》第 185 条引发的思考

陈虎

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摘要：《民法总则》第 185 条表面上规定了对死者人格的保护，单该条实际着眼于因侵犯死者生前享有的人格权而侵犯公共利益的情形。著作权是民事权利的一种，一般人格权理论应当准用于著作权人身权。我国《著作权法》移植大陆法系人格权理论时，未注意到德国等大陆法系国家著作人格权理论的特殊性，导致以设权模式对死者著作人身权保护的悖论。著作人身权的不可继受与以设权模式在作者死后进行永久保护相矛盾。作者死后，法律将一种拟制意志负载于作品上，使作品成为拟制的法益载体，以代理制度作为死者著作人身权的保护路径具备可行性。

关键词：人格权;著作人身权;代理制度

Study on the Dead Author's moral rights

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Abstract: The art.185 of the General Civil Law provides protection of the personality for the dead, which focus on the public interests, rather than the protection of the the dead's personality right. Copyright belongs to civil rights, the general personality right theory should be applied into copyright. Chinese Copyright Law transplant continental legal system theory of personality right, without notice to the particularity of the civil law countries such as Germany's copyright theory of personality right, it

makes contradiction between civil law and copyright law. It is feasible to protect the moral rights by applying agency system after the death of the author.

Key words: personality rights, moral rights, agency system

美国“转换性使用”规则转型经验及其借鉴

周贺微

（中国政法大学民商经济法学院博士生）

摘要：合理使用制度是著作权保护与公共利益保护的平衡器。美国转换性使用的扩张，扩大了著作权合理使用的范围。在美国转换性使用规则膨胀的同时，一些新的商业模式和技术发展带来的著作权相关利益分配新问题，使美国从一定程度上注意到了转换性使用扩张的弊端。美国在最近的案件中，对转换性使用的限制及规范对合理使用中“转换性”的边界遏制有较大的帮助。我国近年来徘徊在是否引入美国转换性使用规则的边缘，虽无明文规定、司法中也较少直接引用“转换性使用”的概念，但该概念仍然存在于相关司法裁判文书中及法官的裁判理念中。基于美国在转换性使用方面的经验及我国实际情况，对该制度的借鉴应慎重，并着力于合理使用规则本身的完善。

关键词：著作权；转换性使用；合理使用；生产性使用；公共利益

The Expansion and Containment of the Transformative Use in the Copyright Law of the U.S. and the Reference Significance to China

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Abstract: Fair use is a balancer of interests between copyright holders' interest and public interest. The expansion of transformative use in the U.S. has expanded the

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makes contradiction between civil law and copyright law. It is feasible to protect the moral rights by applying agency system after the death of the author.

Key words: personality rights, moral rights, agency system

美国“转换性使用”规则转型经验及其借鉴

周贺微

（中国政法大学民商经济法学院博士生）

摘要：合理使用制度是著作权保护与公共利益保护的平衡器。美国转换性使用的扩张，扩大了著作权合理使用的范围。在美国转换性使用规则膨胀的同时，一些新的商业模式和技术发展带来的著作权相关利益分配新问题，使美国从一定程度上注意到了转换性使用扩张的弊端。美国在最近的案件中，对转换性使用的限制及规范对合理使用中“转换性”的边界遏制有较大的帮助。我国近年来徘徊在是否引入美国转换性使用规则的边缘，虽无明文规定、司法中也较少直接引用“转换性使用”的概念，但该概念仍然存在于相关司法裁判文书中及法官的裁判理念中。基于美国在转换性使用方面的经验及我国实际情况，对该制度的借鉴应慎重，并着力于合理使用规则本身的完善。

关键词：著作权；转换性使用；合理使用；生产性使用；公共利益

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scope of fair use in copyright. With the expansion of the transformative use in the U.S., new technology and new business models produce disputes on the distribution of copyright-related benefits which led the U.S. to notice the drawbacks of the expansion of transitional use and fair use to some degree. The limitation and restraint in application of transformative use in recent U.S. cases implies the U.S. may take measures for her transformative use expansion. China has no transformative use in her Copyright Law, but Chinese courts have used "transformative use" directly and indirectly in some copyright cases. China is hesitating about whether transformative use should be introduced to the Copyright Law. Considering that transformative use is too flexible and it does endorse fair use in the U.S., China should not surely introduce transformative use into its Copyright Law. Instead, China should take some measures to improve its fair use system by stipulate four factors of fair use in its Copyright Law.

Key words: copyright, transformative use, fair use, productive use, public interest

基于维权驱动的版权运营模式：特点、问题与建议

袁真富

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摘要：基于维权驱动的版权运营模式主要有以音著协为代表的集体管理型、以三面向公司为代表的诉讼激进型、以方正电子为代表的警告协商型、以维权骑士为代表的技术介入型和以计易公司为代表的模式混合型等五种类型。该模式的特点表现为集中取得了大量权利人的授权，集中于文字、图片和视频等作品类型，集中针对信息网络传播权，并且诉讼攻击比较活跃；同时也存在欺骗作者、商业维权、恶意诉讼、非法集体管理、社会批评强烈等问题。有鉴于此，倡议运营主体采取温和的维权策略，注意运营行为的合规审查，鼓励其构建版权交易生态体系，同时通过区别性判赔抑制过度商业维权。

关键词：版权运营　诉讼维权　典型模式　主要问题　规制措施

Abstract: The mode of copyright operation based on the rights enforcement is mainly composed of five types, namely, collective management type represented by Music Copyright Society of China, litigation attack type represented by the Sanmianxiang Co.,Ltd. the warning consultative type represented by Fangzheng electronics, the technical intervention type represented by the rights knight and the mixed model represented by Jiyi Co.,Ltd. The characteristic of this model is that it has been authorized by a large number of rights holders; it concentrates on the types of works, such as words, pictures and videos, and focuses on the right of information network communication, and the litigation attacks are more active. At the same time, there are also problems such as cheating authors, commercial rights protection, malicious

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lawsuits, illegal collective management, and strong social criticism. In view of this, it advocates that the operators take a mild rights enforcement strategy, pay attention to the compliance review of operation, and encourages them to build an ecosystem of copyright trading, and suppresses excessive commercial litigation through discriminative compensation.

Key words: copyright operation; rights enforcement; typical models; main problems; regulation measures

保护作品完整权侵权判定的符号学分析

方芳*

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摘要：我国理论界关于保护作品完整权侵权判定标准等问题尚有诸多争议。原告诉讼请求的类型化归纳可见，权利人往往同时提起保护作品完整权和修改权侵权之诉，司法实践中存在同案异判现象。侵犯保护作品完整权的法定行为方式"歪曲"和"篡改"在解释论上存在冲突，与国际上通行的开放式立法例不契合。侵权行为的本质是破坏作品完整性，破坏作品表达符号的完整性是表征，破坏作品思想表达的同一性是核心。侵权行为方式可借鉴符号学的思路一分为三：第一类是局部破坏符号能指和符号所指的行为，第二类是未破坏符号能指但破坏作品所指的行为，第三类是完全毁损符号能指和符号所指的行为。应当确立"作品本意标准"判定侵权，从表达符号所指的解释项中阐述作品意义，将违背作品本意作为侵权判断的依据。同时，综合考虑改动行为的目的正当、改动行为的手段恰当和改动系基于作品性质与特点所必需等因素，将必要改动视为侵权判定的例外。

关键词：保护作品完整权；侵权判断标准；作品完整性；符号能指和所

Semiotic analysis on the infringement of the right of integrity

Abstract: There are still many controversies such as the standards of infringement of the right of integrity in China's theoretical circles. Which can be seen from the analysis on the plaintiff's claims as typed is that they always lodged a suit to protect the right of integrity and the right of revision at the same time, and there are different judgments in the similar cases. There are conflicts between the distortion and mutilation in the interpretation of law; and it is inconsistent with the legislative

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practice in typical countries. The essence of infringement is to destroy the integrity of the work. Destroying the integrity of the work's expression symbols is the characterization, and destroying the identity of ideas and expressions is the core. Using semiotic analysis, infringement behaviors can be divided into three types: the first one is to destroy the symbolic signifier and symbolic referents (sign), the second one is not to destroy the signifier but to destroy the sign, and the third one is to destruct the signifiers and the signs completely. It is necessary to establish "the original intention standard of the work", and interpret the meaning of the work from the expression sign, so that we can define the violation of the original intention of the work as infringement. At the same time, attentions should be paid to necessary changes as the exceptions to the infringement. The following three elements are needed to determine whether the change is necessary or not: in accordance with the purpose of the behavior, the appropriate means of the behavior, and the adaption is needed basing on the nature and characteristics of the work.

Key words: The right of integrity; judgment standards of infringement; the integrity of the work; symbolic signifiers and referents

作品“可复制性”要件的“死亡”[1]

——兼论作品概念条款与作品类型条款的关系

金松[2]
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摘要：作品的“可复制性”要件在理论上和司法实践中存在不同理解。实践中法院主要对涉案智力成果的“独创性”进行考察，而对“可复制性”要件则将其置于被遗忘的角落，或者仅仅蜻蜓点水般一笔带过。这在客观上造成了“可复制性”要件的“名存实亡”。本文探讨了“可复制性”要件在解释论上的困惑。认为“可复制性”应被界定为“能够被客观感知的外在表达”。对此进行明确的基础上，建议重构我国作品概念条款，明确作品的属概念为“表达”。这既能契合“思想——表达二分法”的要求，又可避免对“可复制性”的误读。界定某一智力成果是否构成作品，应依据作品概念条款，作品类型条款不是可版权要件，无法归属于现行法的作品类型条款不影响智力成果的作品属性。

关键词：作品；可复制性；固定性；作品类型

Abstract: There are different understandings about the element of “duplicability”in theory and judicial practice. In practice, courts in China mainly inspect the element of “originality” of the intellectual creation involved in the dispute. However, the element of “duplicability” either be put in a forgotten corner or be downplayed. The situation objectively caused the element of “duplicability”“exist in name only”. This paper probes into the perplexity of the element of “duplicability” in the explanation theory and concludes that that the element of “duplicability” should be defined as “the external expression that can be perceived objectively”. On this basis, the author

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proposes to reconstruct the concept of works in our copyright law. Clarifying the genericconcept of works as "expression", can not only fit the requirement of "idea-expression dichotomy", but also avoid misreading of "duplicability". To define whether or not an intellectual production constitutes works, it shall be based on the concept clause of works, rather than the type clause. Cannot be attributed to the type clause does not affect the intellectual expression constitutes works.

Key Words: works; duplicability; fixation; type of works

论著作权权项设置中兜底条款的适用

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摘要：司法实践中，著作权权项设置中兜底条款的适用并未打破知识产权法定主义，其不仅能够弥补著作权法立法的缺陷，增强著作权法的稳定性和适应性，而且可以界定立法未否定的利益。因此，在第三次修订的《著作权法》中，这一条款应予以保留。但是，兜底条款可能存在被误用或滥用的情形，应明晰兜底条款的适用规则，以平衡作品创作者与使用者、传播者的利益。对此，兜底条款的适用应遵循以下规则：一是应当有适用的合理性基础，二是应当在穷尽有名权利仍不能对被诉行为进行规制下适用，三是应当规制著作权法意义上的作品使用行为。

关键词：兜底条款；法定主义；作品使用行为

On the Application of the save clause in the Setting of Copyright Rights

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Abstract: In judicial practice, the application of the save clause of the copyright in the setting of the judge did not break the Numberus clauses of intellectual property rights. which can not only make up for the defects of the copyright law, maintain the stability and adaptability of the law, but also define the benefits that the legislation does not negate. Therefore, in the Third Amendment of the Copyright Law, this provision should be retained in the Copyright Law. However, there may be misuse or misuse of save clause and the application of the save clause should be limited to

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balance the interests of the creators and users of the works. In this regard, the judge should follow the following rules when applying the save clause: First, it should be based on the rationality of the application., and second, it should be applied under the condition that the exhausted and rights under the law still cannot regulate the act of being sued. Third, the works in the sense of copyright law should be regulated. Use behavior.

Keywords: Save clause; Numberus clauses of intellectual property;Use behavior of the work

论体育赛事 GIF 动图的合法性

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摘要： 利用体育赛事画面制作 GIF 动图在著作权法和反不正当竞争法上都具有合法性。GIF 动图的制作主要利用了处于公有领域的体育赛事本身这一事实，未复制体育赛事画面的独创性表达部分，不构成著作权侵权。对于著作权法明确排除的领域，反不正当竞争法不应介入。另外，GIF 动图的制作和传播未对体育赛事画面的市场造成实质性损害，不构成不正当竞争行为。因此，体育赛事 GIF 动图具有合法性。

关键词： GIF 动图 独创性表达 不正当竞争行为

Abstract:: The use of broadcast to produce GIF animations has legitimacy in both copyright law and anti-unfair competition law. When GIF animations was produced, the fact that the sports events in the public domain were mainly used but not the original expression of the sports events, and it did not satisfy the conditions of copyright infringement.. For areas that are explicitly excluded by the Copyright Law, the anti-unfair competition law should not be involved. In addition, the production and dissemination of GIF animations did not cause substantial damage to the market of broadcast and it did not constitute Acts of anti-unfair competition. Therefore, the producting and disseminating of sports events GIF animations have legitimacy.

Keywords : GIF animated picture the original expression Acts of unfair competition

合理使用未注明出处的法律性质及责任承担

——兼谈《著作权法(修订草案送审稿)》相关条款的修改

凌宗亮*

（上海知识产权法院法官）

摘要：著作权法中的注明出处义务关涉的是著作权人的人身权益，并非合理使用的构成要件，而是使用人在使用他人作品时应负有的独立义务。合理使用人未注明出处的，并不导致原本属于合理使用的情形成为侵害著作财产权的行为，但应承担消除影响或赔礼道歉的民事责任。注明出处并不等同于署名，二者均系保护作者人身权益的方式。未注明出处并非一定构成剽窃，只有使用他人作品超过合理的限度，且未注明出处的，才构成剽窃。因此，在合理使用与剽窃之间存在独立的侵权行为，即合理使用未注明出处的行为。合理使用人未注明出处的，无需承担侵害著作财产权的民事责任，仅需承担赔礼道歉等民事责任。

关键词： 合理使用　注明出处　人身权　民事责任

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论网络服务提供行为的著作权刑民规制衔接

——兼析《刑法修正案（九）》第二十九条关于中立帮助行为的规定

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摘要：网络服务提供行为的法律规制在刑民两大法域具有不同的价值基础和目的驱动，即具有“违法相对性”，然而鉴于不同法领域的最终价值基础是共通的，其违法性判断应当基于“一般违法性”在整个法秩序体系中作统一理解。鉴于此，立法者将提供网络服务行为等间接侵权行为通过法律拟制界定为实行犯，以期达到前置保护知识产权法益的目的，不仅强化了刑法的宣示功能，而且将侵权风险管控的关口实质性地提前至民事领域。为确保立法体系和法律适用的理论自洽性，有必要通过客体法益及主观要件的区别设置厘清刑民交错关系，进而有机衔接刑民两大法域的法律适用规则。

关键词：法秩序统一性　法益前置　刑民衔接　风险预防

Abstract: The criminal and civil regulations related to ISP are based on different value systems and motivations. Thereafter, the ultimate value of them is common. Therefore, lawmakers set ISP as director conductors, to advance the IP protection. Thus, the theory system between related criminal and civil laws can achieve harmony.

Key Words: law order harmony; benefit advancement; civil and criminal harmony; risk protection

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体育赛事节目的著作权定性问题研究

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摘要：近年来，体育产业不断发展壮大，与体育赛事节目有关的侵权案件也层出不穷。究其原因，我国《著作权法》中对体育赛事节目的立法缺位是首要的原因。无论是从法理层面来说，还是结合著作权法所保护的客体的属性，体育赛事节目都应当受到著作权法的保护。因此，立法者应当在此次《著作权法》第三次修改之际，对体育赛事节目的可版权性作出明确规定，并将其连同电影作品、以类似于摄制电影的方法创作的作品等一起归入“视听作品”的范畴。如此，才能从源头上制止体育赛事节目“盗播”案件的发生。

关键词：体育赛事 ； 独创性 ； 著作权 ； 视听作品

The Research for Copyright Qualitative of Sports Program

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Abstract: In recent years ,the sports economy is developing and strengthening , the cases of infringement of sports programs emerges in endlessly as well. What made it become like this ? The absence of legislation of the Copyright Law of our country sports programs is the primary reason. No matter from the aspect of legal principle, or in combination with the object properties which is protected by Copyright Law, sports programs should be protected by Copyright Law. As a result, the legislator should make the copyright of sports program clearly while the third modifying of the copyright law, going it into the category of “audiovisual works ”along with the cinematographic works and in a similar film method to create works. Therefore , the

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theft cases of sports program can be stopped from the source.

Key Words: Sports ； Originality ； Copyright ； Audiovisual works

敢问励在何方？——关于对著作权法创作激励理论的思考

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（中国政法大学民商经济法学院博士研究生）

摘要：纵观我国和世界范围内相当部分国家和地区的《著作权法》，“激励创作”被当然纳入了立法目的而写入法条。但《著作权法》本质性质应为权利法，与促进激励作者进行创作之间并无直接的因果关系。创作行为为人类自有天性之一，无需外在激励即可产生，与普通劳作行为相比具有本质差异。以《著作权法》第三次修改为契机，理性对待《著作权法》立法目的，有助于我们科学思考我国当下的立法体系构造。

关键词：激励机制 著作权法 创作激励 激励理论

Abstract: As a overview，Promoting and inspiring the creation of works has been written into the "Copyright Law" in a lots of countries and regions in the world. The nature of copyright law is a“rights law”. As a right law，there is no direct cause-and-effect relationship to promote the author creates works. Creation is one of human nature, and it can be produced without external motivation, which is essentially different from ordinary labor. To refine the legislative purpose of the copyright law in a rational way ，which will helps us to think scientifically about the structure of our current legislative system.

Key Words: incentives ； Copyright Law; the inspiration to create works; incentive theory

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司法实务视角下的短视频可作品性判断

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摘要：智能移动终端的发展和社交平台功能的多样化，导致短视频在近年来出现了爆发式增长。短视频市场的高速增长，也使短视频的著作权问题成为热点。对短视频的可作品性分析，必须立足于我国的著作权法框架范围内，大量摘抄或引述国外法或理论并无实际意义。我国的著作权法规定了著作权和邻接权两个权利体系，针对短视频这一对象，承载著作权的是电影和类似拍摄电影的方法创作的作品，承载邻接权的是录像制品，区分作品与制品的标准是独创性的高或低，而非独创性的有和无。从司法审判的视角出发，短视频要构成作品必须满足一定的独创性高度。多数短视频因其独创性高度较低，实质上无法满足作品的要求，应被归入录像制品范畴。短视频形式多种多样，在不分析其特点的情况下，大而化之地认定其构成作品，并简单套用影视作品的标准进行权属、侵权等分析，其结果有可能是盲人摸象，并不符合我国的著作权法规定和司法实践的要求。

关键词： 短视频 著作权 独创性 司法视角

Abstract: The development of Intelligent mobile terminal and the diversification of social platform function lead to the explosive growth of short video in recent years. The rapid growth of short video market has also made the issue of copyright of short video a hotspot. The analysis of the works of short video must be based on the framework of China's copyright law, and it has no practical significance to extract or quote foreign law or theory. China's copyright law stipulates the copyright and neighboring rights two rights system, for short video This object, the bearer of

copyright is the film and similar to the method of filming films produced works, the bearer of neighboring rights is the video products, the distinction between works and products of the standard is the high or low originality, rather than originality and no. From the perspective of judicial judgment, the short video must meet certain originality height to compose the work. Most short videos are classified as video products because of their low originality and the fact that they do not meet the requirements of the work. Short video form a variety of, in the case of not analyzing its characteristics, generalizing to identify its composition, and simply apply the standards of the film and television works of ownership, infringement and other analysis, the results may not conform to the requirements of China's copyright law and judicial practice.

Keywords: short video copyright originality the perspective of judicial judgment

游戏画面是否构成作品及相关著作权问题分析

陈艺

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摘要：近年来，网络游戏产业不断发展，游戏直播作为一种新兴的商业模式日渐兴起，并获取了巨大的商业成功，赚取了巨额的商业利润。在这个过程中，相关利益主体的权利产生了分歧，并诉诸法院，如引起巨大争论的斗鱼案，案件中有很多值得讨论的点。要判断游戏直播行为是否侵犯了游戏开发商的著作权，就需要判断游戏画面是否构成著作权意义上的作品，本文的观点是，游戏画面构成著作权法意义上的作品，受著作权的保护。这里主要结合近几年有关游戏画面是否构成作品的几个有影响力的知识产权的案件，对此展开讨论。

关键词：游戏画面　作品　著作权

雇佣作品原则

——以中美两起著作权纠纷案为视角

樊 宇

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摘要： 1986 年在美国发生的“美国的第三世界”版权纠纷案和 1995 年发生在我国的十世班禅大师灵塔案的涉案作品，均为雕塑作品，均是在委托关系下创作完成的，美国初审法院和中国二审法院均将委托关系认定为雇佣关系，并且均适用了雇佣作品原则。但中美两案的最终结局却大相径庭。1989 年美国最高法院在此案终审中申明，委托关系不是雇佣关系，委托作品不是雇佣作品，不适用雇佣作品原则，遂做出维持二审判决的终审判决，在美国持续了百年之久的委托作品与雇佣作品之争，从此尘埃落定。此终审判决对于移植雇佣作品原则后深受法人作品与职务作品（雇佣作品）之争困扰的我国法院和正在进行中的《著作权法》的修订，均有重要的示范意义和参考价值。

关键词： 雇佣作品原则　视为作者原则　职务作品　法人作品

The Evolution of Work-for-Hire Doctrine: In the Perspective of A Comparative Study of Two Similar Chinese and American Case

Summary: The work at issue in *CCNV* in the United States in 1986 and the work at issue in the case of Banchan Coffin Tower in China in 1995 were both sculptures, the sculptures were both created under commission, and both the American trial court and the Chinese appellate court treated the relationship of commission as the relationship of employment. However, the final outcome of each case varied greatly. In 1989, the Supreme Court of the United States stated clearly in its final judgment, which sustained the judgment of the appellate court, that the relationship of

commission was not the relationship of employment and a commissioned work was not a work made for hire to which the work-for-hire doctrine did not apply. Thus a rest was finally put to the century-longed dispute in the United States over the commissioned work and the work made for hire. This final judgment of the United States Supreme Court is of great exemplary significance and reference merits to the people's courts which have been perplexed by disputes over commissioned works and works made for hire ever since the reception of the doctrine of work-made-for-hire as well as to the third revision in the process of the Chinese Copyright Act of 1990.

Key Terms: work-for-hire doctrine; work made for hire; deemed authorship principles; work of legal person

论同人作品侵权与否的考量因素

——兼评金庸诉江南《此间的少年》案

傅兆衡[①]

（上海市锦天城（深圳）律师事务所律师）

摘要：同人作品的现象引发了广泛的争议。同人作品是否侵犯原作著作权，需要具体问题具体分析。本文提出通过考量同人作品的类型、是否具备“转换性”，以及其对在先作品的影响判断同人作品是否侵权。最后，本文试图使用提出的考量因素对金庸诉江南案进行分析与评论。

关键词]：同人作品；类型；转换性使用；影响；合理使用

ABSTRACT： The phenomenon of Fanfiction Works has caused wide controversy. Whether or not the Fanfiction Works infringe the copyright of the original work needs to be analysed according to the particular situation. In this paper, the author suggests that judge whether the Fanfiction Works infringe the copyright by considering the type of the works, whether they are "transformativeness" and their influence on the previous works. Finally, the author tries to analyze and comment on Louis Cha v. Richard Yang（pseudonym：Jiangnan）by using the factors proposed.

KEYWORDS： Fanfiction Works, Genre, Transformative Use, Effects, Fair Use

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体育赛事转播著作权问题研究综述

高金娣

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摘要：近年来，体育赛事转播问题成为学界研究的热点话题。绝大多数学者将焦点集中于著作权领域，对体育赛事转播过程中的两类权利客体（体育赛事、体育赛事节目）和著作权的关系提出了自己的见解，进而对体育赛事转播权的法律属性进行界定，从而提出体育赛事转播权的合理保护途径。本文结合国内外体育赛事转播相关研究成果，分别从体育赛事的法律性质、体育赛事节目的法律性质、体育赛事转播权的属性之辩、体育赛事转播权立法保护模式四个方面对体育赛事转播著作权问题研究进行综述。

关键词：体育赛事；体育赛事节目；体育赛事转播权

A summary of research on broadcasting copyright of sports events

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Abstract: In recent years, the broadcasting of sports events has become a hot topic in academic circles. Most scholars focus on the field of copyright and put forward their own opinions on the relationship between the two types of right objects (sports events, sports events programs) and copyright in the process of sports events broadcasting, and then define the legal nature of sports events broadcasting rights, thus putting forward the reasonable protection of sports events broadcasting rights. Protect the way. Based on the related research results of sports event broadcast at home and abroad, this paper summarizes the copyright issues of sports event broadcast from four aspects: the legal nature of sports event, the legal nature of sports event program,

the debate on the attributes of sports event broadcast right, and the legislative protection mode of sports event broadcast right.

Key Words: sports event; sports event program; sports event broadcast right

转换性使用规则的判定标准及其完善路径

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摘要：转换性使用规则通常被视为合理使用制度第一要素（使用目的和性质）的判断依据。从价值功能来看，亟待厘清转换性使用与合理使用、演绎权以及保护作品完整权的差异性，避免因概念混淆而导致对现行著作权制度的不当侵蚀。在司法实践中，因艺术重塑、信息提供以及画面解说等案件引发的转换性使用争议不断涌现，其核心要义在于判断在后作品使用原作的目的是否产生了对原作品的替换效应。结合我国著作权合理使用制度的列举式立法模式，有必要进一步明确转换性使用的适用范围，以相关领域的普通公众认知作为转换性使用目的之判断标准，力求从多维度考量以提升转换性使用规则的适用效果。

关键词：转换性使用；著作权；合理使用

The Criteria For Judging Transformative Use and Its Improvement Path

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Abstract: The transformative use rule is usually regarded as the basis for judging the first element of the fair use system (purpose and nature of use). From the view of value function, it is urgent to clarify the differences between the transformative use and the fair use, deductive right and the right of integrity, so as to avoid the improper erosion for the current copyright system due to confusion of concepts. In judicial practice, the disputes of transformative use arising from some cases such as art reshaping, information provision, and screen explanations are constantly emerging. The core point is to judge whether the purpose of using the original works in

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subsequent works has a substitution effect on the original works. In combination with the enumerated legislative model of the fair use system of copyright in China, it is necessary to further clarify the scope of application of transformative use, and to use the general public cognition in related fields as the criterion for judging the purpose of transformative use, and strive to improve the application effect of transformative use rule from multiple dimensions.

Keywords: transformative use; copyright; fair use

网络游戏界面著作权保护——以著作权法修订为契机

李昕玥

（南京大学法学院）

摘要：我国对网络游戏的保护仍处于起步阶段。立法中仅将源代码作为计算机软件进行保护，对于游戏界面这一侵权频发领域则无妥善的保护措施和制度规制。理论上对游戏界面的定性和保护模式也存在较大的争议。本文从游戏界面的定性入手，结合作品的定义和条件，考量独创性和玩家操作的影响，明确可版权性。并与电影作品进行比对，分析在现有法律框架下归入类电影作品的合理性。其次基于司法实践中保护模式的弊端，提出视听作品的保护模式构想。最后以利益平衡为立场，从权利人和社会公众两个角度，在著作权法固有规定的基础上，参照电影作品的保护方式，结合游戏界面的特殊性，着眼于现有法律的缺陷，提出完善游戏界面著作权法制度的意见和建议。

Abstract: With the development of Internet technology, network game industry continues to grow. However, driven by the pursuit of profit, copyright infringement cases occur frequently. China's protection of the network game is still in its infancy. The law only protects the source code as computer software, but there is no specific protection measures or systems for network game interface which is the very field where the infringement can easily occurred. The theory of game interface qualitative and protection mode also has a greater dispute.This paper starts form the legal attribute of network game interface, according to the definition and conditions of work, to demonstrate that it belongs to the object which is protected by the copyright law.By comparing with the originality and the operation of the game player, the author will discusses its rationality as the cinematographic works. Secondly, the author puts forward the concept of new protection mode on the basis of the

drawbacks existed in practice. Furthermore, based on the idea and expression dichotomy and the theory of originality, the author assumes a special method of infringement judgment. In the end, the author stands in the position of the balance of interests, according to the characteristic of the game interface and the protection of cinematographic works to refine the copyright system of game interface from the viewpoint of both the obligee and the public.

关键词：网络游戏界面；类电影作品；视听作品；

对播放权的反思与重构

——以权利客体双重构造理论为进路

罗祥[①]

（华侨大学法学院）

摘要：播放权是第三次著作权法修改送审稿第 13 条新增的著作财产权，其仍存在改造空间。权利客体双重构造理论静态、动态两个层面的解读，可为播放权的解构和重构提供进路。在静态的行为客体层面，应肯定播放权作品定义之准确。在动态的支配客体层面，可将对播放权的使用行为二分为行为手段和行为效果。在行为手段上应继续肯定“有线或无线方式”的价值，检讨播放权行为手段的三段式设权方法弊端，强调播放权应重视使用行为之行为效果。在行为效果上，通过检视并借鉴信息网络传播权支配客体的行为效果，认为播放权支配客体的行为效果宜选择“使公众在异地同时获得作品的权利”的表述。最终可将播放权重构为：以有线或无线方式向公众播放作品，使公众在异地同时获得作品的权利。

关键词：播放权；广播权；权利客体构造；使用行为；信息网络传播权；公开传播权

Abstract: The broadcasting right is the new copyright property in the Article 13 of the third revision of the Copyright Law in China. It still has room for improvement. The static and dynamic interpretations of the dual models of object of right can provide a way for the deconstruction and reconstruction of the broadcasting right. At the static behavior object level, we should affirm the accuracy of the definition of the broadcasting right.At the dynamic dominant object level, the use of the right to play can be divided into the means of action and the effect of action. We should continue to affirm the value of "wired or wireless mode" in the means of behavior, review the

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shortcomings of the three-stage way of setting rights in the means of behavior of the broadcasting right, and emphasize that the broadcasting right should pay attention to the effect of the use of behavior. In terms of behavior effect, by examining and drawing lessons from the behavior effect of the right of dissemination through information network who dominates the object, the author thinks that the behavior effect of the broadcast right dominating the object should choose the expression of "enabling the public to obtain the right of works in different places at the same time". Ultimately, the broadcasting right can be structured as: broadcasting works to the public by wired or wireless means, so that the public can obtain the right of works in different places at the same time.

Key words: broadcasting right; right of broadcast; dual models of object of right; using behavior; right of dissemination through information network; public communication right.

恰当对待“作品名称”

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摘要：作品名称不仅是对作品的概括，还有作品来源的指示功能，在传播过程中具有推动相关指示对象传播的作用，可能会凝结着成功作品可拓展的商业符号利益，作品名称的这种价值来源于作品的成功，作品名称本身凝结了作品成功后的优质社会评价。但对于作品名称的保护贸然引入商品化权，也许会引起法定权利不必要的扩张，破坏原来的生活秩序。作品名称所具有商业利益可能还不适合以权利进行类型化，反不正当竞争法在弥补相关知识产权制度的不足，调整各知识产权制度的交叉或空白地带具有独特作用，特别是在著作权和商标权的保护条件暂时难以满足的情况下，竞争法保护路径从维护公平的竞争秩序出发，平衡新出现的权益也许是一条值得探索的路径。

关键词：作品名称 法益分配 竞争秩序

Abstract: The title of a work is not only a generalization of the work, but also an indication of the source of the work. It plays a role in promoting the dissemination of relevant indicative objects in the process of dissemination, and may condense the expandable commercial symbolic interests of successful works. The value of the title of a work comes from the success of the work, and the name of the work itself condenses the formation of the work. Quality social evaluation after work. However, the protection of the title of the work hastily introduced the right to commercialization, may cause unnecessary expansion of legal rights, undermining the original order of life. The commercial interests of the title of a work may not be suitable for the classification of rights. The Anti-Unfair Competition Law plays a unique role in compensating for the deficiencies of the relevant intellectual property

system and adjusting the intersections or gaps of various intellectual property systems, especially when the conditions for the protection of copyright and trademark rights are temporarily difficult to meet. The protection path of competition law is to maintain a fair competition order. Balancing the emerging rights and interests may be a path worth exploring.

Keyword: The title of a work　Distribution of legal interests　Competition order

同人作品的侵权问题探究

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摘要：同人作品在已有作品的基础上，利用原作的人物因素或者情节因素进行创作。其中，借用人物名称、外貌或者性格等要素的，属于思想范畴，难以认定侵权；仅有完全借用原作设定或歪曲原作的少数类型同人作品构成侵权，而其余类型则被实质性相似原则排除在外。而反不正当竞争法的兜底保护，只对那些在营销方面不注意和原著区分的同人作品生效。对此，可以在商标法中允许作者对人物形象申请商标、设立统一的平台和专门行业协会进行监督以保护原作者的权益。

关键字：同人作品　著作权　独创性　实质性相似　不正当竞争

Abstract: On base of the existing productions, people use the characters in some famous literatures, animations, cinematographic works to make business creation, which is independent of the original story. In these productions, only those which totally use the same setting or distort the orininal works that consititute infringement, while others are excluded. To excluded ones, we can only depend anti-unfair competition law to limit, but it provide a zone for fan workers to avoid the responsibility of copyright, which is unfair to the original authors. Permitting a novel character to be registed as a brand may be a solution to this problem.

体育赛事直播画面的著作权法保护研究

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摘要：体育赛事直播画面由于其制作过程中要符合观众对画面的合理预期，其拍摄过程中使用的技巧和编排已经成为技术规范，从而导致体育赛事直播画面的独创性有限，不能构成我国《著作权法》意义上的作品。同时，广播组织权由于其主体限定为广播电台、电视台，这使得单纯使用广播组织权对体育赛事直播画面进行保护存在缺陷。而通过将体育赛事直播画面认定为录像制品，不仅符合我国著作权法根据独创性采用的二分法结构保护体系，同时也能根据录像制品享有的网络信息传播权和允许广播电台、电视台播放的权利进行合理保护。因此，对于体育赛事直播画面的保护，应该通过完善我国《著作权法》中网络信息传播权和广播组织权之间的衔接以及对录音录像制品的相关规定加以实现。

关键词：体育赛事直播画面；著作权；广播组织权；信息网络传播权；录音录像制作者权

Abstract: Due to the reasonable expectation of the audience during the production process, the skills and arrangement used in the shooting process have become technical specifications, which leads to the limited originality of the live broadcast of sports events, which cannot constitute China's copyright law. Works in the sense. At the same time, the right of broadcasting organization is limited to radio stations and TV stations because of its main body, which makes it difficult to protect the live broadcast pictures of sports events by simply using the rights of broadcasting

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organizations. By identifying the live broadcast of sports events as video products, it not only conforms to the dichotomy structure protection system adopted by China's copyright law based on originality, but also can be based on the rights of network information dissemination enjoyed by video products and the right to broadcast by radio stations and TV stations. Reasonable protection. Therefore, the protection of the live broadcast of sports events should be achieved by improving the connection between the right to network information dissemination and the right to broadcast organizations in China's Copyright Law and the relevant provisions on audio and video products.

Keywords: live broadcast of sports events; copyright; broadcasting organization rights; information network communication rights; audio and video producer rights

网络中立性视角下信息网络传播权的保护

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摘要：信息网络传播权看似只是著作权中的一项小权利、新权利，但在网络空间中却是越来越重要的一项权利。虽然国家一直都在出台相关的规定和政策填补信息网络传播权立法方面的空白，但是目前并没有一项很好的制度或原则作为基础来保护信息网络传播权。网络中立性原则是维护互联网空间自由、开放的基础，而网络自由的其中一个大方面就是传播自由，因此，可以用网络中立性原则来保护信息网络传播权。

关键词：信息网络传播权　网络中立性　网络版权　网络自由和开放

Abstract: The right of information network communication seems to be only a new and a small right in copyright, but it is becoming more and more important in cyberspace. Although the country has been issuing relevant regulations and policies to fill the gap in the legislation of information network communication right, but there is no good system or principle as the basis to protect the information network communication right. The principle of network neutrality is the basis of maintaining the freedom and openness of Internet space, and one of the major aspects of network freedom is the freedom of communication. Therefore, the principle of network neutrality can be used to protect the right of information dissemination on the network.

Keywords: The right of information network communication　Network neutrality　Network copyright　Network freedom and openness

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视听表演作品的二次获酬权问题研究

贺淑芳

（宁波大学）

摘要：《视听表演北京条约》宣誓性地提出二次获酬权，但这不是我国提出设置二次获酬权的依据。目前国内引入二次获酬权制度还具有很多争议，草案中的规定也并不完善。文章在借鉴外国相关优秀制度的基础上，根据国内影视产业的实际情况，从制度内外两个角度提出改进意见，以期真正实现视听表演者的二次获酬权。

关键词：视听表演；二次获酬权；集体管理

体育赛事现场直播画面的著作权保护

王碧云

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摘要：体育赛事[①]组织者不能通过自设章程原始取得著作权法意义上的赛事转播权，仅能基于对举办赛事场所享有的物权控制他人未经许可的实时直播行为。基于我国的著作权权利体系、我国现行著作权相关法律规定以及国际条约的分析，电影作品与录像之间的区别在于独创性的程度，而并非独创性的有无。体育赛事直播画面中的制作者的个性化选择不等同于独创性，电影作品与录像的区分在独创性的程度，应当以相关领域内普通观众的认识水平作为判断基准，并将表达分为内在表达和外在表达，内在表达作为独创性认定的主要因素，只有智力创造成果的内在表达的创造性达到一定的高度才构成作品。体育赛事直播画面因赛事的特殊性而使其内在表达达不到较高程度的独创性，仅属于录像的保护范围。

关键词：独创性 电影作品 录像 内在表达

Abstract: The sports event organizer cannot obtain the broadcasting rights of the event through its own rules and regulations. It is only possible to control the live action of others without permission based on the property right of the venue where the event is held. Based on the analysis of copyright rights system, existing copyright related laws and international treaties, the difference between the film and the video is the degree of originality, not the originality of it. The maker's personalized choice in live images of sporting events is not equal to originality. The distinction between a film and a video is the degree of originality. It should be based on the level of the average audience in the field. And the expression is divided into internal expression

[①]本文中所称的体育赛事不包含马拉松等在非封闭性场所举办的体育赛事。

and external expression. Internal expression is the main factor of originality determination. Only when the inner expression of the intellectual creation results in a certain level of creativity can constitute the work. Due to the particularity of sports events, the live pictures of sports events cannot achieve a high degree of originality in their internal expression, which only belongs to the scope of protection of videos

网络表情图的著作权表意探究

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摘要：网络表情图是网络社交社群发展到一定程度后所形成的一种特殊表达方式。这一新兴事物的出现，在有关著作权的权利界定方面仍存在不明确之处。鉴于网络传播环境的特殊性，网络表情图作者基于网络表情图所产生的权利与他人既有权利之间，权利互相冲突的情况时有发生。在我国现行《著作权法》语境下，这种矛盾与冲突该如何定性，仍存在争议。在合理使用制度以及作品许可使用制度之上做出一定的修改，将有助于对网络言论自由及作品传播的保护。

关键词：演绎作品　可版权性　权利冲突　合理使用

ABSTRACT： The network emoticon is a special expression formed by the development of the online social community to a certain extent. The emergence of this new thing still has ambiguity in the definition of rights related[②] to copyright. In view of the particularity of the network communication environment, the situation in which the author of the network emoticon is based on the rights generated by the network emoticon and the existing rights of others, conflicts with each other. In the context of China's current "Copyright Law", there is still controversy about how such contradictions and conflicts should be characterized. Making certain modifications on the basis of the fair use system and the license use system, it will help protect the freedom of speech on the Internet and the spread of works.

Keywords ： deductive work; copyright ability; conflict of rights; fair use

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②

论著作权纠纷调解前置机制的构建

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摘要 随着信息时代的迅猛发展，网络著作权侵权案件逐渐增多，传统著作权纠纷审理难度的增大，对我国现有著作权保护制度及普通著作权案件审理模式带来巨大的挑战。基于实际需要，构建著作权纠纷调解前置机制，加强对著作权纠纷类案件的调解工作，可以有效缓解并减轻司法负担，使司法资源得到高效配置。

关键词：著作权　网络侵权　调解前置

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体育赛事节目的独创性探析

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摘要：体育赛事节目作为新兴的体育赛事传播形式，以体育赛事为表现对象，因相关领域的立法滞后，导致在现有的《著作权法》体系下难以认定其独创性，而无法将其作为作品对其著作权进行及时、有效、充分的保护。依据作品独创性的"最低限度"标准，并结合体育赛事节目自身的特点，可以将其与摄影作品、电影作品进行对比，肯定其具有相应的独创性，认定为以类似摄制电影的方法创作的作品给予著作权保护。

关键词：体育赛事节目；独创性；最低限度标准；作品

Abstracts:As a new form of communication of sporting events, sporting events programs take sports events as the object of expression. Because of the lag of legislation in related fields, it is difficult to identify its originality under the existing copyright law system.Ideed, it can be hardly regarded as a work to protect its copyright timely, effectively and adequately.According to "the minimal standards" of originality of works, and combined with the characteristics of sports events, we can compare it with photographic works and film works, affirming that it has corresponding originality and gives the coryright protection as works created in a way similar to filming.

Key Words: sporting events programs; originality; the minimal standards; work

论"信息网络传播行为"认定标准的实质化

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摘要："服务器"标准是实务中认定"信息网络传播行为"的主流标准。这是一种形式化的标准，仅以行为的技术特征判定行为的性质，而不论其行为效果。在"服务器"标准下，很多"与初始上传行为相分离的二次传播行为"都被排除在了"信息网络传播权"的调整范围之外，例如深层链接行为、云盘信息公开行为以及种子文件分享行为。这对于保护著作权人是不利的，因为无论是民法的间接侵权原则还是反不正当竞争法规则都无法代替著作权赋予的权能。因此"信息网络传播"的认定标准需要实质化。目前理论界和实务界存在两种实质化标准，分别是"用户感知"标准和"实质呈现标准"（"实质替代"标准）。但是，由于这两种标准都是在"深层链接"纠纷中提出的，而且本身比较笼统（尤其是"实质呈现"标准），使得其在"深层链接"以外的情形中适用可操作性很弱。事实上，"具有作品传播效果的非上传行为"远不止"深层链接"。本文力图将"信息网络传播行为"认定的实质标准具体化，使之能够在一个可操作的层面上，回答"哪些与初始上传行为相分离的二次传播行为可以构成独立的信息网络传播行为。"

关键词：信息网络传播权、"服务器"标准、"实质呈现"标准

Abstract： "The Server Test" is the test under which most Chinese courts determine whether a certain act constitutes the act of "communication through information network." This test is formal in nature, in the sense that the test merely looks at the technological aspect instead of the substantive effect of an act. Under "the server test," many non-uploading acts with communicative effects are left out of the

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regulation of the right of communication through information network, such the provision of deep-links, publishing cloud storage information and sharing BitTorrent files. This is detrimental to copyright holders, because neither secondary infringement rules nor unfair competition rules could substitute the protection given by copyright. Hence, the test of determining "act of communication through information network" must be substantialized. There are two existing substantial tests – "users' perception test" and "substantive presentation test." However, these two tests were both created in cases of deep-links. And since these tests, particularly "substantive presentation test" is quite general, they cannot apply to other non-uploading acts with communicative effects at a workable level. In fact, there are many non-uploading acts with communicative effects other than provision of deep-links. Against this background, this Paper aims to concretize the substantive test, in order to answer the question – "to what extent and in what circumstances, a non-uploading act with communicative effect can constitute an independent act of communication through information network."

五、专利与相关技术

论我国专利纠纷解决的司法、行政路径

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摘要：我国在《国家知识产权战略纲要》中确立了司法保护知识产权为主导，兼顾行政执法的方针。近年来，我国又出现了构建知识产权“大保护”工作格局的构想。基于对国外制度的类型化分析和相关制度运行问题的研究，并结合国内当下的实际情况，我国专利纠纷解决的司法、行政路径之间的关系需要进一步澄清，司法权和行政权的职能范围需要进一步厘定。就专利侵权纠纷而言，法院的司法保护主导作用应得到充分的发挥，并进一步强化专利行政机关的行政执法职能；就专利确权纠纷而言，除了在专利侵权诉讼中，法院可以获得有限的处理专利确权纠纷的职能之外，专利复审委员会应当继续大力发挥其应有的职能。

关键词：专利纠纷解决；司法路径；行政路径

A study on judicial and administrative paths of China's patent-dispute resolution

Abstract: In the Outline of the National Intellectual Property Strategy, China has established a policy-that is, as for protection of IPRs, while administrative enforcement system should be strengthened, judicial protection of IPRs should play its leading role. In addition, the idea of constructing “Broad Protection” of IPRs has been put forward recently. Based on typological analysis of foreign systems, research of operation issues of related systems and China's present situations, the relation between judicial and administrative paths of China's patent-dispute resolution should be further determined. As to patent right protection, function scope of judicial power and administrative power needs more clarification. Specifically, when it comes to patent-infringement disputes, the court's leading role of judicial protection should be fully developed, and patent administrative enforcement should be further strengthened; as for disputes of patent right determination, except that courts could acquire limited power to resolve such disputes in an infringement action, the Patent Reexamination Board should fully exert its due function.

Key words: Patent-dispute resolution; Judicial path; Administrative path

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中国知识产权法学研究会 2018 年年会

电子商务平台专利间接侵权问题探究

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摘要：随着互联网及电子商务的迅猛发展，实践中存在诸多网络专利侵权的现象。然而我国现有的《专利法》及《侵权责任法》中关于专利侵权的救济方式与实践中出现的专利侵权行为之间有很大出入。第三方电子商务平台对于自身权利及义务的行使方式与其应当承担的专利间接侵权责任具有很大关系。本文对专利侵权中第三方电子商务平台的责任认定展开探讨，期盼该方面问题能够得到更为广泛的关注，从而保证专利权在电子商务发展中能够得到更好保护。

关键词：第三方电子商务平台；专利侵权；过错责任；审查义务

创新激励视野下我国药品试验数据保护制度的革新

褚童

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摘要：药品试验数据保护制度是以给予创新药品数据独占保护为核心内容，以创新激励与利益平衡为根本目的的新型药品知识产权保护制度。我国现行的药品试验数据保护制度由于存在保护范围不明确、保护方式不清晰、保护程序缺失等问题，始终无法发挥其应有作用。对药品试验数据保护制度进行全面完善，是我国在药品审批制度改革中探索知识产权创新激励机制的重要实践。《药品试验数据保护实施办法》意见稿在借鉴他国制度经验的基础上，结合我国实际情况与需求进行了制度革新，但在明确权利性质与定位、具体规则细化与表述、利益平衡的制度设计等方面还有待进一步完善，以期在法规正式出台后能够发挥鼓励药品创新、加快药品可及的目的。

关键词：数据独占；创新激励；利益平衡

The Reform of Pharmaceutical Test Data Protection in China from the Perspective of Innovation Incentive

Abstract: Pharmaceutical test data protection is a new type of pharmaceutical intellectual property protection regime which is regarded data exclusivity of original drug products as essential requirement, innovation incentive and interests balance as basic purpose. Due to the vague of protection scope, the ambiguity of protection approaches and the vacancy of enforcement procedure, China's current regulation of pharmaceutical test data protection hardly plays its role. To improve the

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本文是教育部人文社科青年基金项目：创新药品研发的知识产权激励机制研究——以药品试验数据保护为视角的阶段研究成果

pharmaceutical test data protection comprehensively is one of the most significant practice to explore the intellectual property innovation incentive mechanism in the drugs approval system. The Draft Implementation Measures for pharmaceutical test data protection draws on the experiences of other countries' legislation and reform the current regulation based on the situation and needs of pharmaceutical industry and health care in China. However, there are still several important issues need to be clear in the Draft Regulation, which is to clarify the character of the data protection rights, to detail the specific content of the document and to design a interests balanced system, so as to expect the Measure in force can play its due role in the future.

Key Words: Data exclusivity; Innovation incentive; Interests balance

日本植物新品种保护研究及其对我国的启示

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摘要:为保护育种者权利，促进本国农业发展，世界各国均采取不同的模式对植物新品种进行保护。日本主要采用专利法和特别立法这一双轨模式，即《专利法》和《种苗法》保护植物新品种，两者在登记要件、保护客体、保护期限等方面均有所不同。因此本文将重点对日本《种苗法》和《专利法》进行研究，为我国植物新品种相关法律的完善提供相应建议。

关键词：植物新品种；种苗法；专利法；日本

Abstract: In order to protect the rights of breeders and promote the development of domestic agriculture, all governments are offering protection for new plant varieties by using different modes . The dual-track mode is mainly adopted in Japan to protect the new plant varieties: Patent Act and the special legislation Plant Variety Protection and Seed Act. which are different in terms of registration requirements, object of protection and term of protection. Therefore, this paper will focus on the research of the Plant Variety Protection and Seed Act and Patent Act, and provide some complete and effective suggestions for the plant variety protection in China.

Key words: plant variety; Plant Variety Protection and Seed Act;Patent Act;Japan

国家财政资助科技成果混合所有制的实证研究

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摘要：职务科技成果权利归属问题是关乎科技创新效率的核心问题，在确定国家财政资助科技成果归属上显得更加复杂。2016 年底，《四川省职务科技成果权属混合所有制改革试点实施方案》率先规定了“先确权、后转化”的成果转化方式，聚焦科技成果转化中产权问题，突破了现行法律制度的规定。四川省试点的这一制度被业界称为“职务科技成果混合所有制”。这一制度推行的必要性、合理性和合法性如何？笔者对我国典型高校和科研院所进行了较大规模的问卷调查。论文主要基于本次调查问卷分析，得出了几点初步结论。

关键词：国家财政资助　科技成果　混合所有制　实证研究

An Empirical Study on the Mixed Ownership of National Funded S&T Achievements

Tang Suqin, Ren Jing, Zhang Yan, Zeng Xinyi

ABSTRACT: The attribution of the right of Ownership about S&T Achievements is a core issue related to the efficiency of scientific and technological innovation. At the end of 2016, “Sichuan Provincial Pilot Plan for the Reform of Mixed Ownership of Professional Scientific and Technological Achievements” was the first to stipulate the transformation mode of achievements, focusing on the property rights in the transformation of S&T Achievements, breaking through the current legal system. The pilot system in Sichuan is called the "mixed ownership of S&T Achievements" by the industry. What is the necessity, rationality and legality of this system? The author conducted a large-scale questionnaire survey on typical universities and research institutes in China. Based on this questionnaire, the paper draws several preliminary conclusions.

Key words: national finance subsidized, S&T Achievements, mixed ownership, empirical research

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英国“伊普斯威奇织布工人案”与专利制度的初衷

邹琳

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摘要：通过对英国“伊普斯威奇织布工人案”的梳理和分析发现，英国 1624 年《垄断法案》的制定受到了该案的重大影响，当年英国制定专利制度的初衷在于对有利于公众的“新”的智力成果授予合理垄断权，其保护的期限限于社会公众能够学习该技术并熟练使用，同时这种独占的专利权不得抬高物价，损害国家利益。由历史分析对现在专利制度的完善提出建议：授予专利权的目的应该是为了将新技术进行推广，专利权的保护期限可以区分技术进行灵活设定，专利权的客体范围可以适当扩大到包括“商业方法”。

关键词：“伊普斯威奇织布工人案”，1624 年《垄断法案》，专利制度的初衷，启示

Abstract: Through the analysis of “the Cloth workers of Ipswich Case” in Britain, it is found that the enactment of “the Statue of Monopolies” of 1624 in Britain was greatly influenced by the case. The original purpose of the patent system in Britain was to grant a reasonable monopoly on the "new" intellectual achievements beneficial to the public, the period of protection was limited to the time which the public could learn and use the technology skillfully, and this exclusive patent right must not raise prices, harming national interests. Based on historical analysis, suggestions are made for the perfection of the patent system: the purpose of granting patent right should be to popularize the new technology, The duration of patent protection can be flexibly differentiated from technology， the object scope of patent right can be appropriately extended to including “business methods”.

Key words: the Cloth workers of Ipswich Case, “the Statue of Monopolies”, the original intention of the patent system, enlightenment

专利权保护范围变化之规律探析

——兼评《专利法（修订草案送审稿）》相关条款

张洋[①]

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摘要：除去《专利法》的第二次修改，迄今为止的《专利法》修改对专利权的保护范围都有所涉及，并且主要集中于医药领域与外观设计领域。对专利权保护范围的修改应当遵循以下规律：以利益平衡为最基本标准、以契合中国国情为最重要标准、以促进创新发展为最直接标准。

关键词：专利法　修改　专利保护范围

An Analysis On The Change Rule Of The Scope Of Patent Right Protection

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Abstract: In addition to the second amendment to the patent law, the scope of patent right protection has been covered by the amendments to the patent law so far.In addition, the amendments are mainly concentrated in the field of medicine and design. The amendment to the scope of patent right protection should follow the rules: the most basic standards of interest balance, the most important standards in line with China's national conditions and the most direct standards for promoting innovation and development.

Key Words: the patent law　amendment　scope of patent protection

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我国专利侵权损害赔偿因侵权获利计算方式的法经济学分析

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摘要：本文拟以 2009 年 1 月 1 日至 2018 年 8 月 4 日期间审结的、我国法院一审认定侵犯发明专利权成立、适用因侵权获利计算方式的案例为统计对象，基于案例实证分析对我国专利因侵权获利计算方式的运行实效进行收益成本分析，以构建“最小化事故成本、最大化社会福利”为原则的因侵权获利适用体系作为建言重点，以期为我国专利公共政策的制定和当前正在进行的最新一轮专利法修订提供理论依据及政策指引。

关键词：专利侵权损害赔偿；因侵权获利；法经济学

Economic Analysis of Chinese Patent Infringement Damage Calculating Method of “Disgorge the Gain”

Li Jing

Abstract: This article aims to conducting cost/benefit analysis on operational efficiency of patent infringement damage calculating method of “disgorge the gain”, based on empirical analysis of all invention patent infringement cases which had been concluded by Chinese courts between Jan. 1st, 2009 and Sep. 4th, 2015. It emphasizes on providing theoretical bases and policy guidance to the latest patent law revision and current patent public policy making, following the principles of “minimizing accident cost and maximizing social benefits”.

Key words: Patent Infringement Damage, Disgorge the Gain, Economic Analysis of Law

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遗传资源专有权与知识产权的协调保护

何平

（中南民族大学讲师）

摘要：遗传资源专有权是目前遗传资源保护理论探索中的重要内容，作为知识产权的在先权利，其对知识产权的影响值得研究。本文认为遗传资源专有权与知识产权之间既有表现为利益冲撞的对立的一面，又有人权意蕴相容的一面，并且在国际保护体制上也存在制度协调的空间。二者应该一体保护，并同时降低独占性，具体规则包括将遗传资源知情权作为专利授权的适度刚性的实质条件；将遗传资源许可使用权作为专利授权的绝对刚性的实质条件；而遗传资源利益分享权则在专利制度上不做要求。

关键词：遗传资源专有权；知识产权；协调；专利授权条件

The Coordinated Protection between the Genetic Resources Right and the Intellectual Property Rights

He ping

Abstract: The right of genetic resources is an important content in the exploration of the protection theory of genetic resources at present. As the prior right of intellectual property, its influence on intellectual property is worth studying. This paper argues that there is not only a conflict of interests between the rights of genetic resources and intellectual property, but also a compatibility of human rights implications. Both of them should be protected in one and be reduced exclusivity at the same time. The specific rules include that the right to be informed about genetic resources as the essential condition of patent authorization with the appropriate rigidity. The licensing right of genetic resources is regarded as essential condition of patent authorization with the absolute rigid. While the right to share the benefits of genetic resources is

not required in the patent system.

Keywords: the Right of genetic resources; Intellectual property rights; Coordination; Conditions of patent authorization

专利许可协议中过期使用费条款的法律规制

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摘要：在我国，如果有关使用费是被许可人就专利期限内使用专利行为应付使用费的延期或分期付款，那么，该条款合法有效；如果有关使用费是被许可人就专利过期后使用专利行为支付的使用费，那么，该条款无效且可能触犯反垄断法。在美国，尽管招到很多学界和司法界人士的反对，联邦最高法院还是认为，专利政策禁止专利权人根据专利许可协议约定在专利期限届满后收取使用费，否则其行为就构成专利权滥用。在欧盟，不存在对专利使用费支付期限的限制，专利过期后使用费条款通常不会违反欧盟竞争法；但是，如果专利过期后被许可人不能在做出合理通知的情况下不受限制地解除有关许可协议，则该条款会触犯《欧盟运行条约》第 101 条(1)款。美国和欧盟的不同，反映它们对公共利益和自由竞争方面的不同侧重，而双方具体的规制后果却殊途同归，都实现了公共利益和自由竞争之间的协调。因此，今后在法条、实践层面对专利过期后使用费条款进行法律规制的恰当路径，是在尊重各种法律机制立法宗旨的同时，追求捍卫知识公有领域、促进技术传播、推动后续创新等公共利益和维护市场自由竞争之间的平衡。

关键词：专利过期后使用费，专利法，反垄断法,合同法，法律规制

The Legal Regulation of Post-expiration Royalties in Patent Licensing Agreements

Abstract: In China, If the post-expiration royalties are the deferred payment or installment payment paid by the licensee for the valid patents, then the arrangement is lawful and valid; If the royalties are the consideration paid by the licensee for the expired patent technology, then the arrangement is invalid or may even constitute patent misuse. In US, the Supreme Court holds that patent policies prohibit patentee charging royalties when the patent is expired, otherwise his conduct may constitute patent misuse, and the rules invokes criticism from many scholars and judges. In EU, there is no restriction against post-expiration patent royalties, generally speaking, the arrangement will not violate EU competition law; however, the arrangement will run a foul of Article 101(1) of the TFEU in the situation that the licensee can not freely terminate the licensing agreements with proper notice after the patent is expired. The difference between US and EU reflects their different preference on public interests or free competition, while the effects of their regulations are almost alike via different routes, both achieving the balance between those interests. Therefore, the proper approach to regulate post-expiration royalties arrangements, is to purse the balance between public interests such as protecting public domain, promoting the diffusion of technologies and the followed-on innovation and interests thus as maintaining the free market competition, as well as to respect the aims of the various legal institutions.

Key words: post-expiration royalties, patent law, antitrust law, contract law, legal regulation

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专利诉讼中律师费转付的困境与出路

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摘要：相较于我国《著作权法》、《商标法》，《专利法》并未对诉讼中的律师费转付问题予以直接规定，引致司法实践中常以类推的做法进行裁判而带来法律的不确定性。同时，专利律师费转付的定性模糊、被控侵权人胜诉时主张律师费赔偿的不公平对待、律师费转付适用范围不明与适用标准不清等问题亟待统一解决。美国法律实践表明，适用合理的专利诉讼中律师费转付制度能有效抑制恶意侵权与专利蟑螂滥诉等情形，从而实现对创新企业健康成长的保护和对专利市场有序发展的促进。综合考虑我国高技术产业发展中专利诉讼中律师费转付制度的影响、专利诉讼对专利不确定性的作用与异化以及专利诉讼专业能力提升，我国《专利法》未来修订时应明确诉讼中律师费转付的性质，限定律师费转付制度仅适用于恶意诉讼与故意侵权之情形，并增设恶意诉讼反赔条款。

关键词：律师费转付；专利蟑螂；恶意诉讼；损害赔偿；惩罚性赔偿；

Predicament and outlet of lawyer fee transfer in patent litigation

Ni Zhu-Liang*

Abstract: To the contrary of Copyright Law and Trademark Law, Patent law does not set up rules of the attorney fee-shifting in patent litigation, and the courts award directly attorney fee-shifting in its discretions, which would results the law into

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uncertainty. We need solving these problems, including identifying nature of attorney fee-shifting problem, fairness for defenders, limiting and explaining the scope and elements of application. According to the history and development of patent law, the rule of attorney fee-shifting could suppress patent trolls, and benefit enterprises and the oriented-patent market development. After analyzing the impacts of the rule of attorney fee-shifting of America patent law and the influences of lawsuit on clarifying the scope of patent right, we should take attorney fee-shifting seriously. In detail, the legislation of patent law should identify the nature, scope and elements of attorney fee-shifting clearly and enact anti-compensation clause.

Keywords: Attorney Fee-shifting; Patent Trolls; Malicious Litigation; Compensation for Damages; Punitive Damages;

美国标准必要专利禁令救济规制实践及其启示

郭壬癸※

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摘要：近些年，我国标准必要专利禁令救济案件量增多，由于此案件类型较新且较为复杂，因此在对其进行规制陷入困境。美国标准必要专利禁令救济案件较为多样，既存在以禁令救济行拒绝许可之实的案件类型，也存在以禁令救济胁迫接受不合理高价的案件类型等；美国相关规制实践也较为丰富，积累了很多经验，如在规制原则上确立了 F/RAND 原则的前置考量地位、在规制思路上提出了契约优先与公益保护的衡平考量、规制依据上发展出了 F/RAND 许可费与善意使用人的具体考量因素。我国在移植美国标准必要专利相关经验时，要有在区分借鉴的前提下，从规制原则、规制思路以及规制依据上分别进行相应经验移植，从而使得我国标准必要专利禁令救济规制体系更加完善。

关键词：美国；标准必要专利；禁令救济；规制经验

American regulation practice about the injunctive relief of the standard essential patent and its enlightenment

Guo rengui

(Intellectual Property Research Institute of Xiamen University)

Abstract： In recent years, China's standard patent injunction relief cases are increasing, because the type of this case is more new and more complex, so it is in trouble to regulate it. The United States standard patent injunction relief cases are more diverse, there are not only the types of cases which have been rejected by the injunctive relief bank, but also the type of cases which accept the unreasonable high

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price with the injunction coercion. The relevant regulation practice in the United States has also been rich and accumulated a lot of experience, such as the establishment of the F/RAND original in the principle of regulation. The position of the preposition, the balance of the contract priority and the public welfare protection, and the specific factors of the F/RAND licensing fee and the bona fide user are developed. When we transplant the relevant experience of the necessary patent of the United States, we should carry out the relevant experience transplanting from the rule of regulation, the thought of regulation and the basis of regulation, so as to make the system of the relief and regulation of the necessary patent injunction more perfect.

Keyword： America; standard essential patent; injunctive relief; regulation experience

论 FRAND 谈判前置制度

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摘要:FRAND 中许可费率决定因素复杂，这使得学界与实务界围绕 FRAND 的性质、许可费的计算、FRAND 承诺与禁令的关系、禁令之诉的合法性、专利法与竞争法之间的界限等相关问题争议不断。虽然 FRAND 谈判机制解决方式已进入立法及司法的视野，但如何保障谈判双方的实质平等和公平、如何确定双方的谈判义务以及如何具体谈判程序设计等问题，仍然有值得深入探讨的空间。为了破解专利劫持与专利反劫持僵局，法律必须要求当事人在 FRAND 谈判前、中、后遵循特定的原则和程序。具体而言，披露制度和禁令制度确保谈判双方谈判过程中免受对方的挟持；诚信原则确立谈判双方在谈判过程中的具体义务，保障谈判过程和谈判内容的公平性，是法院判断谈判双方在 FRAND 谈判中是否存有过错的依据。

关键词: FRAND 谈判 标准必要专利 披露制度 禁令制度 诚信原则

ABSTRACT: The determinants of FRAND royalty rate are complex, which causes continuous debates about the nature of FRAND, the calculation of royalty rates, the nexus between FRAND and injunction, the legality of injunction, the boundary between the Patent Law and the Competition Law, etc. Although the FRAND negotiation mechanism has entered the legislative and judicial perspective, many questions such as how to guarantee the substantive equality and fairness of the negotiators, how to determine obligations of the negotiators, and how to specifically design the procedures for negotiations still have space for deep research. In order to break the deadlock of patent hold-up and reverse hold-up, a specific framework of principles and procedures must be built in the course of negotiations.Specifically, the

disclosure system and the injunction system ensure the negotiators avoids being threatened by the other side during the negotiation. The good faith principle establishes the specific obligations , guarantees the fairness of the process and the content in negotiations. And it also is the basis of the court to decide whether the negotiators are in fault.

KEYWORDS: FRAND negotiation ; Standard Essential Patents; disclosure system; injunction system; the good faith principle

实用新型专利侵权判定时等同原则“三基本、一普通”适用研究

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摘要：实用新型专利是指对产品的形状、构造及其改进所提出的适于应用的技术方案，专利等同原则是判定是否侵权的原则之一。随着理论研究、司法实践活动开展，等同原则适用不断发展。本文从等同原则形成历程、概念、内涵、规定入手，通过案例，对实用新型专利在诉讼活动中等同原则适用进行研究，对我国“三基本、一普通”的等同原则进行分析，提出完善等同原则的建议。

关键词：实用新型专利；等同原则；侵权判定；

Study on the application of the doctrine of equivalents "three basic and one common " in Infringement judgment of utility model patent

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Abstract: Utility model patents refer to the technical proposals for the shape, construction and improvement of products. Doctrine of equivalents one of the principles to judge whether a patent is infringed. With the development of theoretical research and judicial practice, the application of the doctrine of equivalents continues to develop. Starting with the formation process, concept, connotation and regulation of the doctrine of equivalents, this paper studies the application of the doctrine of equivalents in the litigation of practical utility model patent through cases, analyzes the application of the doctrine of equivalents in China's "three basic, one common" and puts forward some suggestions to improve the doctrine of equivalents.

Key words: Utility model patent, Doctrine of Equivalents, Infringement judgment

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中国知识产权法学研究会 2018 年年会

专利链接中拟制侵权的理论基础与实施问题

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摘要：拟制侵权制度作为专利链接中链接简化申请手续与后续等待期、独占期制度的链接节点，对于构建药品专利链接制度，提前解决专利纠纷具有重要意义。我国尚未规定拟制侵权，本文针对拟制侵权的理论基础与适用可能存在的问题进行分析，为我国规定拟制侵权提供建议。本文认为拟制侵权规制的药品审批申请行为本质上为侵权促成性事由，无法构成专利法规定的侵权行为情况下通过法律拟制的方式，法定列举具体行为视为侵权。在适用拟制侵权制度时，应当把握拟制侵权的适用范围，在我国鉴于法院无权判定专利无效，在规定侵权诉讼与审批程序的衔接同时应当注意构建专利无效审查与药品审批程序的链接；同时在与等待期的链接上也注意连接点与等待时间的规定。最后针对拟制侵权可能被专利权人滥用的情况，我国应当限定拟制侵权的适用范围，限缩药品专利公开列明范围、限定等待期适用次数，同时允许被告提起删除无效列举专利的反诉，平衡专利权人与仿制药商的利益关系。

关键词：拟制侵权，侵权促成性事由，等待期

Abstract: As the connection between ANDA and stay period, exclusivity period, artificial infringement is of great significance for the construction of drug patent linkage system and the settlement of patent disputes in advance. To build patent linkage system, it is necessary for China to apply artificial infringement and make relevant adjustments. This paper analyzes the theoretical basis and possible problems in its application, and provides corresponding suggestions. This paper holds that the pharmaceutical approval application governed by artificial infringement is in essence a facilitate event for "actual infringement" in patent law, which cannot constitute an

infringe act in the patent law. In the application of the proposed infringement system, the scope of application of the proposed infringement should be grasped. In view of the court's inability to determine the invalidity of the patent in China, the connection between the infringement lawsuit and the examination and approval procedure should be specified, and the link between the examination of patent invalidation and the examination and approval procedure should be constructed. It is also needed to pay attention to the connection point and waiting time on the link with the waiting period. Finally, in view of the potential abuse of the artificial infringement by the patentee, China should limit the scope of application of the artificial infringement, limit the listed scope of drug patents and the number of applications in waiting period, and allow the defendant to file a counterclaim to question the quality of listing patents, so as to balance the interest relationship between the patentee and the generic drug producers.

方法专利分离式侵权判定的“反不正当竞争法”解决思路
——兼评“西电捷通诉索尼案”

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摘要：科技发展使得专利对技术创新愈发重要，新时代为专利事业发展方向提出新的要求。在“云概念”盛行的今天，企业更多地开始倾向于多主体联合式服务，将原本曾经一个企业需要完成的工作分散至多主体联合完成，在降低成本的同时提升效率。如此也引发了“方法专利分离式侵权行为”的困境出现。2017年第一个方法专利分离式侵权案件——“西电捷通诉索尼案”在我国出现，昭示解决该困境的迫切性。如何在满足法律规定的同时也能满足法理，从反不正当竞争法方向寻找突破口也是一个良法。

关键词：方法专利；分离式侵权；间接侵权；直接侵权；共同侵权

Abstract: The development of science and technology makes patents more and more important for technological innovation,, and this new era puts forward new requirements for the development direction of patents. Today, when the “cloud” is prevalent, enterprises are beginning to prefer multi-agent joint services, and the work that was once needed by a company is dispersed to multi-agent joint completion, which improves efficiency while reducing costs. But it also led to the emergence of the dilemma of "divided infringement of method patent". In 2017, the first divided infringement case - "Xicai Jietong v. Sony case" appeared in China, indicating the urgency of solving this dilemma. How to satisfy the legal requirements while satisfying the legal principles, it is also a good law to find a breakthrough from the direction of the competition law.

Keywords: method patent; divided infringement; indirect infringement; direct infringement; joint infringement

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局部外观设计制度的立法必要性研究

——以实务中“局部要素”的运用为视角[①]

顾昕

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摘要：全文旨在通过梳理实务中“局部要素”对外观设计整体判断原则的影响，得出是否有必要在立法上引入局部外观设计的结论。在我国没有规定局部外观设计制度的现状下，随着法律拟制的判断主体水平的变化，越来越多的“局部要素”对外观设计的相同或近似性判断产生重要影响。但由于部分法院确定的“局部要素”和权利人意图保护的局部并不一致，再加上行政保护机关和各级法院对“局部要素”的判断大相径庭而难以提前预测判断结果，“局部要素”在实务中仍无法替代局部外观设计的作用。图形用户界面（GUI）保护的新问题无法通过引入局部外观设计制度解决。

关键字： 局部外观设计　局部要素 外观设计相同或近似性判断　一般消费者 图形用户界面　GUI

A study on the necessity for legislation of partial design patent

-From the perspective of practical application of "partial elements"

Abstract: This paper aims to study the effect of “partial elements” on the overall judgment principle of design patent in order to draw the conclusion that Partial Design patent should be introduced in legislation. With the change of the level of Legal fictional characters , more and more “partial elements” have important influence on the judgment of identical or similar design. However, because the partial elements verified by judicial procedures haven’t been coincided with rights holders’ intentions, and partial elements recognized by all-lever administrative and judicial

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organs has been discordant radically, which has dazzled the prediction of the rights holders. “partial elements” can’t replace the functions played by partial design in legal practice. Some new problems in the protection of graphical user interface (GUI) cannot be solved by introducing partial design patent.

Keywords: Partial Design patent, Partial Elements, Judgement of identical or similar design, Ordinary Consumers, Graphical User Interface

药品专利链接制度下专利纠纷的仲裁解决探析

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摘要：为推动我国仿制药市场的发展，我国政府引进了药品专利链接制度。通过该制度，仿制药企业能在仿制药注册审查程序中及早了解可能涉及的专利，发现潜在侵犯他人药品专利的法律风险，并将可能发生的侵权争议解决在审批前。与诉讼相比，仲裁在保持灵活性和保密性的同时，可以更快的速度和更低的成本解决争议。以仲裁快速解决药品专利侵权纠纷，可减少药企在正式上市其仿制药后因被认定侵犯专利权而需支付高额赔偿金或被迫停产而导致的资源浪费和损失。

关键词：药品专利链接制度；专利纠纷；仲裁

Abstract： In order to promote the development of China's generic drug market, the Chinese government has introduced the Pharmaceutical Patent Linkage System. Through this system, generic drug companies can discover the legal risks of potential infringement of other companies' drug patents, and resolve the infringement disputes before the drugs are officially appeared on the market. Compared with litigation, arbitration retains the benefits of litigation while maintaining flexibility and confidentiality. If the generic drug companies adopt patent arbitration to resolve the disputes quickly. It can reduce the waste of resources and losses caused by the infringement of patent rights and the need to pay high compensation or forced to stop production.

Key Words: Pharmaceutical Patent Linkage System; Patent Disputes; Arbitration

论专利侵权损害赔偿计算方式的完善

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摘要：我国立法规定专利权人在权利受到侵害索取赔偿时，可以选择四种方式：权利人受损数额、侵权人获益数额、专有使用费用的合理倍数和法定赔偿金。可以说，在专利权人的索赔方面，我国的规定较很多发达国家的规定都更加全面。然而，在面对损害赔偿额的计算方式选择上，却没有赋予当事人完全的选择权利，而是将四种赔偿计算方式进行先后顺序规定，只有前一种方式完全无法确定的情况下才可以适用后一种方式，无形中增加了专利权人的维权成本。此外，权利人在举证方面的客观不能也将导致权利人不能完全止损。因此在计算方式方面，既要将我国目前的计算方式具体化，也要赋予当事人更加自由的选择权，可以根据实际情况选择更加有利于权利人维权的方式索赔，并且要合理配置在损害赔偿方面的举证责任，严厉打击侵权行为。

关键字：知识产权损害；计算方式；举证责任

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ON THE INTERNATIONAL COMPARISON OF THE COMPENSATION SYSTEM FOR INTELLCTUAL PROPERTY DAMAGE

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Abstract: Our country's legislation stipulates that the intellectual property owners can choose four ways to claim compensation when their rights are infringed. It includes the loss of the right holder, the profit obtained by the infringer, the reasonable multiple of the exclusive use cost and the legal indemnity. In the respect of the compensation of intellectual property owners, China's regulations are more comprehensive than those of many developed countries. However, our country's legislation does not give the parties the right to freely choose the method of calculating the amount of compensation. The four methods of compensation are in sequence, and the latter one can be applied only if the previous one is completely unsure. This provision increases the cost of rights holders in the maintenance of rights. In addition, because of the limitation of objective conditions, the lack of proof of the right holder will lead to the lack of complete stop loss. Therefore, in the way of calculation, we should not only specify the way of calculation, but also give the litigants more free choice so that the obligee can choose the way that is more conducive to their own rights according to the actual situation. Moreover, we should rationally configure the burden of proof in the damage compensation and crack down on torts.

Key word: intellectual property damage, the way of calculation, the burden of proof

探索建立中国药品专利链接制度

——兼论美国 Hatch-Waxman 法案之借鉴

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摘要：药品关系着人类的生存和发展，实现药品可及性需要兼顾创新药和仿制药的发展。美国 Hatch-Waxman 法案是平衡创新药产业和仿制药产业利益的典范，从实践效果来看，其实现了激励创新和鼓励仿制的效果。而在中国，长期以来，由于制度、体制、管理等种种深层次原因，我国医药产业发展面临种种问题和矛盾。在法律层面，作为保护创新的最重要的部门法之一《专利法》对于药品专利的保护经历了从无到有的过程，并在修法过程中不断实现专利保护与公共利益之间的平衡；在政策层面，自 2006 年以来，医药产业创新始终是国家政策持续的重点和目标，特别是 2015 年以来，出台了一系列政策和措施，旨在推进医药产业改革，解决目前医药产业发展面临的困境。2017 年 10 月，中共中央明确要探索建立药品专利链接制度的大方向。本文拟从美国 Hatch-Waxman 法案出台背景、主要内容、制度创新及实施效果四个方面，对该法案中有关药品专利保护的内容，特别是与药品专利链接制度相关的内容进行全面介绍，以期为如何在现有制度框架内建立适合我国国情的有效的专利链接制度提出了建议。

关键词：Hatch-Waxman 法案；药品专利链接；创新；仿制

Abstract: Drugs are closely related to the survival and development of human beings. The realization of accessibility of drugs requires development of both innovative drugs and generic drugs. The Hatch-Waxman Act of the United States is an excellent example of balancing the interests between the innovative industry and the generic

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industry. Viewing from the perspective of practical effect, it comes out to be both a stimulation of innovative drugs and an encouragement of generic drugs. However, In China, owing to various fundamental reasons related to system, regime and administration, the development of the pharmaceutical industry in China has been, for a long time, encountered with various problems and conflicts. From the perspective of law, the drug-related patent protection under the Patent Law, one of the most important law dealing with innovation protection, has gone through a process, in which it has started from scratch and constantly reinforced it. Besides, the balance between patent protection and public interests has always been taken into consideration during the law alteration. From the perspective of policy, the innovation of pharmaceutical industry has always been the focus and mission of the national policies ever since 2006; particularly after 2015, a series of policies have been issued in order to promote the reform of pharmaceutical industry as well as solve the difficult situation of the development of the industry. In October 2017, the general direction of exploring establishment of patent linkage system in China has been clarified by the CCCPC. The essay tries to provide thorough and detailed introduction of the Hatch–Waxman Act regarding the part related to patent protection, particularly with a focus on patent linkage system provided in the Act, from four aspects including the background of the legislation, the main contents, the innovation in the system and the result of implementation, so as to provide suggestions on how to establish an effective patent linkage system in China which is suitable for our national situation within the current legal structure.

Key Words: Hatch-Waxman Act; patent linkage; innovative drugs; generic drugs

浅议我国药品专利强制许可制度的完善

——基于专利法第四次修改

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摘要：随着我国社会经济文化事业的和平稳定发展，在求得生存的同时需要保障身体的健康，但是各种疾病困扰着我们的生活，由于我们的健康医疗药品专利技术的缺失，使得我们不得不依赖于跨国医药集团。为了民众的生命健康，医药专利强制许可制度的完善显得十分重要。专利强制许可制度制定的出发点在于防止专利权人滥用专利权，以此达到平衡专利权人与社会公众之间利益的目的。我国自 1984 年颁布实施《专利法》以来，虽然规定了专利强制许可制度，但是并不为人们所关注，使得该制度没能发挥其应有的作用。自专利法颁布至今，医药专利尚未获得过强制许可，值得深思。因此结合我国现阶段的国情和相关法律规定，提出相应完善举措，在第四次修改专利法之际，完善药品专利强制许可制度显得尤为重要。

关键词：专利许可，专利强制许可，药品专利

Abstract: With the steady development of social economy and culture, we need to protect our health for surviving. But all kinds of diseases disturb our life. Because of the lack of patented technology of health medicine, we have to rely on multinational pharmaceutical groups. For the life and health of the people, the perfection of the compulsory license system for pharmaceutical patents is very important. The starting point of the patent compulsory licensing system is to prevent the patentee from abusing the patent right, so as to balance the interests between the patentee and the public. Since China promulgated and implemented the Patent Law in 1984, although

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the compulsory licensing system for patents has been stipulated, it has not been paid attention to by people, which makes the system fail to play its due role. Since the promulgation of the self-interest law, medical patents have not yet been granted compulsory license, which is worth pondering. Therefore, it is particularly important to improve the compulsory licensing system of pharmaceutical patents at the time of the fourth amendment of the Patent Law.

Key words: patent licensing, patent compulsory license, drug patent

我国新专利链接制度下的纠纷解决路径及思考

陶冠东

（上海知识产权法院法官）

摘要：当前，国家陆续出台了多项与药品专利链接制度相关的政策文件，相关法律法规的修订也已开始，这必将对我国药品行业产生重大的影响。此前实施的 Bolar 例外相对于仿制药企较为有利，司法实践中的争议焦点主要集中于仿制申报中的仿制时间和仿制数量。在新专利链接制度下，当事各方的争议问题不仅局限于前述内容，还会围绕更多问题进行争辩，仿制药企和原研药企也将会在等待期、告知期、批准等待期等问题上产生分歧。新药品专利链接制度以将仿制药企和原研药企在仿制中的纠纷早期解决为制度动因，但在民行二元分立体制下，加之药品专利纠纷的复杂性，这一目标难以实现，较之其他国家和地区更为复杂，需要做好必要的心理准备。

关键词：专利链接；药品；仿制；纠纷 、

Disputes and Considerationson New Drug Patent Linkage System in China

Abstract: Currently, several policy documents relevant to drug patent linkage system have been issued in China, relevant laws are also under amendment, which will bring strong impacts to the drug industry. The Bolar Provision is advantageous to generic pharmaceutical company, and there are two key disputed issues in judicial practice, they are manufacturing time and manufacturing number of the generic drug. While in new drug patent linkage system, disputes will be more complicated, waiting time, informing time, approving time, more issues will be generated between generic drug company and brand name drug company. New drug patent linage system aims to solve disputes between generic drug company and brand name drug company in the early stage, however, compare with other countries and regions, due to the different

legal system of civil law and administrative law, as well as the complexity of drug patent disputes, this aim is difficult to achieve. Therefore, sufficient preparation is necessary.

Key points: Patent linkage; Drug; Develop a generic drug; Disputes

试论药品专利强制许可制度

——以《我不是药神》的困境为视角

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摘要：跨境购买仿制药涉及到药品专利及其强制许可制度。发达国家通过多边协议制定规则，保护自己发达的药品研发成果，但这为存在严重公共健康问题的发展中国家与不发达国家所难以接受。经过多年多次谈判，《Trips 协定》《公共健康宣言》就药品专利强制许可制度作出明确规定。我国也加入《Trips 协定》，并在《专利法》中规定药品专利强制许可制度相关条款。然而药品专利强制许可制度并无在专利私权与公共健康判断孰轻孰重的权力，作为一项解决公共健康危机的制度选择，实际上效力有限，因此应当在药品专利强制许可制度之外尝试寻找合理有效的路径，政府在公共健康危机的问题上应当积极承担责任。

关键词：《我不是药神》 药品专利 专利强制许可 公共健康 专利法

Abstract: The acts of buying transborder generic drugs are related to the system of pharmaceutical patent and its compulsory license system. Developed countries set rules through multilateral agreements to protect their own developed drug research and development achievements, but this is difficult for developing countries and underdeveloped countries with serious public health problems to accept. After many years of negotiations, TRIPS agreement and the Doha Declaration clearly stipulates the compulsory licensing system of medicine patent. China is also a member of the TRIPS agreement, and the Patent Law also provides for the compulsory licensing of medicine patent. However, the compulsory licensing system of medicine patent does not have the power to choose between the private rights of patents and public health. The effectiveness of this system to solve the public health crisis is actually limited, so

we should try to find another way that is reasonable and effective, and the government should take responsibility for public health crisis.

Keywords: *Dying to Survive;* Patent Rights of Pharmaceuticals ; Compulsory License of Medicine Patent; Public Health; Patent Law

网络交易平台入驻商家对抗专利侵权投诉的担保机制研究

——对车某向"淘宝"投诉朱某专利侵权案的法律思考

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摘要：在专利权人车某向"淘宝"投诉朱某专利侵权一案中，"淘宝"为了免除其可能的侵权责任断然将朱某在"淘宝"经营的网店关闭，致使朱某蒙受了巨大的经济损失，就现行的相关法律法规的规定而言，"淘宝"的做法确实是一种规避侵权风险的"理性"做法。然而，作为在先的外观设计专利权人，朱某销售的是自己的外观设计专利产品，并不存在侵犯他人实用新型专利权的问题，而"淘宝"在处理该投诉案件时完全无视朱某的外观设计专利，故上述关闭网店的处理方式难谓公平。虽然朱某可以采取向法院提起不侵权之诉或者请求专利复审委员会宣告车某的实用新型专利无效的法律救济手段来对抗车某的侵权投诉，但无论是不侵权之诉，还是专利权无效宣告程序，其审理周期都比较长，故所述法律救济手段难以真正维护朱某的合法权益。车某诉朱某专利侵权投诉一案虽然是个案，但朱某的不幸遭遇具有一定程度的普遍性。为了维护被控侵权网络交易平台入驻商家的合法权益，同时也为了维护网络交易平台入驻商家与专利权人乃至其他知识产权权利人之间的利益平衡。有必要建立网络交易平台入驻商家对抗专利或者其他知识产权侵权投诉的担保机制。

关键词：网络交易平台；专利侵权；投诉；入驻商家；担保

Abstract: In the patent infringement dispute in which the patentee Che complained Zhu to the Taobao e-commerce platform, Taobao abruptly closed the online store of Zhu on that platform to avoid possible infringement responsibilities, causing great

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economic losses to Zhu. In light of the current provisions of the related laws and regulations, Taobao's action is indeed "reasonable" for avoiding infringement risks. However, as the prior design patentee, Zhu sold his/her own design patent products and did not infringe the utility model patent right of others. Taobao completely ignored Zhu's design patent when dealing with the complaint. Thus, closing Zhu's online store is hardly fair. Although Zhu may resort to legal relief measures to oppose Che's infringement complaint, such as initiating a non-infringement action before the court or requesting for invalidation of Che's utility model patent before the Patent Reexamination Board, either relief method requires a long trial period. Therefore, such legal relief measures cannot effectively and efficiently safeguard Zhu's legitimate rights. This dispute is an individual one, yet Zhu's unfortunate experience has certain generality. It is necessary to establish a warrant mechanism for online stores operating on internet trading platforms to oppose patent or other intellectual property infringement complaints to protect the legitimate rights of online stores operating on internet trading platforms and balance the rights between these stores and patentees or other intellectual property owners.

Key words: Internet Trading Platforms; Patent Infringement; Complaint; Online Stores Operating on Internet Trading Platforms; Warrant.

GUI 外观设计专利权保护问题研究

——以专利复审委第 31958 号审查决定为例

骆俊峰

（浙江素豪律师事务所律师）

摘要：随着互联网通信技术与移动智能终端设备的迅猛发展，关于图形用户界面（GUI）的知识产权保护问题便呈现在学界与实务界面前。由于我国专利法保护体系的框架约束，对 GUI 外观设计的认识仍然必须在产品载体的框架内讨论。2014 年 3 月 12 日国家知识产权局对《专利审查指南》进行修订，正式将 GUI 外观设计纳入专利法保护客体。当前，《专利法》第四次修订工作在中美贸易摩擦的大环境下正在加速论证并完善，GUI 外观设计以及与此密切相关的局部外观设计问题成为此轮修法的核心议题之一。专利复审委第 31958 号审查决定所涉及的案例系国内首例 GUI 外观设计专利无效案件，该案表明了当前我国对 GUI 保护的基本态度，案例中体现的审查基准也可以为 GUI 申请程序的完善提供参考。

关键词：图形用户界面；GUI；外观设计；专利权；无效宣告程序

Research on Patent Protection of the GUI Design

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Abstract: With the rapid development of Internet communication technology, the intellectual property protection about GUI is presenting in front of the academic and practical interfaces.For the patent law protection system, the understanding of GUI must be discussed on product as the carrier.On March 12, 2014, the State Intellectual Property Office revised the Patent Examination Guidelines and incorporated the GUI

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design into patent law protection system. Nowdays, the fourth revision of the Patent Law is being completed under the trade war between US and China.Obviously,the core issues of this round of revision include GUI design and Partial Design. AS the first invalid application case about GUI design patent in China,No.31958 decision of Patent Reexamination Board of SIPO shows the current basic attitude of GUI protection and provides the reference during GUI design patent application procedure..

Key Words： GUI; patent right; invalidation application; industrial designs

浅论标准必要专利与专利劫持
——以 3GPP 会议“联想荣誉保卫战”为引入

米仁豪

（桂林电子科技大学法学院法律硕士）

摘要：“联想荣誉保卫战”的起因、经过、结果作为标准必要专利讨论热潮的“导火索”打开了我国标准必要专利等系列知识产权法深入探究的大门。作为行业标准的必要技术，专利劫持产生的原因是专利与标准之间的利益冲突，只有依据严格的标准和原则颁发禁令救济，确定标准必要专利的合理许可费，才能使标准专利的各方当事人对峙或冲突中走向相互协调。

关键词：标准必要专利、专利劫持、禁令救济、披露义务、知识产权法

生物研究工具专利实验使用例外问题研究

李伟

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摘要：一旦生物研究工具被授予专利权，则何种行为构成实验使用例外对基于该生物研究工具的后续研发至关重要。然而我国《专利法》对实验使用例外的规定语焉不详，国外亦无统一之认定标准，又因生物研究工具专利之特殊性，致使生物研究工具专利实验使用例外认定较为困难。本文将简要比较美德两种实验使用例外认定模式，结合我国科技发展现状，提出生物研究工具专利实验使用例外应满足非营利目的与合理使用两个要件，并分别分析我国非营利目的的认定标准及合理使用的要求。

关键词：生物研究工具专利 实验使用例外 非营利目的 合理使用

A Study on the Exception to the Use of Patent Experiments on Biological Research Tools

Abstract Once a biological research tool is patented, the behavior constitutes an exception to the use of experiments is crucial to the subsequent development based on the biological research tool. However, the provisions of the Patent Law of our country on the exception of experimental use are not clear, and there is no uniform standard of the identification in foreign countries, Because of the particularity of the patent of biological research tools, it is difficult to distinguish the exceptions from the use of patent for biological research tools. In this paper, the author briefly compares the two kinds of models of comparing exceptions with the experimental use of virtue, combining with the present situation of the development of science and technology in China, and puts forward the two requirements of non-profit purposes and rational use

that the exceptions to the use of patent experiments of biological research tools should meet. Then analyzing the standard of non-profit purpose and the requirement of reasonable use.

Key Words Biological Research Tool Patent Experimental Use Exception None-profit Purpose Reasonable Use

《专利侵权判定指南》对审理标准必要专利纠纷等案件的指导

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（桂林电子科技大学）

摘要：2017 年 4 月，修订后的“专利侵权判定指南”于北京市高级人民法院颁布，其中“标准必要专利”成为这次修订的重点之一，此次修订对“标准必要专利”做了大篇幅的解释。专利侵权判定指南的诸多规定，有益地补充了最高人民法院关于审理侵犯专利权纠纷案件应用法律若干问题的解释（二）中对于标准必要专利的规定，从去年开始火热的华为诉三星案、小米被诉侵犯 3 GPP 专利案等，该规定为这些案件作出了更具体明确的指导，这不仅明确了审理标准必要专利纠纷案件以及垄断纠纷案件时应遵循的 FRAND 原则，也增强了社会公众对于标准必要专利法律适用的可预期性。

关键词：专利侵权判定指南；标准必要专利；FRAND 原则（公平，合理，无歧视原则）；指引作用

Abstract: In April 2017, the revised "patent infringement judge guide" issued in Beijing municipal higher people's court, the "standard essential patents" has become one of the highlights of the revision, the revision of "standard essential patents" did much to explain. Many provisions of the patent infringement determination guide, beneficial supplement to the supreme people's court on the application for patent infringement dispute cases (2) the explanation of some issues of law to the provisions of the standard essential patents since last year the hot huawei, millet was v. v. samsung case in 3 GPP patent case, etc., the rules for these cases are made more specific guidance, it not only has been clear about the standard patent monopoly

dispute necessary courts should follow the principle of the Frand requirement, also enhanced the social public for a standard patent law applicable necessary predictability.

Key words: Patent infringement judgment guide; Standard necessary patents; Frand principle (fair, reasonable and non-discriminatory principle); Guiding role

摆脱内容聚合技术的滥用——对技术价值二重性的思考

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摘要：当代中国，在将科学与技术混同立法时，往往强调创新与保护却轻视了引导与控制。这一现象的产生，是对科学与技术差异的忽视。正确认识技术价值二重性，把握技术的价值理性与工具理性，在技术立法中强调引导和控制，将避免技术的无限制发展可能造成的严重危害。内容聚合技术作为一种常用的互联网技术手段，也需要在充分考虑技术特性的基础之上，通过链接不替代原则确认技术使用者的责任，避免技术滥用。

关键词：内容聚合、技术价值二重性、工具理性、价值理性

Abstract: In contemporary China, when the science and technology are mixed and legislated, they often emphasize innovation and protection but despise guidance and control. Correctly understanding the dual value of technical, grasping the value rationality and instrumental rationality of technology, and emphasizing guidance and control in technical legislation will avoid the serious harm that may be caused by the unrestricted development of technology. As a common Internet technology, content aggregation technology also needs to fully recognize the technical characteristics, confirm the responsibility of technology users through the principle of non-replacement of links, and avoid technology abuse.

Keyword: content aggregation, dual value of technology, instrumental rationality, value rationality

限定专利无效宣告程序之申请主体范围研究

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摘要：专利权无效宣告是专利法中一个不可或缺的制度，在历次专利法修改中都引发人们的广泛关注与热议，[2]在专利法体系的完善中此项制度的地位与作用也是日渐清晰与重要。对于何人能够提出申请启动此项程序，《专利法》及其实施细则虽有规定，但对其范围却未加限制，由此引发的问题以及社会资源的无端浪费不得不引起人们的重视与思考。专利无效宣告程序解决的是平等民事主体之间的专利纠纷，由公权力主体提起是否合适？作为专利权人能否自行申请宣告其专利无效？以利害关系为界，普通大众提起专利无效宣告意旨何在等等一系列问题。对此，本文对是否应该限定专利无效宣告程序的申请主体范围的研究，认为应将申请主体范围限于与该专利有“利害关系”者，并明确专利权人的适格申请人地位，排除“利害关系人”中专利许可、转让合同的受让方以及专利代理人、专利行政机关等中立主体。此研究有利于我国专利制度的完善，明确申请启动程序的适格主体，有利于提高专利行政机关的效率。

关键词：专利权；无效宣告；申请主体；限制

Abstract: The invalidation of patent rights is an indispensable system in the patent law. It has caused widespread concern and discussion in the revision of the previous patent laws, the status and role of which is becoming increasingly clear and important in the improvement of the patent law system. As for who can apply to start this procedure, although the Patent Law and its implementation rules are stipulated, there is no restriction on its scope. The problems caused by this and the unwarranted waste

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[2]

of social resources have to be paid attention to and considered by people. The patent invalidation procedure solves the patent dispute between equal civil subjects, whether is it appropriate for the public authority to file a dispute? Can the patentee claim to declare his patent invalid? Taking the interests as the boundary, what is the intention of the general public having raised the intent of patent invalidation, and so on. In this regard, this paper studies whether the scope of the subject of the patent invalidation procedure should be limited. It is considered that the scope of the application should be limited to those who have "interest" with the patent, and the applicant's status as a suitable applicant should be clarified. The transferee of the patent license contract and transfer contract, and the neutral subject such as the patent attorney and the patent administration should be excluded. The research on whether to limit the scope of the application subject of the patent invalidation procedure is conducive to the improvement of the patent system in China; it is conducive to improving the efficiency of the patent administrative organ.

Key words: patent right; invalid declaration; applicant; limitation

六、商业秘密保护

商业秘密民刑司法保护若干问题探讨

宋健

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摘要：在涉及商业秘密主要是技术秘密司法保护中，商业秘密权利人经常面临着究竟是诉诸民事诉讼还是刑事保护的困境。从司法实务看，商业秘密民刑司法保护程序各有特点，各有优势。而在现行法律框架下，综合运用民刑司法保护措施，对于加大商业秘密司法保护力度，促进我国创新经济发展和经济转型升级具有重要意义。

关键词：知识产权　商业秘密　民刑司法保护

我国商业秘密侵权诉讼实务对权利人利好的动向剖析

章建勤，丛芳，孙长江

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摘要：最高人民法院宣告的2017年保护知识产权十大案例及50个重点案例表明：我国商业秘密民事诉讼的价值取向已经从偏重于“保护劳动者的合法权益”转向强调员工离职后的保密义务，并倡导诚实信用的价值取向，维护公认的商业秩序与商业道德，出现了将商业秘密当做市民的房屋、农民的粮食一样保护的趋势；我国商业秘密侵权诉讼实务已经突破了法释〔2007〕2号第十四条关于权利人举证责任的规定，大大减轻了权利人的举证责任。由此表明，我国商业秘密民事诉讼实务发生了对权利人利好的重大转向。这一变化，对于企业来说非常重要。不论在企业商业秘密保护的内部制度设计、人力物力的投入，甚至研发生产立项，还是在企业商业秘密遭受侵犯后是否通过诉讼维权的决策方面，都应该作出相应调整。

关键词：商业秘密侵权诉讼　对权利人利好　重大转向

Abstract： The Supreme People's Court announced the top ten cases of intellectual property protection and 50 key cases, which implies the focus on the value orientation of the civil litigation relating to trade secrets has shifted from “protecting the legitimate rights and interests of laborers” to emphasizing the confidentiality obligations of employees leaving the employers in China. Moreover, it advocated the value orientation of honesty and credit, maintaining the recognized business order and business ethics. Which shows there is a trend of protecting trade secrets as citizens' houses or farmers' grains. In China, judicial interpretation [2007] No. 2 Article 14 has been broken through by the trade secrets infringement litigation in practice, which

means the burden of the proof providing for the right holders has been greatly reduced. It shows that the trade secrets civil litigation practice has undergone a major shift toward the right holders, which is of great significance for the employers. Therefore, the internal system design for the enterprise trade secrets protection, the input of the human resources and material resources, the research and projects for the development of production, and even the decision on protecting the rights of the enterprise being violated should be adjusted accordingly.

欧盟商业秘密保护例外问题研究[1]

周克放

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摘要：2016 年生效的欧盟《商业秘密保护指令》第 5 条规定了商业秘密保护的例外，涉及公民及媒体的言论与通信自由、劳动者权利保护和公共权利保护等问题。此部分内容为原则性规定，有必要对其内涵作进一步的探究，特别是在落实到具体实践当中时，应当如何认定某一行为是否侵犯了权利人的商业秘密。就我国而言，商业秘密已经作为知识产权客体之一，无论采取何种立法方式，均有必要对上述问题进行思考。

关键词：欧盟；商业秘密；欧盟商业秘密保护指令；保护例外

Research on the Exception of EU Trade Secret Protection

Abstract: Article 5 of the EU Trade Secret Protection Directive, which came into effect in 2016, provides for exceptions to trade secrets protection, including freedom of speech and communication of citizens and the media, protection of workers'rights and protection of public rights. This part of the content is the principle of the provisions, it is necessary to further explore its connotation, especially in the implementation of specific practice, how to determine whether an act infringes the business secrets of the obligee. As far as our country is concerned, trade secrets have already been regarded as one of the objects of intellectual property rights. No matter what legislative methods are adopted, it is necessary to think about the above problems.

Key words: EU; trade secrets; EU trade secret protection directive; protection exception

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论商业秘密保护行为的除外规定[1]

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摘要：目前是知识经济的时代，知识产权已经成为创新性企业不可替代的无形资产。其中，商业秘密是企业在激烈的市场竞争中的竞争优势之一。2016 年，美国和欧盟先后颁行保护商业秘密的立法，两者都有关于侵犯商业秘密的除外规定，这一规定有助于平衡私人利益与公共利益，防止商业秘密权利的滥用。我国相关的商业秘密立法有必要纳入除外规定，明晰知识产权领域中公共利益的界限范围借鉴域外立法经验，将为了保护善意第三人利益、公共利益以及其他合法利益等的除外规定纳入到相应的法律体系内。

关键词：商业秘密 除外规定 公共利益 利益平衡

Abstract: At present，in the era of knowledge-based economy, intellectual property has become an irreplaceable intangible asset of innovative enterprises. Among them, trade secrets is one of the competitive advantages of enterprises in the fierce market competition. In 2016, the United States and the EU successively enacted legislation on the protection of trade secrets. Both of them contain exceptions to the trade secrets infringement. This provision contributes to balance private and public interests and prevents the abuse of the right to trade secrets. China's relevant commercial secrets legislation is necessary to need the exception of the provisions, drawing on foreign legislation and experience, in order to protect interests of the3rd person of goodwill,

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the public interest and other legitimate interests of the exclusion of provisions into the corresponding Within the legal system.

Key words: trade secrets; exceptions to the trade secrets infringement; public interest; balance of interests

三网融合下广播组织权的重构

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摘要：广播组织权是一项在作品传播过程中产生的权利，自诞生之日起就随着传播技术的发展而不断丰富自己的内涵。如今电信网、广播电视网与互联网的三网融合又给广播组织权带来了新的挑战，现行广播组织权存在主体范围狭窄，技术限定僵化的不足，但又受制于维护公共利益的需要而难以向互联网和交互式传播领域延伸。为了顺应技术发展的要求，我国应当适时地对广播组织权进行重构：一方面由于与传统广播组织性质的趋同，因此有理由将网播组织作为新的主体纳入保护，另一方面从技术融合的角度考虑，应当遵循技术中立原则为广播组织设置可以涵盖多种传播渠道与传播方式的远程传播权，但同时为了防止私人权利的扩张侵害公共利益，还需要通过保护期制度和法定许可制度对事业类型广播电视的私权进行限制，使广播组织权在利益平衡的基础上实现促进科技发展与文化传播的目的。

关键词：广播组织权；三网融合；技术中立

The Reconstruction of the Right of Broadcasting Organization under Tri-networks Integration

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Abstract: Produced in the dissemination of works, the right of broadcasting organization has been enriching its connotation with the development of communication technology since its birth. Now it has to face a new challenge brought by tri-networks integration among telecommunication network, broadcast network and Internet. Although there are a narrow subject range of right and a rigid technical limitation, for the sake of public interest, it's difficult to extend the right to the field of Internet and interactive communication. In order to comply with the requirements of technical development, we should reconstruct the right of broadcasting organization at the right time: On the one hand, it is reasonable to protect webcasting organization which is converging with the traditional broadcasting organization in nature as a new subject of right. On the other hand, from the perspective of technology integration, we should follow the principle of technology neutrality and set up the right of long distance communication which can cover various communication channels and modes. At the same time, we need to restrict the private right whose expansion may violate the public interest through the term of protection and statutory license system in the field of public, so that the right of broadcasting organization will achieve the purpose of promoting scientific and technological development as well as cultural transmission on the basis of interest balance.

Keywords:the right of broadcasting organization; tri-networks integration; technology neutrality

商业秘密“不为公众所知悉”不应具有新颖性含义

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摘要：商业秘密的首要构成要件是“不为公众所知悉”，即指该信息未被披露或非公开，这一构成要件即是商业秘密的秘密性。秘密性仅要求该信息处于“不为公众所知悉”的状态，并非要求该信息必须具备新颖性。深刻认识这一点，才能不偏离商业秘密保护的立法价值取向，更好的发挥商业秘密保护相关法律应有的维持市场公平竞争的作用。

关键词：商业秘密　不为公众所知悉　秘密性　新颖性

Abstract: The primary constituent element of a trade secret is " Unknown to the public", which means that the information is not disclosed or not disclosed. This constituent element is the Secrecy of a trade secret. the Secrecy only requires that the information be " Unknown to the public" and does not require that the information must be novel. To understand this point deeply, we can not deviate from the legislative value orientation of commercial secret protection, and better play the role of maintaining fair competition in the market due to the relevant laws of commercial secret protection.

Keywords: Trade secrets　Unknown to the public　Secrecy　Novelty

科技型中小企业商业秘密保护的必要性研究

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摘要：中小型企业随着技术革新与产业经济的发展，已然成为地方经济实力的关键组成部分。例如浙江省作为中小型企业迅速发展的经济大省，大力的政策扶持，优化的产业链升级以及稳步提升的科技水平，进一步促进了地方科技型中小企业的创建。科技型中小企业的崛起也面临着全新的挑战，部分企业的发展完全依赖于自身特有的科技技术。这也使科技型中小企业的商业秘密保护问题显得尤为突出，如何有效的防范商业秘密泄露，合法合理保护自身的商业秘密也是当下科技型中小企业面临的现实问题。本文结合浙江省相关案例为例，分析科技型中小企业商业秘密保护的必要性研究。

关键词：科技型中小企业；商业秘密保护；必要性；浙江省

Study on Trade Secret Protection and Legalization of Small and Medium Sized Sci - Tech Enterprises - A Case Study of Zhejiang Province

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Abstract: With the development of technological innovation and industrial economy, small and medium-sized enterprises have become a key component of local economic power. For example as small and medium enterprises in Zhejiang province of the rapid development of the economy big province, strong policy support, optimize the industrial upgrade and steadily enhance the level of technology and further promote

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the creation of the place of technology-based SMEs. The rise of small and medium-sized technology-based enterprises is also facing a new challenge, and some enterprises are completely dependent on their own unique technology and technology. It also makes small and mid-sized enterprise of trade secret protection problem is particularly prominent, how to effectively prevent the commercial secret, reasonable legal protection of business secrets is also the practical problem confronted by science and technology of small and medium-sized enterprises. Based on the case of Zhejiang province, this paper analyzes the necessity of commercial secret protection of small and medium-sized enterprises in science and technology.

Keywords: technology-based SMEs; Trade secret protection; necessity; Zhejiang province

七、新技术变革与知识产权

人工智能生成物的著作权归属探析

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( )

摘要：人工智能的迅速发展使得大量与人类创作作品无异的人工智能生成物出现在人们的生活中。对人工智能生成物的可版权性，学界基本达成共识。但对人工智能生成物著作权归属的认定分歧较大，目前主要有人工智能编程设计者说、使用者说、所有者说、投资者说等学说。人工智能生成物体现了使用者的创作意志，使用者是做出必要安排、贡献最大之人，将人工智能生成物的著作权归属于人工智能的使用者更符合著作权法、民法原理，符合国际立法趋势。

关键词：人工智能、人工智能生成物、著作权归属

Abstract: With the rapid development of artificial intelligence, a large number of artificial intelligence creations, which are similar to those created by human beings, appear in people's life. There is a consensus on the copyright of artificial intelligence creations. However, there are big differences in the identification of the copyright ownership of artificial intelligence products. At present, main theories are as follows: the theory of artificial intelligence programming designer, user theory, owner theory , investor theory and so on. Artificial intelligence creations reflect the user's will, the user is the one who makes necessary arrangements and give the biggest contribution. So the copyright of artificial intelligence creations belongs to the users of artificial intelligence ,which is more in line with the principle of copyright law, civil law, and conforms to the international trend of legislation.

Key words: Artificial intelligence ； creation ； ownership of copyright

论人工智能创作物的赋权与模式

——基于私法角度的考察

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摘要“技术的发展使得人工智能具有“自主创作”的能力。人工智能自主创作的现象逐渐成为常态。然而，在现行法律框架内，人工智能创作物却面临着诸多理念与制度上的逻辑困局。著作权、邻接权、特殊权利、物权、债权以及竞争法制都有为人工智能创作物提供或多或少的保护可能性。比较而言，邻接权赋权模式应该是优选。赋予人工智能创作物以邻接权，可以保证著作权法“人类精神创作激励”的纯粹性，也意味着人工智能创作物实行较低强度的保护水准，避免对人类智慧创作积极性造成损害。“标注”制可较好地解决人类智慧创作物与人工智能创作物的界分问题。

关键词：人工智能、创作物、著作权、邻接权、赋权

Abstract: The development of technology has made artificial intelligence capable of "self-creation". The phenomenon of artificial intelligence creation has gradually become the norm. However, within the current legal framework, artificial intelligence creations are faced with many dilemmas of the idea and institutional logic. Copyright, neighboring rights, special rights, property rights, claims, and competition laws all provide more or less protection possibilities for artificial intelligence creations. In comparison, the neighboring weighting mode should be preferred. Giving artificial intelligence creations a neighboring right can guarantee the purity of the "human spiritual creation incentives" for the copyright law, and also means that the artificial

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intelligence creations implement a lower level of protection and avoid damage to the enthusiasm of human intelligence creation. The "labeling" system can better solve the problem of the division between human wisdom creation and artificial intelligence creation.

Keywords： artificial intelligence, creation, copyright, neighboring rights, empowerment

基于区块链技术的版权登记问题研究

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摘要：版权自作品创作完成自动取得，作品的登记不是版权取得的必要条件。但是，版权登记却是版权权属和维权的初步证据，是版权交易的起点，创作者有动力去登记版权。基于区块链技术的版权登记可以有效解决传统版权登记费用高、期限长等问题，并在技术层面上增加登记的公信力，版权登记数据库会更安全。但是，区块链版权登记无法解决作品的“独创性”问题，难以解决登记作品的创作者身份认定问题，难以解决版权登记效力的公示公信问题，短期内也难以获得传统官方版权登记机构的法律地位。从促进区块链版权登记产业发展角度看，当前要须突破区块链版权登记的技术障碍，处理好与传统版权登记机构的关系，要加强合作解决行业面临的共性问题。我们应当以包容的心态、辩证的思维看待版权登记中的区块链技术应用前景。

关键词：区块链；互联网；版权登记；辩证思维

Research on Copyright Registration Based on Blockchain Technology

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Abstract： Copyright has been obtained automatically since the creation of the work，Registration of the work is not a necessary condition for obtaining copyright. However, copyright registration is a preliminary evidence of copyright ownership and rights protection，and also is the starting point of copyright transactions, which stimulate the creators to register their copyrights. Copyright registration based on

blockchain technology can effectively solve the problems of high cost and long term of traditional copyright registration, and increase the credibility of registration on the technical level. The copyright registration database will be more secure. However, blockchain copyright registration cannot solve the problem of "originality" of works, and it is difficult to solve the problem of creator identification of registered works, It is difficult to solve the public trust issues of the validity of copyright registration, and it is difficult to obtain the law of traditional official copyright registration agencies in the short term. From the perspective of promoting the development of the blockchain copyright registration industry, it is necessary to break through the technical obstacles to the blockchain copyright registration, handle the relationship with the traditional copyright registration agencies. It is necessary to strengthen cooperation to solve the common problems in the industry. We should view the application of blockchain technology in copyright registration with an inclusive mentality and dialectical thinking.

Keywords: blockchain; internet; copyright registration; dialectical thinking

数字环境下构建文本与数据挖掘的版权例外规范

——基于域外版权例外规范的比较及对我国的启示

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摘要：数字环境时代背景下，文本与数据挖掘技术已然成为科研创新与丰富文化生活的重要工具。然而，在我国版权制度语境下，文本与数据挖掘技术尚不属于版权例外的范畴，容易引发版权侵权风险，不利于文本与数据挖掘技术的深度拓展。但是，域外国家或地区通过立法或司法的途径逐渐认可文本与数据挖掘技术的正当性。因此，本文以域外规范文本与数据挖掘技术的制度经验为镜鉴，并依据我国版权制度与社会实际，认为我国应当选用"有条件的允许模式"，并且较为系统地提出构建文本与数据挖掘技术例外规范的核心旨要，以期为完善我国版权制度提供一定助益。

关键词：文本与数据挖掘；版权法；合理使用

Structure of Copyright exceptions stardard for the text and data mining in Digital Environment

——based on the Comparison of extraterritorial copyright exceptions and Its Enlightenment to China

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Abstract： In the digital era background,technology of text and data mining has been

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an important tool of research innovation and rich of cultural life.However,In the context of China's copyright system, text and data mining technology is not an exception to copyright,It is easy to cause copyright infringement risks and not conducive to the depth of text and data mining technology.But the legitimacy of text and data mining technology is gradually recognized by foreign countries or regions through legislative or judicial means. Therefore, the paper takes the institutional experience of foreign standard text and data mining technology as reference, and based on the China's copyright system and social reality,thinks that China should choose the "conditional permission model", and systematically puts forward the core point of constructing exceptional specification of text and data mining technology, with a view to providing some help to the copyright system.

Key words: text and data mining; Copyright Law; Rational use.

人工智能创作物版权保护的正当性及其版权归属*

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摘要：人工智能创作物的版权保护具有文化、经济和技术上的正当性。在文化方面，这种保护可以增加知识学习的素材，拓展人类思维的广度和深度，以及激励人类创作出更优秀的作品。在经济方面，这种保护可以促进人工智能的开发以及维持版权市场的均衡竞争。在技术方面，这种保护符合版权法应对技术革新的一贯态度，并可以避免增加版权制度运行的成本。人工智能创作物由其产生过程所反映出来的特点，客观上符合“作品中心主义”的独创性判断标准，为其版权保护提供了现实可能性。从法律上的能力、责任以及公共政策考量的角度而言，相较于人工智能本身、人工智能设计者和使用者，将人工智能创作物的版权归属于人工智能所有者是最佳的立法选择。

关键词：人工智能创作物；版权；正当性；版权归属

Legitimacy of Copyright Protection of Artificial Intelligence Creations and Their Copyright Ownership

Abstract: The copyright protection of artificial intelligence creations has cultural, economic and technical legitimacy. With regard to culture, this protection can increase the knowledge of learning materials, expand the breadth and depth of human thinking, and encourage people to create better works. As to economy, this protection can promote the development of artificial intelligence and maintain a balanced competition in the copyright market. In relation with technology, this protection is consistent with the attitude of copyright law reacted to technological innovations, and

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can avoid increasing the implementation cost of copyright system. The characteristics of artificial intelligence creations reflected by its generation process meet the originality standard of "work centralism", which provide the possibility of their copyright protection. From the perspective of legal capacity, responsibility, and public policy considerations, compared to artificial intelligence itself, artificial intelligence programmers and users, let the artificial intelligence owner enjoy the copyright of artificial intelligence creations is the best legislative choice.

Key words: artificial intelligence creations; copyright; legitimacy; copyright attribution

功能视角下的人工智能公共领域

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摘 要：信息功能领域的先进性使人工智能及其生成物的知识产权赋权成为人工智能资源优化的重要议题。通过特定主体对人工智能及其生成物的专有权主张，形成对高效信息生成物的合法垄断以及对人工智能技术更新改良的有效激励。人工智能是处理信息资源的技术，亦可运用公共领域的功能思维。公共领域确保低成本的获得和使用智力资源，契合了人工智能通过机器学习技术获得信息的运行模式。机器学习的自我完善能力为人工智能在数量层面提供更丰富的信息资源。通过非赋权的渠道增加信息资源的总数，并不受专有机制的限制和影响。

关键词：人工智能；公共领域；知识产权

The Function Strategy on Artificial Intelligence

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Abstract: The advance of informational function forges the importance on the acquisition of artificial intelligence in the field of intellectual property. Through the ownership on AI as well as its output, the effective incentives and the legitimate monopoly on high-quality informational output have been established. The AI is certain technology on information, which could be processed with the function of public domain. The public domain ensures the nominal costs on the access and usage to intellectual resources, echoing the operational mode of machine learning of

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artificial intelligence. The self-improvement of machine learning provides information resources in high quantities. The function strategy of public domain negates the ownership discourse and precludes exclusive control on information, which effectively enhance the total value of information resources.

Key Word: Artificial Intelligence; Public Domain; Intellectual Property

《著作权法》修订视域下全息影像的著作权分析

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摘要：依照全息投影的技术原理，全息影像属于具体的表达，又满足固定性的要求，在具备独创性的情况下，可以成为著作权法上的作品。全息影像中的存储代码与展示影像分属不同作品：存储代码属于计算机软件；技术的发展要求取消电影作品“摄制”要求而代之以外延更广的视听作品，因此展示影像整体在满足条件的情况下属于视听作品。随着放映手段的网络化，放映权已无单独存在的必要，可并入表演权和信息网络传播权之中。全息表演整体在不构成视听作品的情况下，属于“利用技术设备向公众传播作品”这一表演行为。其中的表演者，由于虚拟“自然人”不具有法律人格，其表演行为实际是由程序设计者的指令所控制，因此程序设计者可视为表演者。而表演者权，根据全息影像的不同创作基础，分由真实的原型人物、程序设计者和演出单位享有。程序设计者与演出单位之间的利益分配，参照职务作品的规则。

关键词：全息影像；视听作品；表演者；表演者权

Copyright Analysis of Hologram Images under the View of Copyright law Revised

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Abstract: According to the technical principle of hologram images, it is specific expression, and can be reproduced in a tangible form, so as it is original, it should be protected by copyright law as a work. However, the computer code and the image

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should be protected respectively: the code is computer software; and the image is audiovisual work as a whole. The development of technology demands the "film" requirement of cinematographic works be cancelled, and replace cinematographic work with a wider extension of audiovisual work. As the means of show networked, the right of show has no necessary to exist independently, and can be incorporated into right of performance and right of information network dissemination. If the hologram images cannot be considered as audiovisual work, it can be classified into "disseminating work to public by virtue of tecnnical equipment". The virtual "natural person" does not have legal personality, and its actual performance behavior is controlled by the programmer's instructions, so the programmer can be regarded as the performers. And right of performers, according to the different basis of hologram, is enjoyed by the real prototype characters, programmer and performance units. The interests' distribution between programmer and performance units, can refer to the rules of works for hire.

Keywords: hologram images; audiovisual works; performer; right of performence

虚拟现实三维数字模型著作权问题初探

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摘要：随着科技的进步与市场经济的高速发展，虚拟现实技术业已成为信息领域中，继多媒体技术、网络技术之后被广泛开发与应用的热点，但随之引发的著作权侵权风险与乱象难题亦日益凸显。本文从虚拟现实技术的理论研究为切入点，在探析虚拟现实三维数字模型转换的技术原理与实践困境基础上，进一步分析该项技术涉及著作权客体与内容的适格要件与规制范围，并从"独创性判断-异形复制-合理使用"三重视角深度剖析虚拟现实三维数字模型应用中的可版权性、合法性与利益权衡考量等问题，以促进虚拟现实技术之科技创新和法治回应的动态均衡发展。

关键词：VR；三维数字模型；合理使用；异形复制

A Preliminary Study on the Copyright of Virtual Reality 3D Digital Model

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Abstract: With the progress of science and technology and the rapid development of market economy, the virtual reality technology has already become the field of information, after the multimedia technology and network technology has been widely development and application of hot, but then the risks of copyright infringement and chaos problem is also growing. This article from the study of the theory of the virtual reality technology as the breakthrough point, in the analysis of virtual reality technology principle and practice of 3D digital model transformation dilemma, on the basis of further analysis of the technology involved in the copyright

object and content of the eligibility requirements and regulatory scope, and from the "original judgment - shaped copy - the rational use of" three-dimensional view depth profiling of virtual reality in the applications of three-dimensional digital model can be the problem such as copyright, legitimacy and benefit trade-off considerations, to the innovation and development of virtual reality technology in China to provide feasible copyright protection advice.

Key words: VR； Three Digital Models; Reasonable Use; Special-shaped Replication

标准必要专利运营-建构于人工智能与区块链技术平台生态系

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摘要： 专利引起的纠纷考验企业经营的智慧，货币化管理知识产权成为新趋势。专利联盟的运营方式是以促进市场上的技术流通且同时避免因涉及到的标准化专利使用所产生的冲突。透过国际合作、加入标准联盟、和遵循公平合理非歧视的许可原则(FRAND)，对标准必要专利权利人而言有机会大量收取权利金，虽然大量降低权利金的百分比；对生产使用标准必要专利的企业而言，支付比较合理的权利金来合法生产商品且减少专利法律纠纷；对消费者而言可以更快速使用新商品且是以较低的售价取的商品。

关键词： 标准必要专利，专利联盟，人工智能，智能合约，区块链技术

Essential Standard Patent Management——an Ecosystem built on AI and Blockchain platform

Abstract: How to manage Intellectual Property dispute is a challenge to industry. Monetization on Intellectual Property rights is the trendy fashion to create more flexibility for a better return on investment. Patent alliance operation can promote the liquidity for technology licensing and trading, it may also avoid unnecessary conflicts by using essential standard patents. For essential standard patent (ESP) owners, there is a better opportunity if he/she can join standard organization following the FRAND (fair, reasonable and non-discriminated) through international organization. The royalty under FRAND principle will be much lower, however, consider the large

usage and global scope, it will compensate the ESP owners. From ESP users (manufactures), it waives the unnecessary legal disputes by paying reasonable royalties. Nevertheless, the consumer will be able to enjoy the new products or services in a faster and less expensive manner because the royalty rates are often much less than the non-ESPs.

Patent Alliance is inevitable to be involved in the monopoly or anti-fair competition. MPEG LA is one the positive case to prove otherwise. Somehow, patent alliance may also facilitate fair competition and enable new technologies to be commercialized globally in a faster manner. Manage patent alliance and make it profitable is a skill of the arts, there is a revolution by applying AI and big data analysis to validate the essential standard patents, nevertheless, the smart contracts build on blockchain platform are utilized to operate patent alliance with a variety of licensing models. It further helps to run patent alliance with better transparence and correctness for the patent ownerships due to the blockchain technology.

人工智能自主发明物的专利法律保护模式论考

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摘要：人工智能是当代科技发展的一个世界潮流，在没有人类干预的情况下，人工智能正逐渐地能够实现自主地发明创造，然而现行法律并没有厘定人工智能自主发明物的法律地位以致于在法律适用方面出现失灵的态势。先行者优势保护模式、添附保护模式以及职务发明保护模式等是当前理论中比较典型的应对之策。其中，职务发明保护模式更加符合人域法的法治秩序以及我国的专利保护环境，“人工智能本身”被视为“雇员”而拟制为“发明人”，“人工智能使用人”被视为“雇主”而成为“专利权人”。除此之外，《专利法》应在专利审查期限上为人工智能自主发明物开辟“绿色通道”，在动态流转中提取该交易额的 5%作为人工智能专项基金并完善强制许可条款。

关键词：人工智能；专利法；自主性；保护模式；职务发明

Research on the Patent Legal Protection Mode of AI-Generated Inventions

Abstract: Artificial intelligence (AI) is a global trend in the development of contemporary science and technology. In the absence of human intervention, AI has gradually been able to make inventions and innovations independently. However, the current laws do not clarify the legal status of inventions independently created by AI so that the legal application tends to malfunction. First-mover advantages, the accession protection mode and the service invention protection mode are the typical countermeasures in the current theory. Among them, the service invention protection

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mode is more consistent with the legal order of the human domain law and the environment of patent protection in China. “AI itself” is regarded as “employee” and fictioned as “inventor” while “AI user” is regarded as “employer” and fictioned as patentee. In addition, the patent law shall open up a “green channel” for AI inventions within the examination period, draw 5% of the turnover as a special AI fund in the aspect of dynamic trading and perfect compulsory licensing terms.

Key Words: Artificial Intelligence;Patent Law;Autonomous;Protection Mode;Service Invention

人工智能生成内容的著作权法保护

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摘要：近年来，全球人工智能产业发展势头迅猛，人工智能“创作物”也日益受到重视。近年来人工智能发展的同时产生的法律、伦理问题也不容忽视。目前我国《著作权法》无法认定人工智能生成内容是否属于“作品”、人工智能是否应当被认定为“作者”、该“作品”的著作权的归属等问题。本文将根据支持人工智能进行“创作”的计算机原理，以我国《著作权法》为基础，再参考外国相关法律，分析人工智能生成内容的性质，及其产生权益的性质及权益划分，最终探讨如何完善立法对人工智能生成内容的著作权进行界定及保护，以及如此立法能够带来的积极影响与潜在的风险。

关键词：人工智能生成内容；作品；权利主体； 著作权

Copyright Law Protection of Artificial Intelligence Generated Content

Abstract: In recent years, the global artificial intelligence industry has developed rapidly, and artificial intelligence “creatives” have also received increasing attention. The legal and ethical issues arising from the development of artificial intelligence in recent years cannot be ignored. At present, China's "copyright law" can not determine whether artificial intelligence generated content belongs to "works", and whether artificial intelligence should be recognized as "author" or not, and the ownership of the copyright of the "work" and other issues. Based on the computer technology principle with which the artificial intelligence moves to "create", and based on our country's "copyright law", and referring to foreign related laws, this article analyzes the nature of the content generated by artificial intelligence, the nature of the rights

generated by it and the division of rights and interests, and finally, it discusses how to improve the legislation's definition and protection of copyrights generated by artificial intelligence and the positive impact and potential risks that such legislation can bring.

Keywords: Artificial Intelligence Generated Content ; Works ; Rights Subjects ; Copyright

区块链技术知识产权保护策略研究

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摘要：作为前沿科技的代表，区块链技术的价值逐步凸显，如何获得知识产权，以便应对未来该领域的激烈竞争，对于利益相关者来说至关重要。在既有的知识产权法架构内，利用专利、版权、商标等手段对该类存有争议的、新型计算机程序进行保护必须满足特定的要求，例如软件的可专利性条件、程序或数据库版权独创性判定、商标构成要素的描述技巧等，只有在深入了解所涉规范性判定标准的基础上，根据既有判例、实务经验和技巧才能在一定程度上确保保护目的的达成。

关键词：区块链　知识产权　保护策略

弹性与塑性：新兴音乐技术背景下，创作中借用现象之法律挑战

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摘要：音乐采样、音乐重混与音乐拼接都是新兴音乐技术变革的产物。与此同时，在这些新兴音乐文化发展的背后，其创作中由于新技术带来的侵权借用也逐年增加。音乐人在享受着新兴音乐创作方式带来的便捷同时，也不经意间卷入了一场“侵权风暴盛宴”。法律面对这些应接不暇的新问题将何去何从？在解决新兴音乐技术背景下:创作借用现象的侵权问题，应沿着实质性相似测试、微量使用原则及美国版权法合理使用四要素的弹性标准与双向许可的方式进行侵权认定与处理。同时，在必要的情况下为电子音乐编曲或编曲者赋权。由此，为新技术变革所产生的音乐文化预留一定的法律空间，发挥立法与司法实践中，法律弹性与塑性平衡的艺术。

关键词：新兴音乐技术　弹性与塑性　创作借用现象　实质性相似测试 合理使用

Abstract :Music sampling, Remix and mashup were born in new music technology . At the same time, behind the development of these new music cultures, the infringement borrowing in music creation with the new technology is also increasing year by year. While enjoying the convenience about the new music creation methods, musicians are also involved in a "torrential storm feast".How should the law solve these problems? In order to solve these infringement problems of creative borrowing under the background of music creation. we should deal with these problem according to substantial similarity test, de minimis copying , fair use of American copyright law and two -way licensing system . At the same time, if necessary, give the rights of

arranger or arranger of electronic music. Consequently, it reserves certain legal space for the music culture produced by the new technology .And it shows art of balancing the elasticity and plasticity in legislative and judicial practice.

Keywords: New music technology ； The elasticity and plasticity ； Borrowing in music creation ； Substantial similarity test ； Fair use

论人工智能生成物在著作权法上的定性

——以作品独创性判断标准为视角

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摘要：明确人工智能生成物的权属分配之前必须首先界定人工智能生成物在著作权法上的定性。对于该问题的分析应当先从解释论的角度分析现行著作权法的适用空间，之后才能在立法论层面进行探讨。目前学界在解释论层面对人工智能生成物的定性存在截然相反的观点。这一现象的根源在于学界对于我国现行著作权法下的"独创性"概念的理解存在分歧。独创性判断标准可以分为独创性内涵界定和独创性判断方式两个层面，目前我国独创性的界定应当以"独立创作"和"一定程度的独创性"为原则。在判断方式上应当做到主客观相结合，关注作品外在表达以及创作过程。人工智能属于运用算法的结果，离不开人类事先设定的程序和规则，未体现人类的个性选择和判断，因此不满足独创性的要求，无法认定为作品。

关键词：人工智能　独创性　独立创作　创造性　算法

Abstract： Before clarifying the ownership assignment of artificial intelligence products, we must first define the definition of artificial intelligence products in the copyright law. The solution to the problem is to first analyze the applicable space of the current copyright law from the perspective of interpretation, and then explore it at the level of legislation. At present, the academic circles hold the opposite view of the qualitative nature of artificial intelligence products at the interpretative level. The root of this phenomenon lies in the differences between the academic circles on the understanding of the concept of "originality" under the current copyright law in China.

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The originality judgment standard can be divided into two levels: originality definition and originality judgment mode. The definition of China's originality should be based on the principle of "independent creation" and "a certain degree of originality". In the judgment method, the subjective and objective should be combined, and the external expression and creative process of the work should be concerned. Artificial intelligence belongs to the result of using algorithms. It is inseparable from the procedures and rules set by human beings. It does not reflect human personality choices and judgments. Therefore, it does not satisfy the requirements of originality and cannot be recognized as works.

Keywords： artificial intelligence; originality; independent creation; creative; algorithm