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100745

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孟祥局长

Via email (zxzhengqiuyijian@163.com)

主题: 《知识产权判决执行工作实施计划(征求意见稿)》与《知识产权判决执行工作指南(征求意见稿)》(三月十五日发布)反馈意见

尊敬的孟局长您好:

美国知识产权所有人协会(下称“IPO协会”)感谢中华人民共和国最高人民法院(下称“最高院”)提供的对2020年3月15日发布的《知识产权判决执行工作实施计划(征求意见稿)》(下称“《实施计划》”)和《知识产权判决执行工作指南(征求意见稿)》(下称“《工作指南》”)提交意见的机会。

IPO协会是一家代表各行业、各技术领域内拥有知识产权或相关权益的公司和个人的国际性行业协会。它拥有大约175家公司会员以及接近一万两千多名个人会员。这些个人会员有些从属于公司会员或律所成员,有些是发明人、作者或律师会员。IPO协会的会员遍及三十多个国家。

IPO协会提倡有效和实惠的知识产权,为会员提供广泛的服务,包括支持会员在立法和国际事务中的利益、分析当前知识产权问题、提供教育和信息服务、以及向公众传播知识产权的重要性。

IPO协会盛赞最高院在征求意见稿中对全面加强知识产权司法保护所做的关注,以保证知识产权案件中有效的判决可以得到执行,并保障各方当事人的合法权利与利益。我们注意到这是最高院第一次针对知识产权判决执行工作作出的实施计划和工作指南,并为这一良好的势头感到欢欣鼓舞。《实施计划》和《工作指南》提供了在中国有效执行知识产权判决的具体规则,体现了中国在美中第一阶段经贸协议中第1.28条中对判决执行所做出的承诺。

以下是我们对《实施计划》和《工作指南》的具体意见。

《实施计划》

《实施计划》中包含了两条确保生效判决(裁定)及时执行以及九条进一步提升判决执行效率的方法。以下是我们对这一部分的具体意见：

第2条

IPO 协会对此条表示赞同，同时指出：“查封、冻结、扣押财产和责令停止侵权行为”这一类的执行权应当适度，仅限于用于保全证据，以实现法律纠纷的公正判决。如果原告乱行使或者过度行使这些查封手段，超过了保障公平诉讼的限度，就会有滥用诉讼的可能性。

第4条

关于网络执行查控系统，我们诚挚地建议，在对财产进行查询或控制以提高财产查找效率的同时，《实施计划》不仅要确保信息安全，还应该确保财产的保密性。如果财产不能保密，它的价值也有可能受到不利影响。

第8条

本条涉及到民事诉讼法及相关司法解释中规定的替代履行方式，即知识产权判决执行中被执行人不履行的行为义务可由他人代为履行的，人民法院可以依法委托有关单位或者其他履行，履行费用由被执行人承担。为了使本条的意思更为明确，我们恳请加入以下解释：

- 代为履行义务的他人所需要的资质；
- 他人履行的义务的限制；
- 如果无法收取到履行费用，可以采用何种手段。

第9条

关于人民法院推进案件繁简分流，我们恳请在《实施计划》中特别说明知识产权判决的救济手段既包括赔偿也包括停止侵权行为，这一强调能够增强有效判决的实施。

第11条

正如以上针对第2条所说：“查封、冻结、扣押财产和责令停止侵权行为”这一类的执行权应当适度，仅限于用于保全证据，以实现法律纠纷的公正判决。如果原告乱行使或者过度行使这些查封手段，超过了保障公平诉讼的限度，就会有滥用诉讼的可能性。尤其是在大多数专利和著作权案中，销毁侵权货物及工具是很罕见的救济手段。在知识产权案中有很多抗辩的例子，在早期很难评估知识产权的范围，也很难判断侵权的可能性。因此，我们建议将第2条中的以下词句加入第11条中。

11. 依法推进执行协助工作，进一步完善知识产权判决执行的部门间协作，加强与市场监管、海关、知识产权等部门的沟通协调，更加及时有效地查控侵权产品、销毁侵权货物及工具，以保障申请人合法权益实现为限，以及推进其他相关执行工作。

第12条

IPO 协会对本条深表赞同。司法和执行的透明度对司法判决的可预见性及公正性至关重要。于此同时，诉讼当事人也不应当为了行使权利或提出抗辩而被迫公开自己的商业秘密。本条针对的正是这两个方面。为了确保本条的实施，我们建议在本条中加入一些实施的具体手段。

《工作指南》

《工作指南》以民事为主，针对知识产权民事、行政、刑事判决的执行提供了详细的指示。IPO 协会建议继续修订本指南，以期在各种合法但可能互相矛盾的需求中找到平衡。我们尤其有顾虑本指南未能将针对于(1)证据收集期的证据保全和(2)执行判决及禁令救济的执行手段充分区别开来。这可能使得原告有机会滥用诉讼，试图乱行使或者过度行使这些保全手段，超过了保障公平诉讼的限度。对(1)和(2)使用同样的指南会造成混淆，而且在大多数情况下并不合适。举例而言，“查封、扣押、冻结、划拨、变价”这些执行权力对于保全证据这一目的并不一定合适。因此，我们建议最高院考虑采用一些平衡各方面需求的条款，例如可以参考美国的《商业秘密保护法》中的如下条款：

(b) (2) (A) (ii) (III)：除非对知识产权所有人的伤害大于对查封对象的伤害并远大于对第三方的伤害，法院不得采取查封的执行手段。

(b) (2) (B) (ii)：用能达到合法执行目的所必要的最窄的财产查封手段，而且查封应当用对第三方的商业运营影响最小的方式进行。如果可能的话，查封手段也不应当打断被控侵权方的合法商业运作。

(b) (2) (D) (iii)：用合适的手段保护被查封材料中与侵权信息无关部分的保密性。

(b) (2) (H)：当事人有权要求将被查封或即将被查封的材料存储在经过加密处理的存储介质上。

第1条

第1条所列的知识产权行政案件包括“著作权、商标权、专利权等知识产权以及不正当竞争”，但是未列出商业秘密。而知识产权民事案件包括“著作权、商标权、专利权、技术合同、商业秘密、植物新品种和集成电路布图设计等知识产权以及不正当竞争、垄断、特许经营合同的民事纠纷案件”。这有可能会造成误解，即知识产权行政案件的范围只包括

列出的类型。因此，我们建议，为了减少误解，在本条中说明知识产权行政案件的范围并不限于列出的类型。

第2条

IPO协会担心本条只讨论保全手段而没有说明保护手段，因而未能充分平衡各种合法但可能互相矛盾的需求。如果发生滥用诉讼，例如查封没有被限制在用于证明侵权所需要的范围，担保可能不足以赔偿被告的损失。举例而言，如果分析侵权只需要用到服务器一部分的代码，而整个服务器都被查封，就属于滥用。所以，为避免这种滥用的情况，需要对被告的保护措施。我们由此建议在本条中加入以下语句：

2. 诉讼保全申请、担保及其数额。可能因一方当事人的行为或者其他原因，使判决难以执行或者造成当事人其他损害的案件，对方当事人可以申请对其财产进行保全、责令其作出一定行为或者禁止其作出一定行为；当事人没有提出申请的，人民法院在必要时也可以裁定采取保全措施。裁定应当禁止乱查封、超标的查封、过度查封，并确保保全的措施仅限于为保护申请人合法权益所需要的部分。裁定应当说明在执行过程中知悉的国家秘密、商业秘密和个人隐私等严格保密，依法不予公开。

第7条

IPO协会希望就外国一方当事人所需要提交的文件做出进一步的说明。举例而言，“法定代表人”和“主要负责人”的概念在另一个国家可能不存在或有和中国不同的意思，因此，当申请人是外国个人、实体、组织时，最好能包括一个授权代表人的选项。我们就此建议在7.(3)中加入以下语句：

(3) 申请执行人的身份证明。公民个人申请的，应当出示居民身份证；法人申请的，应当提交法人营业执照副本和法定代表人身份证明；其他组织申请的，应当提交营业执照副本和主要负责人身份证明；申请执行人为外国法人或其他组织的，应当提交主体存续证明文件和法定代表人或授权代表人身份证明。

第9-10条

IPO协会担心被执行人有时会用财产转移的方式逃避执行。执行申请人通常状况下无法合法地了解财产转移的情况，只有通过人民法院才能得到。我们因此建议以下的修改：

9. 查找发现被执行人财产的方式。执行过程中，申请执行人有责任提供被执行人的财产线索供人民法院核实与执行。申请执行人也可以申请人民法院责令被执行人报告财产，或者申请人民法院通过网络执行查控系统对被执行人的资金、动产、不动产等财产情况以及财产转移情况进行调查。

10. 被执行人违反报告财产义务的处罚。被执行人拒绝报告、虚假报告或者无正当理由逾期报告财产情况和财产转移情况的，以及恶意转移财产的，人民法院依照相关规定将其纳入失信被执行人名单，并可以根据情节轻重对被执行人或者其法定代表人、有关单位的主要负责人或者直接责任人员予以罚款、拘留；构成犯罪的，依法追究刑事责任。

第 11 条

IPO 协会对本条的担心基于以上所述的平衡各种需求以防止诉讼滥用以及财产转移。我们建议将以下语句加入本条：

11. 人民法院发现财产后可以采取哪些措施。发现被执行人财产后，人民法院可以根据不同情形，采取查封、扣押、冻结、划拨、变价等措施。发现财产恶意转移后，人民法院可以做出转移无效的决定。人民法院应当禁止乱查封、超标的查封、过度查封，并确保财产保全的措施不超过保护申请人合法权益所需要的范围。人民法院应当对执行过程中知悉的商业秘密和个人隐私等严格保密，依法不予公开。

第 19-20 条

根据第 19-20 条的规定，人民法院应当自收到书面异议之日起十五日内审查。而当事人，尤其是在涉及到商业秘密的情况下，为了确保财产的安全和保密性，需要审查更快地进行。因此，我们诚挚地建议人民法院自收到书面异议之日起七日内审查。基于同样的理由，我们也希望条款中加入上一级人民法院审查复议的时间。

随信附上本信的翻译版本。IPO 协会再次感谢最高院给予此次机会提出反馈意见。我们也非常愿意进一步交流或能有机会提供更多的信息。

此致

美国知识产权所有人协会谨启



Daniel J. Staudt
主席

附件：IPO 协会对《知识产权判决执行工作实施计划（征求意见稿）》和《知识产权判决执行工作指南（征求意见稿）》的反馈意见(英文版)



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15 May 2020

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Via email (zxzhengqiuyijian@163.com)

Re: *Comments on Guideline for Intellectual Property Judgment Enforcement (Draft for Comments) and Implementation Plan for Intellectual Property Judgment Enforcement (Draft for Comments) (15 March 2020)*

Dear Director Meng:

The Intellectual Property Owners Association (IPO) wishes to thank the Supreme People's Court (hereinafter referred to as the "SPC") for the opportunity to respond to the request for comments on the drafts entitled "*Implementation Plan for Intellectual Property Judgment Enforcement*" (hereinafter referred to as the "Implementation Plan") and *Guidelines for Intellectual Property Judgment Enforcement*" (hereinafter referred to as the "Guidelines"), both of which were published on March 15, 2020.

IPO is an international trade association representing companies and individuals in all industries and fields of technology who own, or are interested in property rights. IPO's membership includes 175 companies and close to 12,000 individuals who are involved in the association either through their companies or as inventor, author, law firm, or attorney members. IPO membership spans over 30 countries.

IPO advocates for effective and affordable IP ownership rights and offers a wide array of services, including supporting member interests relating to legislative and international issues; analyzing current IP issues; providing information and educational services; and disseminating information to the public on the importance of IP rights.

We commend the SPC for the attention being given, through these drafts, to the comprehensive strengthening of judicial protection for IP, ensuring that effective judgments in intellectual property cases are implemented, and safeguarding the legitimate rights and interests of all parties. We note that this is the first time that the SPC has addressed an implementation plan and guidelines for IP enforcement. We very much welcome this initiative. These drafts also further support China's commitments under Article 1.28 of the Phase 1 Intellectual Property Agreement by providing detailed rules on how to effectively enforce an intellectual property judgment in China.

General Counsel
Jeffrey Kochian
Akin Gump Strauss Hauer & Feld
LLP

Executive Director
Jessica K. Landacre

More specific comments on the Implementation Plan and Guidelines are found below.

Implementation Plan

The Implementation Plan embraces, in part, 2 ways to ensure the timely enforcement of effective judgement and 9 ways to improve the implementation efficiency of judgment enforcement. Our comments regarding this portion of the Implementation Plan are as follows:

Article 2

IPO commends the SPC on the adoption of this provision. Enforcement powers such as "seizure, detention, freezing" and orders to stop infringement should be limited to measures that are in fact appropriate for the purpose of preservation of evidence to fairly adjudicate legal disputes. There is potential for litigation abuse if a plaintiff tries to obtain arbitrary or excessive seizure measures for preservation beyond what is required to safeguard a fair litigation process.

Article 4

With respect to the network execution investigation and control system, we respectfully recommend that in its efforts to improve efficiency in identifying property and controlling the property under execution that the Implementation Plan should specifically seek not only to ensure information security, but also the confidentiality of such property. The value of such property can be adversely impacted if its confidentiality is not maintained.

Article 8

Article 8 mentions that the Civil Procedure Law of the People's Republic of China and its related Judicial Interpretations stipulate that the obligations of the subject of enforcement in an intellectual property case could be carried out by a third party appointed by the court, while the subject of enforcement bears the costs of execution. For clarity purposes, we respectfully recommend that the following are explained:

- Qualifications on the third party to be appointed by the court;
- Limitations on the obligations to be carried out by the third party; and
- Measures to be taken if the costs of execution could not be recovered.

Article 9

Regarding the people's court's spirit of promoting simplified and streamlined cases, we respectfully recommend that the Implementation Plan specifically set forth that enforcement of IP judgments include "remedial action covering, as appropriate, both compensatory damages and injunctive relief." Emphasizing that the remedial relief under the judgment can include both compensatory damages as well as injunctive relief often strengthens the effectiveness of the judgment.

Article 11

As per Article 2, enforcement powers such as "seizure, detention, freezing" and orders to stop infringement should be limited to measures that are in fact appropriate for the purpose of preservation of evidence to fairly adjudicate legal disputes. There is potential for litigation abuse if a plaintiff tries to obtain arbitrary or excessive seizure measures for preservation beyond what is required to safeguard a fair litigation process. In particular, destruction of goods and the tools to manufacture goods is quite a rare remedy in most patent and copyright cases. There are many examples of defenses in IP cases where it is difficult at the initial stages of a case to assess the scope of IP rights and whether there is a likelihood of finding infringement, thus destruction is an extreme remedy subject to potential abuse by litigants. Accordingly, IPO recommends that language from paragraph 2 of Article 2 be added to Article 11 as follows.

Advance the enforcement assistance work in accordance with the law, further improve inter-department cooperation in the enforcement of intellectual property judgments, strengthen the communication and coordination with departments such as market regulation, customs and intellectual property, so as to find and control infringing products, destroy infringing goods and the tools used for infringement in a more timely and effective manner, ensure that measures for preservation are limited to what is required to safeguard the realization of legitimate rights and interests of applicants, and advance other relevant enforcement work as well.

Article 12

IPO commends the SPC on the adoption of this provision. Transparency is essential to the predictability and fairness of judicial decisions. At the same time, litigants should not be forced to disclose their trade secrets in order to enforce their rights, or in order to raise defenses to enforcement. This provision addresses both concerns. In order to ensure compliance, IPO recommends that compliance measures for this provision be adopted.

The Guidelines

The Guidelines provide detailed instructions regarding enforcement of IP civil, administrative, and criminal judgments, with a focus primarily on civil actions.

IPO suggests that the guidelines should be revised to better balance competing legitimate concerns. In particular, IPO is concerned that the guidelines do not sufficiently distinguish enforcement measures for (1) preservation of documents for discovery from (2) enforcing judgments and injunctive relief. This could enable litigation abuse by a plaintiff who tries to obtain arbitrary or excessive seizure measures for preservation beyond what is required to safeguard a fair litigation process. Applying the same guidelines to both (1) and (2) would be confusing and likely would not be appropriate in most cases. For instance, enforcement powers such as "seizure, detention, freezing, forced transfer and sell-off" are not appropriate for the purpose of preservation of evidence to fairly adjudicate legal disputes. IPO thus recommends that the SPC

consider adopting provisions to balance the competing legal concerns of the parties, such as those found in the U.S. Defense of Trade Secrets Act (DTSA, codified as 18 U.S.C. § 1836). For example, the DTSA includes the following provisions:

(b)(2)(A)(ii)(III): The court may not adopt an enforcement measure unless the harm to the IP owner outweighs the harm to the legitimate interests of the person against whom seizure would be ordered and substantially outweighs the harm to any third parties who may be harmed by such seizure.

(b)(2)(B)(ii): Providing for the narrowest seizure of property necessary to achieve the legitimate objectives of enforcement and directing that the seizure be conducted in a manner that minimizes any interruption of the business operations of third parties and, to the extent possible, does not interrupt the legitimate business operations of the person accused of infringement;

(b)(2)(D)(iii): Taking appropriate measures to protect the confidentiality of seized materials that are unrelated to the infringement information ordered seized.

(b)(2)(H): A party may request that any material seized or to be seized that is stored on a storage medium be encrypted.

Guidelines

Article 1

The specific scope of IP administrative cases lists copyrights, trademarks, and patents but not, for example, trade secrets (although unfair competition is listed). This could lead one to think that the types of IP cases subject to administrative action are limited to those involving copyrights, trademarks, and patents. However, the list of IP civil cases specifically recites, among other types of cases, those involving trade secrets as well as unfair competition. Accordingly, we respectfully recommend that, in order to avoid any confusion, Article 1 specifically add that the list of administrative IP cases is not limited to those recited therein.

Article 2

IPO is concerned that this provision does not sufficiently balance competing legitimate concerns because it discusses only preservation measures and fails to discuss protective measures. A bond may not sufficiently compensate a defendant in the event of litigation abuse, for instance, where a seizure is not limited to what is required to show infringement. Thus, protective measures are required to protect a defendant from such abuse. An example would be where an entire server is seized even though only a portion of the server's code is required for an infringement analysis. IPO therefore recommends that the language underlined below, adapted from language elsewhere in these annexes, be added to this provision.

The application for litigation preservation, the guarantee and its amount. For cases in which the judgment is difficult to enforce or other damages are caused to parties involved due to the act of one party or for some other reasons, the other party may file an application to preserve properties of that party or order it to perform certain acts or prohibit it from committing certain acts; where no application is filed by parties involved, the people's court may also, when

necessary, issue a ruling to take preservation measures. The ruling shall prohibit arbitrary seizure, over-standard seizure and excessive seizure, and ensure that measures for preservation are limited to what is required to safeguard the realization of legitimate rights and interests of applicants. In particular, the ruling shall provide that any trade secret or personal privacy information known during the enforcement be kept strictly confidential and not be disclosed in accordance with the law.

When the people's court takes preservation measures, it may order the applicant to provide guarantee; if the applicant fails to provide guarantee, the court may rule that the application should be dismissed. When the people's court orders the applicant to provide guarantee for property preservation, the amount of guarantee shall not exceed 30 percent of the preservation amount as requested; where the property applied for preservation is a disputed subject matter, the amount of guarantee shall not exceed 30 percent of the value of the disputed subject matter. When the people's court orders the applicant to provide guarantee for act preservation, the amount of guarantee should be equivalent to the losses that the respondent might suffer due to the enforcement of act preservation measures, including reasonable losses, such as sales revenue and custodian fees, from the products involved in the infringement ordered to stop.

Article 7

IPO respectfully requests further clarification on the documents required to be submitted by a foreign party applicant. For example, the concepts of “legal representatives” and “main person in charge” may not exist or may take on a different meaning in a foreign country, and therefore it would be helpful to include “authorized representative” as an option when the applicant is a foreign person, entity, or organization. IPO therefore recommends that the language underlined below be added to 7(3).

Identification of the applicant.; when the applicant is a foreign legal entity or other organization, the applicant should submit a certificate of good standing and a certificate of identity of legal representative or authorized representative thereof.

Articles 9 and 10

IPO is concerned that persons subject to enforcement sometimes evade enforcement by transferring their properties to others. The enforcement applicant usually cannot legally access the transfer information and must resort to courts for such information. We therefore propose revising these articles as follows:

9. Methods for searching and discovering the properties of persons subject to enforcement. During the enforcement, the enforcement applicant is responsible for providing the clues of properties of the person subject to enforcement to the

people's court for verification and enforcement. The enforcement applicant may also apply to the people's court for ordering the person subject to enforcement to report its properties or carrying out investigation in the properties of the person subject to enforcement, including fund, personal property and real property, and transfer information of the properties, through the online enforcement inquiry and control system.

10. Penalties against persons subject to enforcement who violate the obligation to report properties. Where the person subject to enforcement refuses to report or misreports its properties and transfer information of the properties, or fails to report within the prescribed time limit while without justified reasons, or maliciously transfers its properties, the people's court shall include it in the list of defaulting persons subject to enforcement in accordance with relevant provisions, and may, according to the severity of circumstance, impose fines against or detain the person subject to enforcement or its legal agent, or the main responsible person of relevant organization or the direct responsible personnel; to the extent a crime is constituted, the violator shall be subject to criminal liability.

Article 11

IPO's concerns about this provision are similar to the concerns expressed above about balancing competing legitimate concerns to prevent the potential for litigation abuse, as well as those stated above about property transfers. IPO recommends that the language underlined below be added to this provision.


Which measures may the people's courts take after the discovery of properties? After discovering the properties of the person subject to enforcement, the people's court may, subject to specific circumstances, take such measures as seizure, detention, freezing, forced transfer and sell-off. After discovering the malicious transfer of the properties, the people's court may determine the transfer is void. The court shall prohibit arbitrary seizure, over-standard seizure and excessive seizure, and ensure that measures for preservation are limited to what is required to safeguard the realization of legitimate rights and interests of applicants. In particular, the court shall provide that any trade secret or personal privacy information known during the enforcement be kept strictly confidential and not be disclosed in accordance with the law.

Articles 19 and 20

According to both of these Articles, the people's court is required to examine any written objections within 15 days. Often a party, and especially when involving trade secrets, needs examination in far less time in order to ensure both the security and confidentiality of the property are maintained. Accordingly, we respectfully recommend that the examination be within 7 days. We also respectfully request, and for the same reasons, that the time period of examination by the next higher level of the people's court be set forth in these Articles.

Attached please find this letter as translated. We again thank you for permitting IPO to provide comments and would welcome any further dialogue or opportunity to provide additional information.

Sincerely,

A handwritten signature in black ink, appearing to read 'D. Staudt', with a large, sweeping horizontal stroke across the middle.

Daniel J. Staudt
President

Attachment