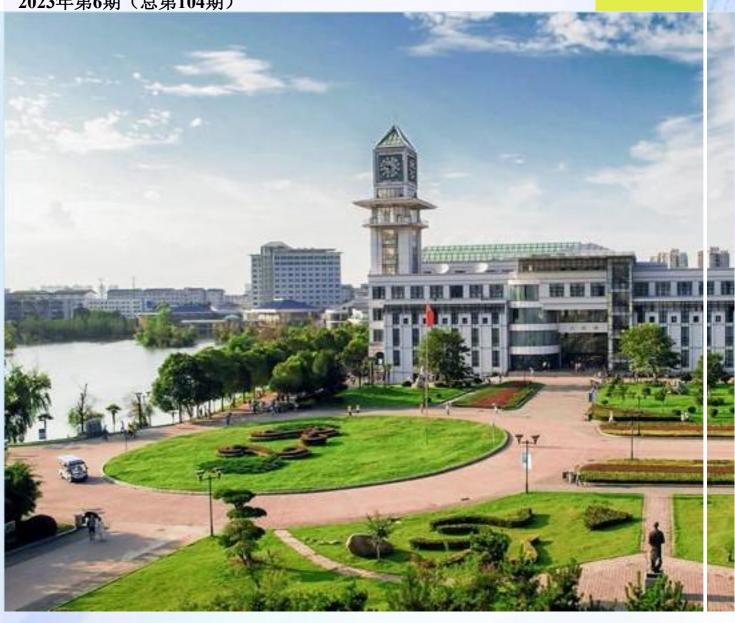
Nanhu Intellectual Property News

知识产权南湖快讯

2023年第6期(总第104期)





国家知识产权战略实施(中南)研究基地中南财经政法大学知识产权研究中心

目 录

| 国内特别天汪 | 1 |
|---|------|
| 国家知识产权局办公室、最高人民法院办公厅关于发布 2021—2022 年知识产权 | 纠纷 |
| 多元调解典型经验做法和案例 | 1 |
| 国家知识产权局发布《二〇二二年中国知识产权保护状况》白皮书 | 3 |
| 国外特别关注 | 4 |
| 韩国将修订技术泄露犯罪的量刑标准 | 4 |
| 欧盟知识产权局(EUIPO)发布欧盟商业秘密诉讼趋势观察报告 | 5 |
| 中文法学类核心期刊知识产权文章摘编 | 6 |
| 1. 反不正当竞争法补充保护知识产权的有限性 | 6 |
| 2. NFT 数字作品的法律属性与交易关系研究 | |
| 3. 论我国《商标法》的私权中心主义——《商标法》公法秩序与私权保护之定位 | 立7 |
| 4. 论商标与企业名称冲突的行为定性与责任形态——兼及《商标法》第58条的 | 存废7 |
| 5. 我国商标权注册取得制度的检视与新塑 | 8 |
| 中文管理类核心期刊知识产权文章摘编 | 9 |
| 1. 知识产权国际秩序的话语构造与中国方案 | 9 |
| 2. 专精特新小巨人遴选培育政策的专利效应研究 | 9 |
| 3. 专利商业化中隐性知识共享动态演化博弈研究 | 10 |
| 4. 美国对华知识产权压力焦点变迁与趋势预见 | 11 |
| 5. 外国专利与进口竞争:来自中国企业的证据 | 11 |
| 6. 基于专利数据的人工智能就业效应研究——来自中关村企业的微观证据 | 12 |
| 外文法学类核心期刊知识产权文章摘编 | . 13 |
| 1. "A Mortgage on a Man's Brain": The Unconscionability of Overly Broad Intellectua | ı1 |
| Property Assignment Clauses in Employment Contracts | 13 |
| 2. The Ghost in the Patent System: An Empirical Study of Patent Law's Elusive "Skille | |
| Artisan" | |
| 3. Redesigning Copyright Protection in the Era of Artificial Intelligence | |
| evocation | |
| 5. Are Geographical Indications sustainable in the face of climate change? | |
| 外文管理类核心期刊知识产权文章摘编 | . 18 |
| 1. A theory of socially inefficient patent holdout | |
| 2. The Hidden Costs of Securing Innovation: The Manifold Impacts of Compulsory | |
| Invention Secrecy | 18 |
| 3. It Was 50 Years Ago Today: Recording Copyright Term and the Supply of Music | 19 |

Nanhu Intellectual Property News

| 4. Deciding on scheduling, secrecy, and patenting during the new product development | |
|--|----|
| process: The relevance of project planning models | 20 |
| 5. Soft but Strong: Software-Based Innovation and Product Differentiation in the IT | |
| Hardware Industry | 21 |
| 南湖学人成果速递 | 23 |
| 1. 数据财产赋权的立法选择 | 23 |

国内特别关注

国家知识产权局办公室、最高人民法院办公厅关于发布 2021—2022 年知识产权纠纷多元调解典型经验做法和案例

2023年6月5日, 国家知识产权局办公室、最高人民法院办公厅关于发布2021—2022年知识产权纠纷多元调解典型经验做法和案例的通知, 全文如下:

近年来,各级知识产权管理部门和人民法院深入学习贯彻党的二十大精神,认真贯彻党中央、国务院关于强化知识产权保护的决策部署,坚持把非诉讼纠纷解决机制挺在前面,从源头预防、在线调解、多元化解、一站式解纷等多个方面加强知识产权纠纷调解工作,健全完善知识产权在线诉调对接工作机制,在构建中国特色"总对总"在线多元解纷新格局方面,取得积极成效。

为总结梳理知识产权纠纷多元调解工作开展情况,提炼知识产权纠纷多元调解经验做法,挖掘一批"总对总"知识产权纠纷调解优秀案例,按照《国家知识产权局办公室 最高人民法院办公厅关于征集2021—2022年知识产权纠纷多元调解经验做法和案例的通知》(国知办发保字〔2022〕54号)部署,国家知识产权局会同最高人民法院组织开展了知识产权纠纷多元调解经验做法和案例征集工作,在各地知识产权管理部门和人民法院报送案例的基础上评选出首批10个省(市)的10条典型经验做法和案例的复传推广,发挥典型经验做法和案例引领示范带动作用,不断把知识产权纠纷多元调解工作引向深入。为加快推进知识产权强国建设提供有力支撑。

表12021-2022年知识产权纠纷多元调解典型经验做法和案例汇总表

| 报送单位 | 经验名称 | 案例名称 |
|----------|----------------------------|--------------------------------|
| 河北省知识产权局 | 河北省知识产权保护中心调解专利纠纷案件"五步工作法" | 河北省知识产权纠纷人民调解委员会调解实用新型专利侵权纠纷 案 |
| 上海市 | 上海市探索专业调解"四个一"工作方 | 上海市知识产权民事纠纷专业调 |

| 知识产权局 | 法,协同打造知识产权"快保护"通道 | 解委员会调解外观设计专利侵权 纠纷案 |
|--------------|---|----------------------------------|
| 江苏省 知识产权局 | 江苏省盐城市中级人民法院联合市知识产权局探索知识产权纠纷多元解纷"盐城模式" | 盐城市中级人民法院委派调解系列商标侵权纠纷案 |
| 浙江省知识产权局 | 浙江省"三立足三强化"推动知识产权 纠纷多元调解工作提质增效 | 浙江省知识产权人民调解委员会调解外观设计专利侵权纠纷案 |
| 山东省知识产权局 | 山东省知识产权纠纷人民调解委员会 探索形成"制度+机制+人才"三位一体 的纠纷调解工作模式 | 山东省知识产权纠纷人民调解委员会调解商标侵权纠纷案 |
| 河南省知识产权局 | 河南省加强调解组织建设,强化部门协作配合,推动知识产权纠纷调解工作走深走实 | 漯河市知识产权纠纷调解委员会 调解外观设计专利侵权纠纷案 |
| 湖北省知识产权局 | 湖北省通过强化制度保障、纳入考核 督导、加强案例宣传,形成知识产权 纠纷调解工作合力 | 黄冈市团风县多部门合力调解涉地理标志纠纷案 |
| 湖南省知识产权局 | 湖南省长沙市建立知识产权纠纷全流程诉调对接工作机制 | 长沙知识产权保护中心调解外观设计专利侵权纠纷案 |
| 广东省知识产权局 | 广东省强化知识产权协同保护, 持续 完善诉调对接机制 | 深圳市知识产权保护中心人民调解委员会调解标准必要专利侵权 纠纷案 |
| 陕西省知识产权局 | 西安市知识产权保护中心建立线下纠纷线上解的"云调解"模式 | 西安市知识产权保护中心调解发明专利侵权纠纷案 |

(来源: https://www.cnipa.gov.cn/art/2023/6/5/art_75_185533.html)

国家知识产权局发布《二〇二二年中国知识产权保护状况》白皮书

2023年6月30日,国家知识产权局举行6月例行新闻发布会,会上发布《二〇二二年中国知识产权保护状况》白皮书。白皮书从五个方面介绍了2022年度中国知识产权保护进展。

一是保护成效方面,全链条保护不断强化,各方面工作效果显著。2022年,中国政府不断加强知识产权民事、行政和刑事审判工作,组织开展多个行政执法专项行动,强化专利、商标、版权、奥林匹克标志、植物新品种、反不正当竞争等重点领域以及海关、网络市场等关键环节的知识产权保护;加大对非正常专利申请和商标恶意注册等行为的打击力度,开展全国商业秘密保护创新试点,加强知识产权海外纠纷应对机制建设。

二是制度建设方面,制度体系不断完善, 法治建设取得积极进展。2022年, 全年修改后实施的知识产权相关法律法规3部, 发布知识产权保护相关司法解释2个, 出台实施知识产权保护相关规范性文件及政策性文件20余个, 知识产权保护地方综合性立法取得积极进展。

三是审批登记方面,知识产权审批登记数量保持增长,审查质量效率稳步提升。 截至2022年底,中国发明专利有效量为421.2万件,同比增长17.1%;中国有效注册商标量为4267.2万件,同比增长14.6%;累计批准保护地理标志产品2495个;全年受理农业植物新品种权申请1.1万件,同比增长15.2%,授权3375件。

四是文化建设方面,宣传渠道有效拓展,助力全社会保护知识产权意识进一步提升。举办"知识产权这十年"专题新闻发布会,系统梳理知识产权事业发展成就;发布知识产权保护相关白皮书及系列报告10份,发布知识产权保护典型案例;成功举办全国知识产权宣传周活动等重要活动。

五是国际合作方面,多边双边合作走深走实,国际合作取得丰硕成果。《工业品外观设计国际注册海牙协定》《关于为盲人、视力障碍者或其他印刷品阅读障碍者获得已出版作品提供便利的马拉喀什条约》在中国正式生效。高质量实施《区域全面经济伙伴关系协定》中知识产权相关内容。认真落实中欧《地理标志保护与合作协定》,公示第二批中欧地理标志互认互保产品清单。

(来源: https://baijiahao.baidu.com/s?id=1770101988769614761&wfr=spider&for=pc

白皮书全文: https://www.cnipa.gov.cn/art/2023/6/30/art 91 186011.html)

国外特别关注

韩国将修订技术泄露犯罪的量刑标准

2023年6月14日,韩国知识产权局(KIPO)于官方网站发布消息称,KIPO和韩国大检察厅在6月12日的第125次量刑委员会上,宣布将修订侵犯商业秘密等技术泄露犯罪的量刑标准。

根据韩国国家情报院的数据,2018-2022年,韩国共发现93起产业技术外流事件,损失约为25万亿韩元;如果加上未被揭发的技术外流事件,预计因技术外流造成的经济损失将更加巨大。但是,相比于技术泄露造成的负面影响,韩国法律对于技术泄露犯罪的惩罚力度不足。2019-2022年,只有10.6%的技术泄露犯罪人员被判刑,且2022年侵犯商业秘密罪判处的平均刑期仅为14.9个月,而最高的法定刑期为15年有期徒刑。

由于适当的量刑是阻止和预防犯罪的必要条件,KIPO和大检察厅将合作修订量刑标准。同时,KIPO将推进相关研究,与国家情报院、产业通商资源部、中小风险企业部、警察厅、关税厅等机关部门,共同探讨量刑标准。

KIPO表示,具体的量刑标准修订方案最快将从今年下半年开始讨论。修正案将首先由量刑委员会通过专家会议起草,然后通过收集KIPO和大检察厅等相关部门的意见进行修改和补充。如果最终草案通过量刑委员会的表决,韩国将开始实施修订后的量刑标准,将于生效日期后提起的公诉案件开始适用。

(来源: https://www.kipo.go.kr/ko/kpoBultnDetail.do?menuCd=SCD0200618&ntatcSeq=19781&aprchId=BUT0000029&sysCd=SCD02)

欧盟知识产权局(EUIPO)发布欧盟商业秘密诉讼趋势观察报告

2023年6月28日,欧盟知识产权局(EUIPO)通过欧洲知识产权侵权观察站(The European Observatory on Infringements of Intellectual Property Rights)发布了关于非法获取、使用或披露商业秘密诉讼趋势的新观察报告。该报告是对2018年观察站发布的《欧盟成员国商业秘密诉讼基线》的补充。该报告为政策制定者、法律从业者及学者提供了坚实的基准,也为企业提供了有用的工具,帮助其更好地了解商业秘密的价值,并提供在竞争激烈的环境中保护商业秘密的可行性方法。

报告对欧盟的商业秘密诉讼趋势进行了全面、彻底的分析,主要由三部分构成:定量分析、定性分析与判例法摘要汇编。

1.定量分析:基于2017年1月1日至2022年10月31日期间发布的约700份判决中观察到的统计趋势,报告发现,欧盟成员国之间的商业秘密诉讼在案件数量、法律论坛和主题以及有关经济部门方面存在显著差异。欧洲的商业秘密诉讼往往在国家层面高度本地化,跨境纠纷相对罕见。商业秘密纠纷往往集中在雇主和(前)雇员之间,与第三方企业的纠纷相对较少。不正当竞争法也继续被普遍用作法律的补充领域,以执行涉及商业秘密权利的诉讼。

报告分析表明, 商业秘密法更多地关注商业信息而不是技术信息的诉讼。制造业是最常涉及诉讼程序的部门, 而具体涉及商业信息诉讼的商业部门非常多样化。

- 2.定性分析:理论探讨并解释了商业秘密的定义、违法行为、《商业秘密指令》规定的措施以及比例原则。此外,报告还指出了在解释满足商业秘密定义的"合理步骤"要求方面、以及在诉讼程序中保护商业秘密的程序措施问题方面的重大进展。
- 3.判例法摘要汇编:概述了成员国法院发布的关于商业秘密的选定案例。该汇编不仅为确定其来源的成员国的诉讼趋势,而且为确定欧盟层面的诉讼趋势提供了宝贵的资源。
- (来源: https://euipo.europa.eu/ohimportal/en/web/observatory/-/news/new-observatory-report-on-trade-secrets-litigation-trends-in-the-eu

报告全文: https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/obser vatory/documents/reports/2023_Trade_Secrets_Litigation_Trends_in_the_EU/2023_Trade_Secret s_Litigation_Trends_Study_FullR_en.pdf)

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. 反不正当竞争法补充保护知识产权的有限性

作者: 孔祥俊

机构: 上海交通大学知识产权和竞争法研究院

摘要: 无

关键词: 无

(来源:《中国法律评论》2023年第3期)

2. NFT 数字作品的法律属性与交易关系研究

作者: 李逸竹

机构: 杭州师范大学沈钧儒法学院

摘要:NFT数字作品本质上是交易服务平台的持续性网络技术服务给付行为后果。平台与持有者之间是网络技术服务合同关系,持有者享有请求平台持续提供技术服务之债权,但不享有任何绝对性财产权。一宗NFT数字作品交易,涉及平台、铸造者、转售者与购买者四种角色之间的多重相对关系,并不仅是"转让对铸造者的债权"。NFT数字作品的首次交易是铸造者向购买者转让其对平台的技术服务债权,以及为购买者设定保值承诺债权。后续交易均是对这两项债权的转让。NFT数字作品的"铸造"与"上架发布"行为涉及对作品的复制与信息网络传播,但出售与转售行为皆是债权行为,并未移转作品的物质载体的所有权,不侵害著作权人的发行权,无需适用"发行权用尽"。

关键词: NFT; 网络虚拟财产; 债权; 物权; 著作权

(来源:《清华法学》2023年第3期)

3. 论我国《商标法》的私权中心主义——《商标法》公法秩序与私权保护之定位

作者: 孔祥俊

机构:上海交通大学凯原法学院

摘要: 商标法是调整商标权取得、变更、消灭和保护的法律。我国《商标法》经历了由管理法到权利法的转变,权利法渐趋主导。商标权毕竟是经行政程序产生和变化的权利,具有财产性和公共政策性的二重性。商标权运行中公权与私权相互交织,公权运行与私权保护的恰当定位应当首先遵从公权与私权的体系划分,并强化尊重和保护私权的理念,尊重商标选择的多元性和必要的商业表达自由,遵从私法秩序与加强信赖保护,兼顾权利保护与维护秩序的利益平衡,以及尊重意思自治与适当限制私权行使。《商标法》应当坚持以商标权的制度构建为中心,纳入品牌建设的政策性内容务必慎重。

关键词: 商标法; 管理法; 权利法; 公权; 私权; 私法中心主义

(来源:《政法论丛》2023年第3期)

4. 论商标与企业名称冲突的行为定性与责任形态——兼及《商标法》 第 58 条的存废

作者: 王艳芳

机构: 华东政法大学知识产权学院

摘要: 商标与企业名称的冲突具有复杂性,既有合法的共存,又有违法的冲突。具有违法性的冲突所采取的商标侵权与不正当竞争二分法,既有行为定性的实践自洽性,又符合法理逻辑。民事责任的承担须与违法行为的种类相匹配,商标侵权行为适用规范使用等侵权责任,不正当竞争行为则对应于停止使用企业名称字号等责任形态。《商标法》第58条是特殊需求之下的实用主义产物,对于商标与企业名称权利冲突的解决发挥了承前启后的功能,但毕竟与《商标法》体系违和,在其完成使命之后应当退出舞台,或者经完善而发挥新的指引作用。

关键词:注册商标:权利冲突:侵犯注册商标专用权:不正当竞争行为

(来源:《政法论丛》2023年第3期)

5. 我国商标权注册取得制度的检视与新塑

作者: 魏丽丽

机构:上海交通大学凯原法学院、河南财经政法大学民商经济法学院

摘要: 我国实行商标权注册取得制度,商标注册是取得商标权的唯一方式,在具有商标确权效率的同时,商标囤积、恶意抢注等非正常商标注册行为频发,已然背离商标法保护注册商标专用权初衷。商标权使用取得制度以商标使用为商标确权依据,体现权利取得的公平性和正当性,但难以满足商标权的公示性、稳定性要求,不宜为我国商标法采用。在适用商标权注册取得制度前提下,规定商标注册申请的意图使用要件,要求申请人提交商标意图使用的相关证据,可弥补注册取得制度忽视商标使用所致的缺陷。相较于承诺使用,增设意图使用要件更具合理性和可行性。同时,将意图使用要件值入商标异议、无效宣告程序中,使意图使用要件在商标制度中得以体系化构建。

关键词: 商标注册; 商标使用; 意图使用; 承诺使用

(来源:《政法论丛》2023年第3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. 知识产权国际秩序的话语构造与中国方案

作者: 杨静

机构: 昆明理工大学法学院

摘要:现代知识产权保护是利益驱动下权力话语作用的结果,话语以其规范及实践本性,形塑着知识产权保护制度的创设与变迁、秩序的缘起与固化。主流话语支配下的知识产权国际秩序镶嵌在非对称结构的权力关系网络中,具有西方中心、利益倾斜和技术等级性特征,规定了国际技术分工以及利益分配的等级机制。中美战略竞争背景下,中国应当主要作为"追求权威的利益相关者",采取中性化改进、建设性塑造方案,支持、维护WTO与WIPO框架下多边协调机制的支配性地位,倡导知识产权国际秩序权力格局的平衡性与合作性,主张知识产权国际规则的包容性与有效性,以言之有道的话语方略,推动国际知识产权话语权力、治理权威的重新分配以及利益关系的合理调整。

关键词:知识产权国际秩序;话语构造;中美战略竞争;追求权威的利益相关者

(来源:《中国软科学》2023年第5期)

2. 专精特新小巨人遴选培育政策的专利效应研究

作者: 张米尔、任腾飞、黄思婷

机构:大连理工大学经济管理学院

摘要:专精特新企业在产业链中占据重要位置,竞争优势建立在长期深耕和技术积累的基础上,发明专利对于企业的长远发展至关重要。2019年,专精特新"小巨人"企业遴选培育政策启动,标志着专精特新企业发展被置于更为重要的位置;发明专利长期是专精特新企业的发展短板,政策实施对发明专利的影响是评价政策有效性的重要

方面,亟待开展深入的实证研究。为此,收集相关企业专利数据,运用双重差分方法分析政策效果;研究结果表明,政策实施对发明专利的申请产生促进作用,而且对离散型、专利密集型产业促进更为显著;但囿于规模实力和创新资源,"小巨人"的发明专利申请还偏低。因此,有必要推进"小巨人"的遴选培育,强化入选企业的后续考核,持续支持"小巨人"的发明专利申请。

关键词: 专精特新企业: "小巨人"企业: 专利效应: 发明专利

(来源:《中国软科学》2023年第5期)

3. 专利商业化中隐性知识共享动态演化博弈研究

作者:杨湘浩1叶旭1刘云2王小黎3,4

机构: 1. 上海工程技术大学管理学院

- 2. 中国科学院大学公共政策与管理学院
- 3. 北京理工大学管理与经济学院
- 4. 中原工学院经济管理学院

摘要:加强专利商业化中隐性知识共享,对挖掘我国专利价值潜力,加快我国从专利大国转向专利强国具有重要意义。本文在"主体有限理性的"基础上,选取发明人积极性、企业接受能力、信誉效应和两阶段付款合同等关键影响变量,构建了发明人、企业、专利中介的多方动态演化博弈模型,并应用复制动态方程和MATLAB软件仿真,探讨上述因素对专利商业化中隐性知识共享的影响。研究结果表明:发明人积极性与企业知识接受能力相匹配时,有助于专利商业化中隐性知识共享,尤其是高积极性和高知识接受能力匹配;完善的市场信誉评价体系能够促进专利商业化中隐性知识共享;同时两阶段合同中不同的阶段付款比例也对专利商业化中隐性知识共享产生重要影响。

关键词:专利商业化;隐性知识共享;演化博弈;两阶段合同

(来源:《科研管理》2023年第6期)

4. 美国对华知识产权压力焦点变迁与趋势预见

作者: 毛昊、赵晓凤、魏洽

机构: 同济大学上海国际知识产权学院

摘要:美国是国际知识产权规则变革的主要推动者,通过将知识产权保护和对外贸易 捆绑关联,在全球范围推行更高的知识产权保护和执法标准。经过多年实践,美国灵 活运用(早期的)TRIPS多边机制以及(近期的)有选择多边、小多边、双边自由贸易协定 提升了知识产权保护标准,形成以国内立法、行政和司法部门紧密配合的全球知识产 权保护网络。美国频繁借助特别301条款及其年度报告,有计划地对外输出知识产权压 力,监督贸易伙伴知识产权制度执行,迫使贸易伙伴建立美国主导下的知识产权保护 制度规则。本文以1989-2022年美国贸易代表办公室发布的33份《特别301报告》为基 础材料,分析美国对华知识产权压力变迁,并对未来发展趋势做出预见。研究结论显 示, 我国知识产权制度调整伴随美国外部压力, 呈现周期特征。美国对华知识产权压 力持续分布在国际规则与国内法律制度、国家知识产权保护执法体系、假冒盗版与全 球执法协作、泛国家安全与高技术产业竞争等方面,呈现出在继续关注传统议题发展 的同时,重点向涉及国家安全与产业竞争转移的演变趋势。未来,中美将进一步围绕 高技术产业、数字经济、信息和通信技术产品市场准入等关键知识产权议题展开激烈 博弈。我国应主动研判世界知识产权制度变革趋向、强化知识产权保护的改革试点机 制与国家创新举措,针对可预见的压力重点分类施策,科学制定国家知识产权对外政 策, 有效参与知识产权全球治理。

关键词:知识产权:美国特别301报告:国家安全:TRIPS协定

(来源:《科学学研究》2023年第7期)

5. 外国专利与进口竞争:来自中国企业的证据

作者: 曲如晓1 李雪2

机构: 1. 北京师范大学经济与工商管理学院

2. 中共河南省委党校经济与管理教研部

摘要:全球市场竞争中专利战略性地位日益凸显. 引发了对外国专利贸易效应的关注。

 $11 \mid 24$

本文构建了一个异质性企业贸易理论框架,利用2007—2013年外国在华专利与中国企业进口数据,系统研究了外国专利对东道国进口竞争的影响及作用机制。结果发现,外国专利具有显著进口扩张效应,并对高价值专利、中技术产品、RCEP贸易伙伴国的作用更强。产品被模仿预期的变动是外国专利影响东道国进口的重要渠道,外国专利更多地扩大了东道国高模仿能力企业、高进口来源地集中度行业以及高需求价格弹性产品的进口。进一步,基于进口产品价格、数量和种类三个维度的扩展研究发现,外国专利影响东道国进口存在着从扩张到垄断的动态演变过程。本文的研究为深入把握专利与贸易互动关系、合理应对外来专利竞争提供了决策参考。

关键词:外国专利;进口竞争;被模仿预期;竞争状态演变

(来源:《中国工业经济》2023年第3期)

6. 基于专利数据的人工智能就业效应研究——来自中关村企业的微观证据

作者: 尹志锋、曹爱家、郭家宝、郭冬梅

机构:中央财经大学经济学院

摘要:本文匹配了2009—2018年中国人工智能专利数据库和中关村企业调查数据库,聚焦于考察人工智能对包括服务业在内的企业就业的影响。研究发现:人工智能显著促进就业,这一研究结论在考虑内生性问题及稳健性检验后依然成立;微观机制方面,人工智能可以通过提升企业市场占有率进而提升企业就业水平。拓展分析表明,人工智能提升了高学历员工、年轻员工、新员工占比;人工智能的就业促进效应在不同细分技术领域和不同类型企业间存在异质性:相较于专家系统及机器人,计算机视觉、机器学习、自然语言处理的就业促进效应更明显;人工智能的就业促进效应在企业规模较大、出口规模较大,以及国有和集体所有的企业中更小。本文基于专利数据对企业人工智能技术水平进行测度,将研究样本拓展至包含服务业企业,从企业市场规模扩大的角度拓展了人工智能影响就业的微观机理,为企业实施人工智能发展战略、政府制定人工智能政策提供了经验证据。

关键词:人工智能:就业:专利

(来源:《中国工业经济》2023年第5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. "A Mortgage on a Man's Brain": The Unconscionability

of Overly Broad Intellectual Property Assignment Clauses in

Employment Contracts

作者: Knuppel, E (Knuppel, Elizabeth)

机构: Univ Texas, Sch Law, Austin, TX 78712 USA

摘要: Employees in a wide range of fields, including engineering, science, and design, are required to sign intellectual property (IP) assignment agreements at the start of employment. These agreements assign IP generated by the employee to the employer. IP assignment agreements are often all-encompassing. The agreement may categorically claim all IP that the employee generates even if the employee creates the IP in the comfort of her own home outside the scope of employment. The agreement may also claim IP created by the employee after the termination of employment, which can restrict the employee's ability to control the future of her career.

When employees have tried to rely on the unconscionability defense to escape an overly broad IP assignment clause, courts have generally determined that the defense does not apply because these clauses are not unconscionable-regardless of their restrictions on the employee's ability to create inventions for herself. Legal commentators have also dismissed the unconscionability defense as unfit for the IP context. This Note aims to show that IP assignment clauses can be unconscionable when the clauses unreasonably restrict the employee. This Note also considers whether IP assignment clauses may be void for public policy in light of the strong desire to promote individual innovation underlying U.S. IP law.

关键词:无

(来源: TEXAS LAW REVIEW. Volume 100. Issue 5. Page 971-997. Apr 2022)

2. The Ghost in the Patent System: An Empirical Study of

Patent Law's Elusive "Skilled Artisan"

作者: Pedraza-Farina, L (Pedraza-Farina, Laura)1 Whalen, R (Whalen, Ryan)2

机构: 1. Northwestern Pritzker Sch Law, Innovat & Partnerships, Chicago, IL 60611 USA

2. Univ Hong Kong, Fac Law, Hong Kong, Peoples R China

摘要: Patent law shares with tort law the presence of an artificial character that structures judicial decision-making. Much like the reasonable person in tort law, the "person having ordinary skill in the art" (or PHOSITA) frames judicial inquiries into such central patent law questions as whether an invention is obvious, set out in sufficient detail, or infringed by a competitor. The PHOSITA's perspective is considered so self-evident and foundational to the field that virtually every patent textbook and judicial opinion emphasizes that doctrinal outcomes are tied to the technical perspective of the PHOSITA, not that of the judge or an ordinary observer. Despite the field's acknowledged reliance on this artificial character, and the Supreme Court's reaffirmation of its importance, scholars and jurists have raised doubts as to whether the PHOSITA in fact plays an outcome-determinative role in the resolution of patent disputes.

In this Article, we conduct the first comprehensive empirical study of the role of the PHOSITA in patent litigation. Through close readings of seven hundred trial and appellate court opinions as well as automated textual analysis of over seven thousand cases, we evaluate the way lower courts create their artificial PHOSITA, the construct's impact on legal decision-making, and the influence of Supreme Court interventions on lower court outcomes. We find that the PHOSITA plays a surprisingly small role in judicial decision-making, even in the aftermath of Supreme Court decisions that emphasize its centrality.

Unpacking these results, we show that lower courts lack guidance in how to reconcile competing conceptions of the PHOSITA as a real- world construct tied to specific facts and as a legal construct designed to advance normative goals. We argue for a normative use of the construct and offer a structure for lower court decision-making. By crafting different versions of the PHOSITA tailored to the normative goals of obviousness, claim construction, and infringement that patent law seeks to answer, lower courts can create a PHOSITA that, however artificial, works more effectively to advance the goals of the patent system.

关键词: federal; circuit

(来源: IOWA LAW REVIEW. Volume 108. Issue 1. Page 247-302. Nov 2022)

3. Redesigning Copyright Protection in the Era of Artificial

Intelligence

作者: Sun, HC (Sun, Haochen)

机构: Univ Hong Kong, Fac Law, Law, Hong Kong, Peoples R China

摘要: How to protect the creations of artificial intelligence ("AI") systems through copyright law is one of the most significant and complex legal issues of our time. Debated by stakeholders around the world, the issue has so far evaded consensus. However, a series of administrative and judicial rulings has altered the landscape. In 2019, a Chinese district court affirmed the copyrightability of a news article written by an AI-powered robot, clarifying that it was the AI developer that should be deemed copyright owner of the news article. In 2020, the United States Patent and Trademark Office, the European Patent Office, and the United Kingdom High Court prominently denied patent applications designating an AI system as an inventor.

This Article reveals the profound implications of these recent AI rulings for copyright protection of AI-generated works. It examines how these rulings shed new light on the nature and scope of authorship and ownership, two legal issues that are central to deciding whether and how AI-generated works merit copyright protection.

Drawing on its in-depth study of the recent AI rulings, the Article proposes a broad-based, forward-looking approach to protecting AI-generated works through a two-tiered legal mechanism. It suggests that legislators may consider awarding sui generis rights to AI works generated with human contributions, while those generated autonomously by AI systems without such contributions should be placed in the public domain without copyright protection.

关键词: rights

(来源: IOWA LAW REVIEW. Volume 107. Issue 3. Page 1213-1251. Mar 2022)

4. Expanding Geographical Indication protection at any cost?

A critique of the EU law of evocation

作者: Xiaoyan Wang1 Xinzhe Song2

机构: 1. China University of Political Science and Law

2. Hainan University, People's Republic of China

摘要: As the major pillar of the EU's quality policy on agricultural products, Geographical Indications (GIs) are protected in the EU at a level significantly higher than in other jurisdictions. Through multilateral and bilateral negotiations, the EU aims to ensure a similar high protection level as is provided in other countries' national legislations, which has already generated much debate globally. This article focuses on a recent trend in the EU for further enhancing the level of GI protection. By way of reviewing the CJEU's application of the EU GI regulations that protect GIs against evocation, this article reveals that the scope of GI protection has been extended greatly with an increasingly broad interpretation of evocation by the CJEU. It further traces the source of the evocation provision and examines potential rationales behind GI protection against evocation. It concludes that it lacks legislative tradition and solid justifications to expand the scope of GI protection via the evocation clause. Such a high level of GI protection against evocation, mostly driven by reasons of policy, will lead to a risk of monopoly of techniques and production of certain types of products, and is enforced at the cost of the freedom of communication, trade and industry of other agricultural operators in the EU. Moreover, non-EU countries need to understand the European approach to GI protection, particularly concerning the scope of protection, before they support or adopt it.

关键词: Geographical Indication; protection against evocation; risk of confusion; agricultura l policy

(来源: Queen Mary Journal of Intellectual Property. Volume 12. Issue 2. Page 206-225. Jun 2022)

5. Are Geographical Indications sustainable in the face of climate change?

作者: William A Kerr, Lisa F Clark

机构: University of Saskatchewan

摘要: The EU is fostering sustainable agriculture. Geographical Indications (GIs) are important in EU agriculture. One justification for GIs is the unique relationship between climate and quality — terroir — in a geographic area. Terroir-based GIs are implicitly sustainable. Relationships in terroir, however, assume constant climate. Climate change can alter these relationships, including sustainability. Economic viability may require new terroir-based production practices. GIs are, however, legal constructs whereby terroir is codified. Thus, altering agronomic practices requires

Nanhu Intellectual Property News

amending legal definitions. This paper explores the legal, agronomic and economic facets of climate change for GIs. It finds that policymakers and GI rights holders may find climate change challenging.

关键词: agriculture; climate change; Geographical Indications; legal codification; sustainability; terroir

(来源: Queen Mary Journal of Intellectual Property. Volume 12. Issue 2. Page 226-241. Jun 20 22)

外文管理类核心期刊知识产权文章摘编

选刊范围: WOS数据库SSCI外文管理期刊

1. A theory of socially inefficient patent holdout

作者: Llobet, G (Llobet, Gerard)1, 2, 4, 5 Padilla, J (Padilla, Jorge)3

机构: 1. CEMFI, Madrid, Spain

- 2. CEPR, Madrid, Spain
- 3. Compass Lexecon, Madrid, Spain
- 4. CEMFI, Casadodel Alisal 5, Madrid 28028, Spain
- 5. CEPR, Casadodel Alisal 5, Madrid 28028, Spain

摘要: This paper proposes a framework to analyze holdout in patent licensing negotiations. We show that when the validity of a patent is probabilistic, a potential downstream user has incentives to shun to pay the price offered by a patent holder to license the technology and risk being brought to court. These incentives are exacerbated when jurisdictions are local, and the downstream producer can approach courts sequentially. The informational spillovers across trials imply that this firm often finds optimal to go to court aiming to invalidate the patent in a jurisdiction due to the knock-on effect on future jurisdictions. This process results in excessive litigation compared to when the jurisdiction is global. The distortions from sequential litigation are likely to be aggravated when final competition is accounted for or when patent injunctions are not allowed.

关键词: 无

(来源: JOURNAL OF ECONOMICS & MANAGEMENT STRATEGY. Volume 32. Issue 2. Page 424-449. Apr 2022)

2. The Hidden Costs of Securing Innovation: The Manifold Impacts of Compulsory Invention Secrecy

作者: Gross, DP (Gross, Daniel P.)1, 2

机构: 1. Duke Univ, Fuqua Sch Business, Durham, NC 27708 USA

2. NBER, Cambridge, MA 02138 USA

摘要: One of the most commanding powers of the U.S. Patent and Trademark Office (USPTO) is to compel inventions into secrecy, withholding patent rights and prohibiting disclosure, to prevent technology from leaking to foreign competitors. This paper studies the impacts of compulsory secrecy on firm invention and the wider innovation system. In World War II, USPTO issued secrecy orders to more than 11,000 patent applications, which it rescinded en masse at the end of the war. Compulsory secrecy caused implicated firms to shift their patenting away from treated classes, with effects persisting through at least 1960. It also restricted commercialization and impeded follow-on innovation. Yet it appears it was effective at keeping sensitive technology out of public view. The results provide insight into the effectiveness of compulsory secrecy as a regulatory strategy and into the roles, and impacts, of formal intellectual property in the innovation system.

关键词: patent citations; knowledge

(来源: MANAGEMENT SCIENCE. Jun 2022)

3. It Was 50 Years Ago Today: Recording Copyright Term and the Supply of Music

作者: Watson, J (Watson, Jeremy)1 MacGarvie, M (MacGarvie, Megan)2, 3 McKeon, J (McKeon, John)2

机构: 1. Univ Minnesota, Carlson Sch Management, Minneapolis, MN 55455 USA

- 2. Boston Univ, Questrom Sch Business, Boston, MA 02215 USA
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摘要: This paper examines the effect of the expiry of recording copyright on the supply of music-in the form of rereleases, availability on streaming platforms, and concert performances-by artists popular in the United Kingdom in the 1960s. We find that recording copyright expiry has different effects on a song's availability in different distribution channels. The lapsing of copyright leads to a large increase in the number of rereleases in physical formats, holding constant artist, age, and year fixed effects. However, when a song's original recording copyright

expires, it becomes less likely to be performed in concert. Moreover, copyright status is not associated with differences in availability on the digital streaming platform Spotify. These results show that copyright expiry has nuanced effects on availability and can lead to different and even opposite effects on availability of a product across different distribution channels. They also show that within the context of digital distribution, the impact of copyright on availability differs based on the business model of a platform.

关键词: empirical-analysis; sales; concerts; piracy; works

(来源: MANAGEMENT SCIENCE. Mar 2022)

4. Deciding on scheduling, secrecy, and patenting during the new product development process: The relevance of project planning models

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摘要: We develop project planning models to integrate scheduling and appropriation decisions for new prod-uct development projects. In addition to the decisions related to the timing of development tasks, we focus on whether and when to use secrecy and patenting. We model the setting as a Markov decision process and develop a state-of-the-art dynamic program that enables companies to arrive at an optimal policy for realistically sized instances. By combining an exact analytical characterization of an optimal policy for serial and parallel project networks with extensive numerical experiments for general project networks, we infer that the innovator can benefit from using both secrecy and patenting during different phases of the development project. This contrasts with the traditional view that secrecy and patenting are seen as mutually exclusive appropriation methods. Our results also indicate that opting for secrecy can prolong the project's lead time, and it might therefore conflict with lead-time advantages. Somewhat surprisingly, we find that it might well be optimal to initiate first (rather than to postpone) those tasks that are most likely to expose the project. Combined, these insights highlight the relevancy of an analyt-ical approach that considers decisions related to secrecy, patenting, and the timing of development tasks simultaneously.

关键词: net present value; intellectual property; innovation; technologies; flexibility;

incentives; maximize; systems; Markov; risk

(来源: OMEGA-INTERNATIONAL JOURNAL OF MANAGEMENT SCIENCE. Volume 11 <u>6</u>. Apr 2022)

5. Soft but Strong: Software-Based Innovation and Product Differentiation in the IT Hardware Industry

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摘要: It has been argued in recent years that software is a significant value-creating factor within the manufacturing sector, leading to an increased interest in understanding the mechanisms by which firms may benefit from software-based innovation. Empirical work in evaluating these mechanisms, however, remains underdeveloped. In this paper, we examine one such process through which software-based innovation may provide value for information technology hardware firms in the U.S. Specifically, we examine the influence of software patents on the extent to which firms are able to benefit from product differentiation in their product markets. Using data on over 380,000 patent grants for innovations filed by 730 public IT hardware firms over the time period 1996-2015, we find that greater levels of software -based innovation within the firm are associated with higher levels of product differentiation in product markets: increases in the intensity of software patents within the firm's patent stock, which we refer to as software intensity, are associated with lower total similarity of product offerings, relative to those offered by rivals, as well as fewer effective competitors in the market. Furthermore, using a different dataset consisting of 23,000 new IT hardware product announcements, we show that firms with greater software intensity subsequently launch a higher number of new products. Moreover, these firms are more likely to launch products that are not only differentiated from those of rivals but also distinct from their own product lines. Our research contributes to the emerging literature on software-based innovation by substantiating an important mechanism through which software helps transform industry sectors, specifically through product differentiation.

关键词: digital innovation; technology spillovers; connected products; investment; knowledge; smart; threats; entry; us

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南湖学人成果速递

推介范围:中南财经政法大学知识产权研究中心之研究成果

1. 数据财产赋权的立法选择

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中文摘要:关于数据财产化问题的探讨,在是否赋权(正当性问题)基本形成共识的情况下,业界应着重探讨选择何种赋权(合理性问题)、怎样进行赋权(可行性问题)。数据财产权的创设,旨在为私法领域调整数据财产归属和利用的民事关系提供新的制度产品。其界权起点为,受保护数据须为"经合法收集和处理,聚合而成的可公开利用的商业数据",客体适格性包含数据的技术特性和法律属性等构成要件;其赋权形成,可采取数据制作者权(有限排他效力的财产权)和数据使用者权(用户及其他同业经营者的访问权)二元权利结构;其确权效力,应在权利保护的同时注重权利限制,包括个人信息权益优先保护、为公共利益、国家安全的数据访问和管理、数据合理使用、数据强制许可,以明确数据财产权效力的合理边界。

关键词:数据财产赋权:受保护数据:二元权利结构:权利保护与例外

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