



2018年12月4日 星期二

[首页](#) | [期刊介绍](#) | [编委会](#) | [投稿指南](#) | [信息服务](#) | [期刊订阅](#) | [联系我们](#) | [预印本过刊](#) | [浙江省高校学报研究会栏目](#) | [留言板](#) | [English Version](#)

浙江大学学报(人文社会科学版)

栏目

[最新目录](#) | [下期目录](#) | [过刊浏览](#) | [高级检索](#)
[◀ 前一篇](#) | [后一篇 ▶](#)

我国知识产权停止侵害请求权限制的法律原则

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Principles for Limiting Injunctive Relief for Infringement on Intellectual Property under Chinese Laws

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[摘要](#)[图/表](#)[参考文献\(0\)](#)[相关文章\(0\)](#)全文: [PDF](#) (3353 KB)输出: [BibTeX](#) | [EndNote](#) (RIS)

摘要

主流学说认为,知识产权请求权是类物权请求权,侵权即应适用停止侵害。这种类推是知识产权物权化的表现,容易使知识产权保护过强而不符合社会经济生活。本质上,知识产权停止侵害请求权是知识产权侵权之债的内容。知识产权侵权行为可造就独特的事实状态,不仅牵涉知识产权人和侵权行为人的利益,而且可能卷入第三人利益和公共利益。法院应基于侵权的具体情况,综合考虑原告对侵权发生的过错,平衡各方利益,公平地确定知识产权侵权之债的具体履行方式,采用灵活的措施修复侵权损害的社会关系,不应机械地判处侵权人停止侵害。在知识产权法无相反规定的情况下,我国法院应类推适用民法有关债之履行的一般法律规范,在特殊情况下不判处知识产权侵权行为人停止侵害,改为责令其赔偿权利人损失和采取适当的补救措施来实现充分救济。

关键词 : 知识产权侵权, 知识产权停止侵害请求权, 赔偿损失, 补救措施, 权利失效

Abstract : Conventionally, intellectual property rights (IPR) are regarded as "property" and injunctive relief is required as automatic when infringement occurs, just like trespass upon property. This approach, however, would make intellectual property rights disproportionately strong and remedies improperly rigid. While intellectual property rights are absolute and can be asserted against anyone in the world, infringement does not happen in this highly generalized way. Rather, IPR infringement involves the interests of the IPR holder, the infringer, third parties and the public. When formulating remedies for IPR infringement, it is not always a good idea to permit injunctive relief regardless of the interests other than those of the IPR holder. In fact, injunctive relief is not the only and sole remedy for trespass upon real property. It should be noted that the creation of a right is distinct from the provision of remedies for violations of that right. When considering injunctive relief, courts should weigh all material interests with a view to remedying the legal order harmed by the infringement. Where courts lose sight of the big picture and allow permanent injunctions mechanically, IPR enforcement runs the risk of unmooring from the genius of IPR laws. The denial of injunctive relief, unlike compulsory licensing, statutory licensing and exceptions to IPRs, is not equal to confining the IPR involved. This relief should be denied where the enforcement would cause the infringer or the public to suffer harm disproportional to possible benefits to the right holder. In those cases, pecuniary damages along with corrective measures can be sufficient to remedy the IPR infringed. In this event, the interests of the IPR involved is not confined but fully recognized. Only the way to make it whole again is changed, not through injunctive relief, but through creative measures. Under the Chinese legal system, IPRs are not subsumed to the property paradigm. Statutorily speaking, courts are not required to allow injunctive relief when copyright, patent or trademark is infringed. Article 118 of the General Principles of Civil Law of P. R. China explicitly provides that the right holders "may" ask for injunctive relief. The Chinese Copyright Law, Patent Law and Trademark Law do not counteract this general principle. This does not mean, however, that there are no rules of law for courts to look at in considering denial of injunctive relief. Where infringement occurs, the infringer has obligations to the IPR holder, including the obligation to desist from infringement. Injunctive relief is the IPR holder's right to ask the court to enforce obligations arising from IPR infringement. In denying injunctive relief, courts should look at the rules of law under the General Principles of Civil Law (GPCL), Tort Liabilities Law (TLL) and Contract Law (CL) which apply generally to performance of obligations. Specifically, Art. 4 GPCL provides that excise of rights should be in good faith and Art. 7 GPCL forbids any excise of rights that would harm public interest or interfere with general economic order. Moreover, Art. 110 CL permits exemption from specific performance of non-pecuniary obligations under the following circumstances: (1) performance is impossible de jure or de facto; (2) the obligation is unsuited for specific performance or the cost of specific performance is excessive; (3) the obligee fails to request specific performance within a reasonable period of time. In practice, Chinese courts do deny injunctive relief in special IPR infringement cases. While they did not explicitly cite those legal provisions mentioned above, case studies show that their legal reasoning can be subsumed to those statutes. Furthermore, in those cases, Chinese courts awarded ongoing royalties in combination with corrective measures in order to remedy the infringed rights vigorously, following the genius of Art. 107 CL, which aims to make contract obligation whole upon breaching. Therefore, it is fair to conclude that the general rules of law applicable to performance of obligations in Chinese civil laws should serve as the principles for denying injunctive relief for IPR infringement. Where the relief is denied, damages and corrective measures should be awarded to adequately remedy the IPR infringed.

Key words : infringement of intellectual property right injunctive relief for infringement of intellectual property right damages corrective measures unenforceable rights

收稿日期: 2014-06-23 出版日期: 2014-11-27

引用本文:

何怀文 陈如文. 我国知识产权停止侵害请求权限制的法律原则[J]. 浙江大学学报(人文社会科学版), 2015, 1(2): 133-150. He Huaiwen Chen Ruwen. Principles for Limiting Injunctive Relief for Infringement on Intellectual Property under Chinese Laws. JOURNAL OF ZHEJIANG UNIVERSITY, 2015, 1(2): 133-150.

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