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二零二零年七月三十一日

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中华人民共和国最高人民法院

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主题:《最高人民法院关于加大知识产权侵权行为制裁力度的意见(征求意见稿)》的反馈意见

致最高人民法院:

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”)提供了对 2020 年 6 月 15 日发布的《最高人民法院关于加大知识产权侵权行为制裁力度的意见(征求意见稿)》(下称“《意见》”)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。它拥有一百七十五家公司会员以及大约一万两千名个人会员。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。

《意见》强调了制止知识产权侵权活动的重要性,从而有效保护知识产权所有人的合法权益。IPO 协会感谢最高院为遏制知识产权侵权活动以在中国营造良好的知识产权环境所做的努力。

以下是我们对《意见》的具体反馈意见。

第一条和第二条

总体而言，IPO 协会欢迎最高院对于依照相关法律的行为保全的支持，以此作为保护知识产权所有人权利的一种手段。我们谨提出，对于根据第一条而实施的行为保全中“即将侵害知识产权”的情形，其应限于存在明确紧急状况的、清晰且令人信服的情况，并且期间应限制在最短的必要时间内。由于被告方没有充分和公平的机会来准备和提出合法的不侵权和/或无效抗辩，因此，根据第一条进行的行为保全是一种非常措施，应谨慎适用。

针对涉及技术问题的专利案件，对于根据第二条的规定在判决前进行的行为保全，应被给予特别的注意。根据相关法律并依照最高院现行的司法解释，除了应当对于各种困难给予平衡的考虑之外，还应考虑实体获胜的可能性。此外，在存在未决的无效案件并且被告方可以证明专利很可能无效的情况下，不应在判决前进行行为保全。

第六条

第六条第一句涉及停止制造和销售侵权产品的一般规则。第六条第二句述及了人民法院可以规定强制许可的条件（即，由于公共健康和环境资源保护）。通常来讲，设定强制许可会削弱知识产权体系为创新和创造所带来的吸引力。但是，如果需要在第六条述及强制许可的话，此处为了一致性谨提出，强制许可的设定应以《中华人民共和国专利法》第六章中的强制许可条款（即，第四十八至五十八条）为指导，并通过对于第二句的如下修改而体现该含义：

因涉及公共健康、环境资源保护等，且根据《中华人民共和国专利法》第六章的相关规定，依法不判令停止侵权的，应当采取经济补偿等替代性措施。

第八条

第八条似乎旨在满足 TRIPS 协议第三部分第二节第四十六条的要求。对于在何时可以将主要用于生产或者制造假冒商品的材料和工具在商业渠道之外进行处置，IPO 协会希望得到进一步的澄清，并建议明确此类处置的目的是将进一步侵权的风险最小化，因此建议根据 TRIPS 协议的表述进行以下修改：

对于假冒、盗版商品及主要用于生产或者制造假冒、盗版商品的材料和工具，权利人在民事诉讼中举证证明上述物品存在并请求立即销毁的，除特殊情况外，人民法院应当支持。在特殊情况下，可以以将进一步侵权的风险最小化的方式在商业渠道之外处置主要用于生产或者

制造假冒、盗版商品的材料和工具。侵权人请求补偿的，人民法院不予支持。

第十一条

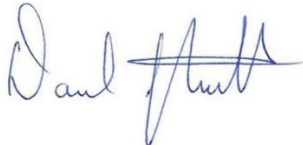
第十一条规定，应积极利用工商税务部门等渠道获取与侵权产品行业平均利润率有关的数据。工商税务部门可以成为权利人合理评估侵权人利润和资产的重要信息来源，对于不合作的侵权人尤为如此。同时，被控侵权方可能有正当理由希望对其销售或财务信息保密。如果没有向法庭提交可靠的损害赔偿证据，在任何情况下都应谨慎处理，以避免给权利人以意外之收获。IPO 协会建议，为支持权利人的赔偿请求以及支持判决的执行，也应积极寻求自此来源的证据，并建议如下所示的修改：

积极运用工商税务部门、第三方商业平台、侵权人网站或者公司依法披露文件显示的相关数据以及行业平均利润率等，在所有证据必须可靠且与被控侵权行为相关的条件下，依法确定侵权获利情况以及对权利人的赔偿，并支持判决的执行。

IPO 协会再次感谢贵院给予此次机会提出反馈意见。我们也非常愿意与贵院进一步交流或能有机会与贵院再行探讨。

随信附上本信的翻译版本。

此致



Daniel J. Staudt
美国知识产权所有人协会主席

附件：IPO 协会对《最高人民法院关于加大知识产权侵权行为制裁力度的意见（征求意见稿）》的反馈意见(英文版)



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31 July 2020

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***Re: Opinions of the Supreme People's Court on Strengthening
Punishment Intensity of Acts Infringing Intellectual Property Rights***

To the Supreme People's Court:

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 draft "*Opinions of the Supreme People's Court on Strengthening Punishment Intensity of Acts Infringing Intellectual Property Rights*" (hereinafter referred to as the "Opinions") published on 15 June 2020.

IPO is an international trade association representing companies and individuals in all industries and fields of technology who own, or are interested in, intellectual 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.

The Opinions highlight the importance of deterring IP infringement activities so as to effectively protect legal rights of IP holders. IPO appreciates SPC's efforts to curb IP infringement activities in order to promote a sound IP environment in China.

We provide our comments on the Opinions below.

Articles 1 and 2

As a general comment, IPO welcomes the SPC's support for conduct preservation in accordance with applicable laws as a means to preserve the IP owner's rights. We respectfully submit that cases of "imminent infringement" where conduct preservation is applied under Article 1 should be limited to clear and compelling situations where there is a clear case of urgency, and that the duration should be restricted to the minimum time necessary. Because the defending party is not afforded a full and fair opportunity to develop and present legitimate non-infringement and/or invalidity arguments, conduct preservation under Article 1 is an extraordinary measure that should be applied sparingly.

Specific to patent cases where technical issues are involved, conduct preservation prior to judgment as provided under Article 2 should be approached with a special degree of care. The balance of hardships should be considered as well as the likelihood of success on the merits in accordance with applicable laws and consistent with SPC's existing judicial interpretations. In addition, conduct preservation prior to judgment should not issue where there is a pending invalidation action and the defending party can demonstrate that there is a strong likelihood that the patent is invalid.

Article 6

The first sentence of Article 6 speaks to the general rule of stopping the manufacture and sale of infringing products. The second sentence of Article 6 addresses conditions under which (*i.e.* due to public health and environmental resource protection) compulsory licensing may be prescribed by the people's court. As a general matter, the imposition of compulsory licenses can undermine the incentives created by the IP system for innovation and creativity. If compulsory licensing is to be addressed in Article 6, however, it is respectfully submitted that, for consistency, imposition of a compulsory license should be guided by the compulsory licensing articles (*i.e.* Articles 48 – 58) under Chapter 6 of the Patent Law of the People's Republic of China, which the following amendment to the second sentence would accomplish:

*If the violation of law is not ordered to stop infringement due to public health and environmental resource protection **and based on the applicable provisions of Chapter 6 of the Patent Law of the People's Republic of China**, alternative measures such as economic compensation shall be taken.*

Article 8

It appears that Article 8 aims to comply with the requirements of TRIPS Part III, Section 2, Article 46. In seeking further clarity as to when the materials and tools mainly used for the production of counterfeit goods can be disposed of outside the channels of commerce, IPO recommends to specify the purpose of such disposal is to minimize the risks of further infringements, and thus proposes the following revision, which is consistent with the language of TRIPS:

In civil proceedings, if the right holder presents evidence to prove the existence of counterfeit or pirated commodities and the materials and

*tools mainly used for the production of counterfeit or pirated commodities and claims that they shall be destroyed immediately, the people's court shall support such claims, except in special circumstances. Under special circumstances, the materials and tools mainly used for the production of counterfeit or pirated commodities may be disposed of outside commercial channels **in such a manner as to minimize the risks of further infringements**. If the infringer claims compensation, the people's court shall reject such claims.*

Article 11

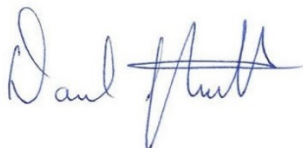
Article 11 provides that avenues such as industrial and commercial taxation departments should be actively utilized to obtain data relating to average profit rate of the industry of the infringing products. Industrial and commercial taxation departments can be important sources of information for the right owner to properly assess the infringer's profits and assets, especially in the case of an uncooperative infringer. At the same time, there may be legitimate reasons why an accused infringer may wish to maintain the confidentiality of its sales or financial information. In all cases, care should be taken to avoid giving a patent owner a windfall where no reliable evidence is presented to the court on damages. IPO recommends that evidence from such sources should be actively sought also to support claims for compensation to the right holder and enforcement of judgments, as shown below:

*Actively use the relevant data displayed in the documents shown in industrial and commercial taxation department, third-party business platforms, infringer websites or disclosure documents legally made by companies and the average profit rate of the industry, etc. to determine the profit status of the infringement **and compensation to the right holder, and to support enforcement of judgment** according to law; **provided that all evidence must be reliable and related to the accused infringement**.*

We thank the Supreme People's Court for the opportunity to comment, and we welcome further dialogue and opportunity for discourse.

We have enclosed this letter as translated herewith.

Sincerely,



Daniel J. Staudt
President

Attachment