外观设计专利侵权判定
理论与实务研究

胡充寒 著

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内 容 摘 要

随着时代的发展，人类所处的社会生活环境发生着日新月异的变化，人类在与自然的交往中逐渐认识自然规律并逐渐实现自己的设想、构思，使得人类的生活更加自由和舒适。在这过程中人类不知不觉都在进行着设计，当人类的历史进入工业社会时，这种创造性的活动就是今天被人们所称的工业设计，在我国被称为外观设计。

相对于整个法律制度而言，知识产权制度虽然出现的时间不长，但是发展非常迅速，其内容不断丰富，规则不断完善，体现出鲜明的时代性和多样性。外观设计专利与发明专利、实用新型专利并列为我国专利法保护的三大专利类型。随着人们知识产权保护意识的增强，我国外观设计专利申请量已居于世界第一位。这彰显出外观设计保护制度在我国社会经济生活中已经占有重要地位，体现了我国的外观设计保护水平在不断提高。

然而，尽管我国外观设计保护制度有了很大发展和完善，但随着外观设计专利侵权纠纷案件的不断增多，在外观设计专利保护实践中出现了大量亟待解决的新问题。如何解决这些新问题，已经成为理论界和实务界所关注和研究的课题。本书立足于我国知识产权法律制度和司法实践，从外观设计的基础理论入手，在研究国外及我国外观设计的制度发展史及保护模式的基础上，指出了外观设计保护的正当性理由，探讨了我国外观设计之实然性规定与应然性重构，论述了外观设计专利侵权判定的前提、外观设计专利侵权判定的主体、外观设计专利侵权判定的方法、外观设计专利侵权判定的标准与保护模式，并且充分分析了被控侵权人所享有的各种抗辩权，在全面回顾和分析我国外观设计保护现状的基础上给出了实现外观设计保护目标的对策。

本书分为导论和六章：

导论，先提出本书的选题背景与研究目的，以体现本书研究的价值所在；然后对国内外的相关研究现状进行述评，表明本课题研究的进展程度；最后阐述本书的创新之处和研究中存在的不足。

第一章，外观设计专利侵权判定的理论基础。本章是关于外观设计专利

基本理论的论述，包括了外观设计法律保护制度的发展历史及立法体例，并从比较分析中探讨我国外观设计定义之实然性规定与应然性重构。

现代工业的竞争，从一定程度上讲就是设计的竞争。由于外观设计既与技术有关，又与美学有关，再加上各国立法政策、制度设计和价值取向、政策有所不同，各国关于外观设计的立法必然存在差异。本章从横向和纵向的角度对外观设计进行考察，采用了对比分析和历史对比的写作手法，通过考察研究国际组织，不同国家和地区有关外观设计的立法，揭示了保护外观设计的正当性理由，进而提出了我国外观设计应采单独立法模式的建议。本章还强调了外观设计权在知识产权权利体系中的位置问题，认为外观设计权应该是一项与发明专利权、商标权、版权及邻接权相并列的知识产权，而这几种权利是平行的，并没有位阶之分。本章从比较分析的角度探讨了我国外观设计定义之实然性规定和应然性重构，并就专利法新修正案的不足提出了如何完善的具体建议。

第二章，外观设计专利侵权判定的前提。本章通过对比分析，揭示了我国外观设计保护客体与其他国家外观设计保护客体方面的差距及原因，提出应从国情出发，逐步扩大外观设计专利的保护范围，并对外观设计的保护客体提出了具体的修改建议。

本章首先分析了外观设计专利的权利对象、外观设计专利保护的产品范围、外观设计专利的权利要求，提出外观设计申请视图是界定外观设计权利范围的根本依据，探讨了简要说明作为确定权利范围的参考作用，着重研究了色彩对于确定外观设计专利保护范围的重要性：(1)当专利申请人申请外观设计专利时，没有申请保护产品的色彩，由于法律要求色彩的保护必须经过法定的申请程序，在缺乏申请的情况下色彩不应当被看作是外观设计保护范围内的要素。(2)当专利申请人申请外观设计专利时，已经申请保护产品的色彩，但是相关的色彩并不符合专利授权条件，如果色彩保护在得到承认的同时，在整体对比下被控侵权产品仍然有可能被认定为与专利产品的外观设计不相同或者不相似。此时，形式上得到专利授权的色彩要素就只能停留在形式的司法保护上，而在实质的判断中却已被架空。(3)色彩保护应当具有独立的保护范围，这种保护是指在获得专利的外观设计中色彩属于授权范围而且亦具有实质的授权条件的，就应当受到保护。

第三章，外观设计专利侵权的判定主体。本章是关于如何确定外观设计专利侵权的判定主体的论述，学界关于外观设计专利侵权判定的主体，有着各种不同的主张：是一般消费者还是所属领域的设计人员？购买者还是使用

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者抑或是最终使用者等?

本章首先分析了我国立法及《审查指南》等部门规章的相关规定,认为我国《专利法》、《专利法实施细则》均未明确规定外观设计相同及相近似的判断主体,立法上的空白和滞后为执法的不统一埋下了隐患。本章分析了世界各主要国家及地区外观设计专利侵权判断主体的有关规定并结合司法实践中的典型案例,认为应当以一般消费者的角度来判断被控侵权产品与外观设计专利之间是否相同或相近似,明确了确定"一般消费者"时应遵循的标准,并提出了如何完善的具体建议。

第四章,外观设计专利侵权判定的标准与保护模式。对于外观设计专利侵权判定的标准及保护模式,理论及实务界尚存在分歧:应当是以"整体视觉效果是否具有显著影响"为标准,还是以混淆为标准,抑或是"包含创新内容"为标准?是应坚持整体保护模式还是创新保护模式?

本章分析了混淆标准的起源与发展、地位,指出混淆标准缺乏理论立足点,在专利侵权判定中采用混淆标准存在判定结果明显不合理的情形、存在外观设计专利创造性越强越难得到保护的悖论,且有可能导致外观设计专利权不能得到有力的保护。论述了创新标准的理论依据,指出外观设计专利保护的立足点应当放在对外观设计创新活动的保护上。在全面比较整体保护模式与创新保护模式的基础上,提出采用创新保护模式能够避免前述混淆标准存在的缺陷并契合了专利法的发展趋势,还就如何完善立法以体现对外观设计创新活动的保护提出了具体的建议。

第五章,外观设计专利侵权判定的方法。在外观设计侵权判定中,判定被控侵权产品是否侵犯了原告的外观设计专利权的方法,概括起来主要有:直接对比、间接对比、交叉对比、视角对比、要部判断、整体观察综合判断法等。

本章在理论研究和司法实践的基础上,结合典型案例,详尽论述了上述各种方法在司法侵权判断中的运用及应注意的各种问题。

第六章,外观设计专利侵权的抗辩。为了达到外观设计专利权人和被控侵权人之间的权利平衡,各国在保护外观设计专利权的同时,赋予被控侵权人针对侵权指控的诸多抗辩事由,例如外观设计专利无效抗辩、公知设计抗辩、先用权抗辩、合同抗辩、专利权滥用抗辩、诉讼时效抗辩等。

尽管有些抗辩事由已经在立法上有所体现,但是关于它们的理论争执并未停息:外观设计专利无效抗辩中,受诉法院与专利复审委员会的职权划分是否合理?中止诉讼情形下如何避免审判期限的过分拖延,以保护权利人的利益?公知设计抗辩的概念如何厘定,是仅限于公众知晓,还是要求可以自由使

用？先用权究竟是抗辩权还是独立的民事权利，“原有范围”如何界定？合同抗辩中，如果抗辩不成立，被控侵权人和第三人如何承担责任？在适用专利权滥用抗辩时，在我国尚未出台知识产权反垄断的配套规定情形下，怎样通过理论上的探讨促进相关配套规定的制定？

笔者针对这些问题提出了见解：(1)在外观设计专利无效抗辩中，应当赋予受诉法院相当的自由裁量权，甚至专利效力的决定权，以避免审判期限的过分拖延；(2)通过对公知设计抗辩多种表述方式的一一评析，得出公知设计抗辩强调的是技术在原告专利申请日之前为公众所知晓，该项技术可能允许公众自由使用，也可能为其他权利人所享有的结论；(3)通过运用民法中的民事权利理论，否定了先用权是独立的民事权利的观点，其应当是一种抗辩权；而且，“原有范围”不能仅仅从数量上予以判断；(4)应当根据被控侵权人与第三人之间合同的不同性质，总结出被控侵权人与第三人的责任承担规则；(5)应当借鉴西方国家的知识产权反垄断经验，完善我国专利权滥用的反垄断法规制。

关键词：外观设计；侵权判定；侵权抗辩

Abstract

With the development of times, the social life of human being is evolving with each passing day. Man becomes to know more about natural laws in the interaction with nature and realizes their vision and ideas gradually. In this way, human life is becoming more freedom and comfortable. In this process, humanity is engaged in design unconsciously, When the history of humanity entered into the industrial society that creative activity is what is known today as the industrial design, while in China called "design".

History of industrial design is essentially an abbreviated version of history of human civilization. Industrial design came into being and developed in the background of industrial revolution. From handicraft production to mechanized production, it provided the historical conditions for industry design, while the refinement of social division of labor like the separation of designing and manufacturing, producing and selling, directly contributed to it. Arts and Crafts movement originated in the design exercise in the United Kingdom during the second half of the 19th century was caused by a fall in the standard of the design because of the industrialization of production for furniture, interior products and architecture. So it is the industrial production and industrialization that makes the role of design to affect the whole industry and even social life, and the originality of design demands for more prominent likewise.

The level of industrial design reflects a country's industrial and scientific and technological degree, which is the concentrated expression of material and spiritual civilization, the important factor directly impacts on the overall quality of products, and is also an important one that determines market competitiveness of them nowadays. The revitalization of national industry and culture is often displayed in the value of designs. Accordingly, environmental significance posed by product is the motivation of the national survival and development. Industrial

design plays an important role in the prosperity of a nation.

Comparing to the entire legal system, the history of the intellectual property system is not so long, but it has extraordinarily rapid development with its content richer and rules more refined, which reflects the distinct characteristics of the times and diversity. Designs, inventions and utility models are the three types of patents equally protected by the Patent Law of China. With the enhancement of awareness of IPR protection, China's design patent application has been Top One in the patent activity over the world. This highlights that the design protection system has occupied an important position in China's social and economic life, and also reflects that the level of protection for the design has been constantly improved.

However, in spite of the significant development and perfection of the design protection system, as the design patent infringement dispute cases are increasing, there have been more and more new problems appeared which demand prompt solution in the design protection practice. How to solve these new problems has become the concern and study issue both of the academia and practical circle. This paper stood on the legal system and judicial practice of intellectual property in China, started with the basic theory of design, and pointed out the significance of the protection of designs and studied the factual definition and ideal reconstruction of designs by analyzing the necessity of taking protection measures for designs. It discussed the premises, subjects, methods, standards and protective modes of the judgement of design patent infringement. It also did a full analysis of a variety of defenses the accused infringers enjoyed as well as the right owners and gave suggestions for achieving the goals of design patent protection based on a comprehensive review and analysis of the present situation.

The structure of this paper is divdied into introduction and five chapters:

The introduction brings forward the selective background and study purpose firstly, so as to embody the studying value of this paper; then makes a comment of the related research situation at home and aboard and shows the development degree of design patent; finally, illustrates the creation and the exsiting shortcomings of this paper.

Chapter Ⅰ is the theoretical basis of the judgement of design patent

infringement. It is about the discussion of the fundemental theory of design patent including the history of sysmatic development and legislative model of design patent, and it also discusses the factual definition and ideal reconstruction of design patent in China.

To some degree, the competition of modern industry is the competition of design. As the design patent is not only related with technology, but also with aesthetics, plus the differences of the legislative policies, systematic design, value orientation and policies in various countries, the legislation of design patent undoubtedly exits differentiation among countries. This chapter makes a observation from the angel of length wise direction and cross wise direction, adopts a writing practice of comparative analysis and historical comparation, reveals its definition by observating the legislation related design patent of different organizations, countries and areas, and further proposes that China should take an independent legislation model in design patent. This paper emphasizes the status of the design patent in the right system of intellectual property. It holds that design patent should be kept balance with invention patent, trademark right, copyright and neighbouring right, all of these rights are parellel, there is no hierarchy of points. Besides, this paper discusses the factual definition and ideal reconstruction of design patent by comparative analysis and proposes concrete suggestions on how to improve the shortcomings of the new patent law amendment.

Chapter Ⅱ is about the premises of the judgement of design patent infringement. This chapter, by comparative analysis, reveals the differences and reasons of protective objects between China and other countries, points out that China should extends the protective range according to its national situation, and proposes concrete amendment suggestions on protective objects of design patent.

Firstly, this chapter analyzes the right objects, product range and right requirements of design patent and points out that the application view is the fundamental basis of the range definition of design patent. Then, it discusses the reference function of brief explaination in the definition of right range. This chapter focuses on the importance of color on defining the scope of design patent protection: (1) if patent applicant does not apply for color protection when he/she applys for design patent, color should not be considered as the element of the

protection scope of design paten as the law requires the protection of color should accord with the application procedure; (2) if patent applicant applys for design patent with color protection, but, the related color does not comply with the relevant licensing conditions, the alleged infringement production may be identified as the same or similar with the patent design products under the overall comparison while the color protection is recognized at the same time. At this point, the formal authority to the color elements can only remain in the formal judicial protection, but in terms of substantive judgments, it has already been pre-empted; (3) Color protection should contain independent areas of protection, such protection which refers to color that belongs to the authorized scope and accords with substantive qualifications should be protected.

Chapter Ⅲ is about the subjects of the judgement of design patent infringement. It's about the discussion of how to determine the subjects of the judgement of design patent infringement, there are a variety of ideas on the subjects of the judgement in academics: whether common consumers or professional designers? Whether the buyer, or the user, or the final user?

This chapter, firstly, analyzes the related regulations of China's legislation and departmental rules like *Examination Guidelines*, holds that *Patent Law* and *Implementation Regulation of Patent Law* have not definitely prescribed the subjects in judging the sameness and resemblance of design patent. The blankness and lag of legislation had occurred hidden dangers in the inconformity of law enforcement. By analyzing the related regulations on the subjects of judgement of main countries and areas and typical cases in judicial practice, it holds that the judgement of the sameness and resemblance between infringment products and patent products should be made by common consumers. Besides, it definites the standards of common consumers clearly and proposes concrete suggestions on how to improve.

Chapter Ⅳ is about the standards and protection modes of design patent. There is bifurcation about the standards and protection modes of design patent in the academia and practical circle. Should accord to whether entire visual effects include distinct influence criterion, or confusion criterion, or including innovation contents criterion? Should insist on entire protection mode or innovation protection mode?

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This paper analyzes the origin, development and status of *confusion* criterion, then points out that *confusion* criterion lacks theoretical basis. The adoption of *confusion* criterion may incur obviously unfair situation in judgement results; the pardox that more stronger of the creation, it is more difficult for it to obtain protection; the possibility that design patent could not get forceful protection. It discusses the theoretical basis of *innovation* criterion and points out that the protection of design patent should be based on the innovation activities. By comprehensively comparing *entire protection* mode with *innovation protection* mode, it proposes that the adoption of *innovation protection* mode can avoid the limitations of *confusion* criterion and correspond to the development trends of patent law. It also proposes concrete suggestions on how to improve the legislation to protect the innovation activities of design patent.

In Chapter Ⅴ, it discusses the methods of the judgement of design patent infringement. The methods which are used to judge whether the alleged infringement products have infringed the rights of design patent of the plaintiff are mainly including direct comparison, indirect comparison, cross - comparison, perspective comparion, the judgement of key parts, the overall observation & integrated determination, and so on.

Basing on theoretical studies and judicial practices, this chapter integrates typical cases and does a full discussion on the implementation of these methods and all kinds of issues which should pay attention to.

Chpater Ⅵ dicusses various plea instances. In order to achieve the right balance between the patentee and the alleged infringer, each country, while they protect design patent, endows the alleged infringer a number of defensive reasons to object infringement accusation. For example, invalid design patent defense, public awareness design defense, prior user rights defense, contract defense, patent abuse defense, limitations of action defense and so on.

While some plea instances have been reflected in legislation, but there are still some theoretical disputes: in the invalid design patent defense, whether the division of functions and powers between the Court of Appeal and the Patent Reexamination Board is reasonable, how to avoid excessive delay of the trial period in the circumstances of suspending proceedings, so as to protect the interests of the patentee; how to define the concept of public awareness design

defense, is it should be limited to public awareness, or to free usage; whether prior user rights is defense right or independent civil rights, how to define "the original scope"; how do the alleged infringer and the third person to take responsibility if the contract defense can not set up; as China has not yet drafted anti-monopoly provisions which match intellectual property legislation, how to promote the formulation of the related provisions by theoretical discussion while applying patent abuse defense.

Aiming at these issues, the author puts forward his views: (1) In appplying of invalid design defense, the Court of Appeal should be given considerable discretionary power and even the decisive power about patent validity to avoid excessive delay in the trial period; (2) By analyzing a variety of statements on public awareness design defense, it concludes that public awareness design defense emphasizes that the technology had been known by the plaintiffs patent applications before the date of public awareness, the technology might allow the public to use freely or have been ocuppied by other obligees; (3) It denies prior user right is an independent civil right but a defense right by applying civil rights theory of civil law. Furthermore, "the original scope" should not be judged from the quantity merely; (4) It should be in accordance with the different nature of contracts between an alleged infringer and a third person to sum up the rules of responsibility bearing; (5) In order to improve anti-monopoly measures in light of patent abuse, we should draw lessons from western countries.

Key words: design patent; judgement of infringement; infringement defense

目　录

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