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中南财经政法大学知识产权研究中心

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目录

国内特别关注

国务院办公厅：《关于完善科技成果评价机制的指导意见》

2021年8月2号，国务院办公厅印发《关于完善科技成果评价机制的指导意见》（以下简称《意见》），围绕科技成果“评什么”“谁来评”“怎么评”“怎么用”完善评价机制，作出明确工作安排部署。

《意见》指出，以习近平新时代中国特色社会主义思想为指导，深入贯彻党的十九大和十九届二中、三中、四中、五中全会精神，深入实施创新驱动发展战略，深化科技体制改革，坚持正确的科技成果评价导向，创新科技成果评价方式，通过评价激发科技人员积极性，推动产出高质量成果、营造良好创新生态，促进创新链、产业链、价值链深度融合，为构建新发展格局和实现高质量发展提供有力支撑。

《意见》要求，科技成果评价要坚持质量、绩效、贡献为核心的评价导向，把握科研渐进性和成果阶段性的特点，合理划分政府和市场在科技成果评价中的角色定位，科学确定评价标准，开展多层次差别化评价。

《意见》指出，要全面准确评价科技成果的科学、技术、经济、社会、文化价值，健全完善科技成果分类评价体系，基础研究成果以同行评议为主，应用研究成果以行业用户和社会评价为主，不涉及军工、国防等敏感领域的技术开发和产业化成果，以用户评价、市场检验和第三方评价为主。要加快推进国家科技项目成果评价改革，按照“四个面向”要求深入推进科研管理改革试点，提升科技成果供给质量。要大力发展科技成果市场化评价，充分发挥金融投资在科技成果评价中的作用，引导规范科技成果第三方评价。要改革完善科技成果奖励体系，控制奖励数量，提升奖励质量。要坚决破解科技成果评价中的“唯论文、唯职称、唯学历、唯奖项”问题，创新科技成果评价工具和模式，利用大数据、人工智能等技术手段，开发信息化评价工具。要完善科技成果评价激励和免责机制，开展科技成果转化尽责担当行动。

《意见》强调，科技部要发挥主责作用，牵头做好科技成果评价改革的组织实施、统筹指导与监督评估，教育部、中科院、工程院、中国科协等相关单位要积极主动协调配合。行业、地方科技管理部门负责本行业本地区成果评价的指导推动、监督服务工作。要选择不同类型单位和地区先行先试，开展有针对性的科技成果评价改革试点，

及时总结推广典型经验做法。各科技评价组织管理单位（机构）要切实承担主体责任，客观公正开展科技成果评价活动。要积极营造良好氛围，加强社会监督并强化学术自律和行业自律，坚决反对“为评而评”、滥用评价结果。

（来源：http://www.gov.cn/xinwen/2021-08/02/content_5629039.htm）

国外特别关注

韩国加快讨论人工智能生成发明的专利认定方案

为了更深入地研究人工智能生成发明的专利认定方案，韩国专利厅于2021年8月11日发布消息称其成立了“人工智能发明专家委员会”，并举行会议就此问题进行讨论。

近年来，随着人工智能技术的迅速发展，美国人工智能开发者斯蒂芬·泰勒教授主张自己的DABUS机器人开发了发明，并向全世界16个国家申请了专利。对此，包括韩国在内的美国、英国和欧洲等大部分国家或地区均以现行专利法中只有自然人才能成为发明人为由，拒绝了将人工智能记载为发明人的泰勒教授的专利申请。然而，最近澳大利亚联邦法院通过澳大利亚专利法的特殊规定和灵活解释，首次对澳大利亚专利厅的驳回决定做出了认定人工智能为发明人的判决。目前，澳大利亚专利厅正在讨论是否上诉。此外，南非专利厅由于施行不进行实体审查的特殊专利制度，只经过形式上的审查，省略了人工智能是否也能成为发明者的讨论，于今年7月授予了专利。

随着人工智能发明人问题成为国际焦点，韩国专利厅认为，有必要进一步研讨是否应该保护人工智能的发明。对此，韩国专利厅为了从多方面讨论是否承认人工智能为发明者、人工智能所发明的所有权由谁拥有等问题和如何保护人工智能所发明的发明等问题，成立了此次的“人工智能发明专家委员会”，其将分为法律、技术和产业领域，每个领域约由15名专家组成。目前，韩国知识产权局正在探索国家人工智能技术和产业发展的多种方案，将在充分听取学术界、研究界、产业界等多领域专家意见的基础上，对人工智能的发明保护方案进行前瞻性、面向未来的研究，以提高韩国的竞争力。

（来源：https://www.kipo.go.kr/kpo/BoardApp/UnewPress1App?a=&board_id=press&cp=&pg=&npp=&catmenu=m03_05_01&sdate=&edate=&searchKey=&searchVal=&bunryu=&st=&c=1003&seq=19114）

中文法学类核心期刊知识产权文章摘编

选刊范围：《中国社会科学》及CSSCI（2021-2022）法学类核心期刊

1. 论著作权保护刑民衔接的正当性

作者：王迁

机构：华东政法大学

摘要：对著作权的刑事保护和民事保护出现了严重的刑民脱节现象，具体表现为刑事司法解释及司法实践与《著作权法》对“复制发行”与“通过信息网络传播”关系界定的脱节、对“发行”与“销售”和“出租”关系界定的脱节以及对出售软件序列号和破解程序行为定性的脱节等。在著作权保护方面，刑民衔接的正当性源于著作权法并非仅为权利保护之法，而首先是赋权之法。没有《著作权法》规定著作权各项专有权利，就不存在具有绝对权性质的专有权利，因此对著作权专有权利的刑法保护也必须以《著作权法》的相关规定为前提，具体体现为对侵犯著作权犯罪的认定应遵从《著作权法》对相关术语的界定，侵犯著作权犯罪的诸行为应在《著作权法》规定的可构成犯罪的侵权行为范围之内，且须符合《著作权法》为侵犯著作权的行为规定的构成要件。《刑法修正案(十一)》将“通过信息网络向公众传播”和规避技术措施等行为纳入侵犯著作权罪的罪状，部分解决了严重的刑民脱节问题，但对此仍需要继续修改《刑法》并在司法实践中贯彻刑民衔接的理念，才能真正解决著作权保护的刑民脱节问题。

关键词：刑民衔接；侵犯著作权罪；复制发行；销售；技术措施；

（来源：《法学》2021年08期）

2. 人工智能生成物著作权问题探究

作者：杨利华

机构：中国政法大学民商经济法学院

摘要：人工智能的出现，改变了以人类为主导的传统作品创作方式，引发了诸多著作

权问题。人工智能生成物可以构成著作权法意义上的作品。在著作权归属问题上，人工智能本身无法成为权利主体，符合作品特征的人工智能生成物的著作权原则上应当归属于人工智能的使用者，但同时也要兼顾对投资者利益的保护。为实现个人利益与公共利益的平衡，还应当对人工智能生成作品的著作权进行一定限制。

关键词：人工智能生成物；著作权；可著作权性；权利归属；权利限制；

（来源：《现代法学》2021年04期）

3. 论维修权与知识产权之协调

作者：刘迪

机构：清华大学法学院

摘要：目前，全球范围内创设维修权的立法方兴未艾。近十年来，美国以州级法律的形式，逐渐在各州铺开维修权的立法进程；欧盟以指令和行动计划等形式，在法律文本中添加了维修权条款。虽然在立法目的上存在差异，但欧美维修权立法都面临着与知识产权法的融合问题。在主张知识产权强保护的当下，单一的侵权抗辩形式已经难以承担修理行为的积极含义，消费者等主体的修理行为及其利益可能会受到侵蚀。因此，在与知识产权法相协调的背景下，维修权具有一定正当性。同时，维修权的适用也将为知识产权拥有者设定相应义务，以期达到利益平衡。此外，当前疫情和3D打印技术的发展，可以深化对于设立维修权以应对知识产权扩张问题的思考。

关键词：知识产权；维修权；示范法；3D打印；疫情；

（来源：《政治与法律》2021年09期）

中文管理类核心期刊知识产权文章摘编

选刊范围：《中国社会科学》及国家自科基金委管理科学部认定AB类重点期刊

1. 大数据能力、技术创新与人力资源服务企业竞争力关系研究

作者：周小刚[1] 陈水琳[1] 李丽清[2]

机构：1.华东交通大学经济管理学院 2.江西科技师范大学经济管理学院

摘要：人力资源服务业是对接劳动力市场供求的重要生产性服务业，大数据、云计算、人工智能等新技术的应用能促进人力资源服务企业创新发展，推动实现高质量就业。基于创新理论和资源整合理论，探讨了大数据能力、技术创新对人力资源服务企业竞争力的影响机制。通过257份人力资源服务企业有效样本数据，运用层级线性回归和结构方程模型进行实证分析，并采用偏差校正的Bootstra方法检验技术创新在大数据能力与人力资源服务企业竞争力之间的中介效应。研究结果表明，在线招聘、人力资源外包为人力资源服务企业主流服务项目，而中高端人才寻访服务项目较为薄弱；大数据资源整合能力、大数据预测分析能力均对人力资源服务企业竞争力具有显著的正向影响，技术创新对人力资源服务企业竞争力具有显著的正向影响；技术创新在大数据资源整合能力与企业竞争力以及大数据预测分析能力与企业竞争力之间均存在部分中介效应，并且技术创新在大数据资源整合能力与企业竞争力间所发挥的中介效应大于大数据预测分析能力与企业竞争力间的中介效应。鉴于此，加强企业的大数据资源整合能力、强化大数据预测分析能力、借助大数据能力融合企业技术创新等方式都有利于增强人力资源服务企业竞争力。

关键词：大数据能力；技术创新；人力资源服务企业；竞争力；

（来源：《管理评论》2021年07期）

2. 科技企业破产阶段专利拍卖模型及启示

作者：徐明 姜南

机构：同济大学上海国际知识产权学院

摘要：专利权的有效性以按时缴纳年费为前提，一旦企业破产清算完毕主体资格将被注销，虽然专利仍有价值，但却将因无人缴纳年费而终止。在破产阶段，专利拍卖能够实现技术转移。通过对专利特征、拍卖动机、拍卖模型、多竞拍者拍卖等因素的研究，得出结论：如果破产后企业所有者希望继续使用专利技术，则其不会启动专利拍卖程序；如果专利拍卖的成本低于专利拍卖的成交额，债权人委员会将启动专利拍卖程序；专利的前期研发成本越高，则拍卖成交的概率越大；参与竞拍的企业数量越多，则拍卖获得较高成交额的概率越大；以竞拍联盟形式参与专利拍卖，能够降低每家竞拍企业的成本和风险。由此提出明确专利强制拍卖情形、降低专利拍卖成本、鼓励专利组合拍卖、采用集中竞拍、多形态专利拍卖等建议。

关键词：科技企业；破产；专利资产；拍卖；技术转移；

（来源：《科研管理》2021年09期）

外文法学类核心期刊知识产权文章摘编

选刊范围：WOS数据库SSCI外文法学期刊

1.Protection Heterogeneity in a Harmonized European Patent System

作者：Zingg, Raphael[1,2] Elsner, Erasmus[2]

机构：1. Waseda Univ, Inst Adv Study, Tokyo 1698050, Japan; 2. Swiss Fed Inst Technol, Ctr Law & Econ, CH-8092 Zurich, Switzerland

摘要：This study proposes a divergent expectation model for patent infringement disputes, where both litigation and settlement are driven by patent quality. Under the model, patent quality depends on both broadness and definiteness of the patent. The model predicts that technologies where the definiteness attribute can be estimated with high accuracy will have higher settlement rates. At trial, it is rather the assessment of the patent quality by the judge which decides the outcome. In its empirical section, the paper evaluates over a thousand hand-collected and hand-coded patent infringement and counterclaim decisions rendered by courts in the three largest patent granting European countries-Germany, France and the United Kingdom. The paper utilizes empirical methods to investigate whether the characteristics of the patents or the country of litigation predict the outcome of litigation. Examination of the patent characteristics is guided by the factors of our model, in that the patent quality, and underlying technology and industry are tested. The findings provide evidence of the continuing heterogeneity of the patent systems in Europe, despite the harmonization efforts. Demonstrated was the lack of importance of the characteristics of the litigated patent; rather, it was the forum to which the case was brought that was decisive. At the dawn of the Unified Patent Court, our study provides for a window into the extent of heterogeneity still prevailing and a starting point for monitoring the further development of European patent harmonization.

关键词：Patent litigation; Patent systems; Harmonization; National courts; Unified patent court

（来源：EUROPEAN JOURNAL OF LAW AND ECONOMICS. Volume 50. Issue 1. P87-131. AUG 2020）

2.Using IP Rights to Protect Human Rights: Copyright for 'Revenge Porn' Removal

作者：O'Connell, Aislinn Bakina, Ksenia

机构：Royal Holloway Univ London, London, England

摘要：'Revenge pornography' is a concept which embraces a broad spectrum of the non-consensual distribution of private sexual images. Acknowledging the harms that arise from this practice and the human rights implications of 'revenge pornography', this paper focuses on the difficulty of removing those images from the Internet. It considers the legal vehicles which can be employed to force websites and third-party operators to remove private sexual images, including privacy law and copyright notice and takedown systems. It concludes that the piecemeal approach to image removal is insufficient, and that a more cohesive and appropriate approach to image removal is required to ensure that victim-survivors' rights to private and family life are properly protected.

关键词：Human rights law; Intellectual property law; Revenge porn; Image-based sexual abuse; Privacy

（来源：LEGAL STUDIES. Volume 40. Issue 3. P442-457. SEP 2020）

3.The Construction of Patent Claims

作者：Booton, David

机构：Univ Manchester, Manchester, Lancs, England

摘要：This paper highlights two recurring facets of the way UK courts approach the construction of patent claims: the adoption of methods typically applied to the interpretation of contracts and the recognition that immaterial variations not expressly claimed nevertheless fall within the scope of protection. Drawing on the normative implications arising out of Ronald Coase's paper on the problem of social cost, this paper argues that the patent system operates as a substitute for an explicit bargain between economically active entities operating in the market under which a duty is accepted by one party in return for acceptance of a burden of risk by the other. This perspective incorporates both the static costs and the dynamic benefits of the system and accords with the monopoly-profit-incentive theory most commonly advanced in support of the patent system. It is shown how the contemporary approach to claims construction is supported by the object of giving effect to the presumed intentions of the parties to this hypothetical bargain and that this underpins both the implication of terms which go beyond those expressly agreed to by parties to a contract and the

construction of patent claims so as to embrace immaterial variations not expressly within their scope.

关键词：Intellectual property law; Patents; Claims construction; Coase theorem

（来源：LEGAL STUDIES. Volume 40. Issue 4. P651-674. DEC 2020）

4.Avoiding Responsibility: the Case for Amending the Duty to Disclose Prior Art in Patent Law

作者：Curry, John O.

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摘要：Federal regulation requires patent applicants in the United States to disclose to the United States Patent and Trademark Office (USPTO) a wide range of references that might be material to their invention's patentability. Applicant disclosure of prior art currently plays a large role in the prosecution and litigation of patents. The effects are quite deleterious, resulting in the filing of unnecessary references that go unreviewed in the USPTO and providing plausible grounds for the assertion of inequitable conduct defenses in patent infringement actions. This Comment looks at the history of the laws that evolved into the codified duty to disclose prior art and finds that the historical rationales no longer justify such an imposition. It also examines several foreign jurisdictions that differ from the United States in their mandates to disclose prior art, ultimately recommending the adoption of the standard used by the European Patent Office as a way to resolve both the administrative and legal challenges posed by the current standard.

关键词：无

（来源：WASHINGTON LAW REVIEW. Volume 95. Issue 2. P1031-1052. JUN 2020）

5.Defective Patent Deference

作者：Narechania, Tejas N.

机构：Univ Calif Berkeley, Sch Law, Law, Boalt Hall, Berkeley, CA 94720 USA

摘要：The Supreme Court's implicit deference to the Office of the Solicitor General in patent cases is well-documented: What the Solicitor General requests, the Solicitor General typically receives. But we know far less about how the Solicitor General arrives at these preferred policy positions, or why the Solicitor General comes to advocate for some outcomes over others. This is problematic.

In practically every other corner of the administrative state, an agency earns substantial deference to its views only where robust procedural protections attend to the policymaking process, where the agency's outcome reflects its substantive expertise, and where the agency may, through presidential removal and election, be held politically accountable for its policy choices.

Not so in patent law. The Patent Office has never claimed to exercise any substantive rulemaking power. Meanwhile, the Solicitor General develops and advocates for patent policy outcomes, but behind closed doors, without deep internal expertise, and under the time constraints of appellate litigation. These shortcomings (among others) suggest that we should reexamine the Solicitor General's influence over patent policy in favor of alternate interpretive practices that improve Executive Branch decision making. And they counsel in favor of several reforms most importantly, to the policymaking power of the Patent Office.

关键词： Supreme-court; Chevron; Office; Foundations; Questions; Standards; Shadow; Rules; PTO

（来源：WASHINGTON LAW REVIEW. Volume 95. Issue 2. P869-945. JUN 2020）

6.Distorted Drug Patents

作者： Lietzan, Erika[1] Lybecker, Kristina M. L. Acri Nee[2]

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摘要： Drug patents are distorted. Unlike most other inventors, drug inventors must complete years of testing to the governments specifications and seek government approval to commercialize their inventions. All the while, the patent term runs. When a drug inventor finally launches a medicine that embodies the invention, only a fraction of the patent life remains. And yet, conventional wisdom holds - and empirical studies show - that patent life is essential to innovation in the pharmaceutical industry, perhaps more so than any other inventive industry. Congress tried to do something about this in 1984, authorizing the Patent and Trademark Office to restore a portion of the patent lost to premarket testing. PTO doesnt restore all of the lost time, though, which raises the question whether the U.S. legal system may steer researchers away from drugs that take a long time to develop. This Article focuses on that question. It examines every grant of patent term restoration for a new drug or biologic from the schemes 1984 enactment to April 1, 2018. And it fills a conspicuous gap in the literature: few scholars have considered patent term restoration from an empirical perspective, none has used a dataset of this size and scope, and none has addressed the questions this Article addresses. Two significant conclusions stand out. First, longer clinical programs lead to shorter effective patent life, even after PTO has granted patent term restoration.

The results are strongly statistically significant and contribute to a growing body of literature raising the alarm that the U.S. legal system may be systematically skewing drug research incentives away from the harder problems - such as a cure for Alzheimers Disease and interventions at the early stages of cancers. Second, Congress decided to allow drug companies to apply patent term restoration to continuation patents, specifically because this would increase the chances of reaching 14 years of effective patent life. Ten years later Congress changed the way patent terms are calculated without considering the effect on patent term restoration. Selecting a continuation patent no longer has the same effect. Today a drug company is most likely to achieve the 14 years of effective patent life by securing a new, original patent that issues late in clinical trials. Policymakers and scholars complain when companies secure these later-expiring patents, but the findings in this Article suggest those patents may be necessary to accomplish what Congress intended in 1984.

关键词： Pharmaceutical-industry; Market exclusivity; Prescription drugs; Innovation; Trends; Time

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7. Unregistered Patents

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摘要： Although all should be treated equally under the law, patent law has long been known to favor some less than others. Patentable technology is highly heterogeneous, covering everything from minute improvements in electronics to pioneering new artificial organs, but patent protection itself is purely a one-size-fits-all system. Patents thus over reward some while under rewarding others. On the one hand, patents over reward low-investment, low-value inventions by granting them the same twenty-year term of protection as those that required much higher investments and yield much higher social value. The resulting glut of low-quality patents has contributed greatly to the "patent crisis" of opportunistic "patent trolls," heightened transaction costs, and costly litigation that have ultimately stalled innovation. On the other hand, patents also under reward in two significant ways. First, patents often fail to give some high-investment, high-value inventions enough protection. Second, many inventors are shut out from patent protection altogether if they lack the resources necessary to navigate the patent system's costly, complex, and frequently biased examination process. This latter phenomenon disproportionately affects female and minority inventors, among others, thereby creating significant distributive effects.

This Article argues that both of these effects the overprotection of low-value inventions and the

under protection of inventions by women and minorities-could be alleviated by altering one particular but seldom-appreciated aspect of the patent system's one-size-fits-all approach: its registration-only design. Copyright and trademark law allow for both registered and unregistered rights, but the patent system grants rights only to those who register their inventions and undergo subsequent examination. If the patent system were to follow the two-tiered approach of copyright and trademark law, however, and implement a regime of automatic but very limited unregistered rights in addition to registered rights, it could help address both problems. First, providing a much lower-cost alternative for obtaining protection, such a two-tiered regime could, with varying degrees of aggressiveness, channel low-investment, low-value inventions away from the system-clogging over protections of the full, twenty-year, broad rights currently granted to registered patents. Second, as the authors of this Article have previously argued, by providing automatic rights without having to go through the resource-intensive registration and examination process, unregistered patent protection could help women and other disadvantaged inventors gain greater access to patent protections. Maintaining a two-tiered regime of both registered and unregistered patent rights thus offers a promising way to mitigate the inefficiencies of the current system by attenuating certain aspects of the current patent crisis while promoting a more egalitarian playing field for inventors.

关键词： Intellectual property; Gender-differences; Ex ante; Copyright; Information; Market; Post; Anticommons; Innovation; Science

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8.Does the Patent Trial and Appeal Board's Precedential Opinion Panel Comport with Due Process?

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摘要： Inter partes review is an adversarial post-grant proceeding conducted at the Patent Trial and Appeal Board of the U.S. Patent and Trademark Office that allows third parties to petition for reexamination of patents. Normally, a panel of three administrative patent judges decides an inter partes review, but occasionally the director of the U.S. Patent and Trademark Office has expanded panels on rehearing to find against the decision of the original panel. The director has expanded panels on rehearing when the original panel found against agency policy. This practice is known as panel stacking. Parties to cases, judges, and scholars have all raised due process concerns with such panel stacking. Recently, the U.S. Patent and Trademark Office has taken a different approach to maintaining agency policy in inter partes reviews with the establishment of the Precedential Opinion

Panel.

The Precedential Opinion Panel is a special panel within the Patent Trial and Appeal Board, with its default members consisting of agency leadership. Use of the Precedential Opinion Panel supplants the need for panel stacking, but it may have its own due process concerns. The main due process concerns with the Precedential Opinion Panel are the director's position as a member of the panel and continued ability to manipulate the makeup of the panel. To alleviate the due process concerns of the Precedential Opinion Panel without getting rid of the panel entirely, this Note suggests that the director either refrain from sitting as a member of the panel, fix the makeup of the panel, or both.

关键词：无

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