


· 广外法律文库 ·

知识产权 强制许可制度研究

黄丽萍 著

 知识产权出版社
全国百佳图书出版单位

· 广外法律文库 ·

广东外语外贸大学法学院资助出版

知识产权 强制许可制度研究

黄丽萍 著

0979543



知识产权出版社

全国百佳图书出版单位

责任编辑：刘睿 蔡敏敏
特约编辑：陆洋

责任校对：韩秀天
责任出版：卢运霞

图书在版编目 (CIP) 数据

知识产权强制许可制度研究 / 黄丽萍著. —北京：知识产权出版社，
2012. 7

ISBN 978 - 7 - 5130 - 1339 - 0

I. ①知… II. ①黄… III. ①知识产权制度 - 许可证制度 - 研究
IV. ①D913.04

中国版本图书馆 CIP 数据核字 (2012) 第 094472 号

知识产权强制许可制度研究

ZHISHI CHANQUAN QIANGZHI XUKE ZHIDU YANJIU

黄丽萍 著

出版发行：知识产权出版社

社址：北京市海淀区马甸南村 1 号

网 址：<http://www.ipph.cn>

发行电话：010 - 82000860 转 8101/8102

责编电话：010 - 82000860 转 8113

印 刷：北京紫瑞利印刷有限公司

开 本：720mm × 960mm 1/16

版 次：2012 年 7 月第一版

字 数：183 千字

ISBN 978 - 7 - 5130 - 1339 - 0 / D · 1492 (4201)

邮 编：100088

邮 箱：bjb@cnipr.com

传 真：010 - 82005070/82000893

责编邮箱：liurui@cnipr.com

经 销：新华书店及相关销售网点

印 张：16

印 次：2012 年 7 月第一次印刷

定 价：35.00 元

出版权专有 侵权必究

如有印装质量问题，本社负责调换。

总 序

广东外语外贸大学法学院成立于 2000 年，其前身是 1996 年设立的法学系。在学校党政的正确领导下，经过学院全体教职员工的共同努力，法学院已经初具规模，是广东省名列前茅的法学院之一。

法学院现有法学、外交学、国际政治 3 个本科专业，分为 6 个系，即法律系、民商法学系、国际法学系、知识产权法学系、外交学系、国际政治系；另有法学、政治学两个一级学科硕士点和一个法律硕士专业学位授权点；设有国际问题研究所、教育法制研究所、非政府组织研究所、欧盟法律与外交研究所、国际安全与战略研究中心、法律援助中心、物证技术实验室、校内学生实践基地等机构。

法学院现已拥有一支以教授为龙头，以博士、副教授为骨干，以青年教师为主力的教师队伍，承担和完成了多项国家级、省部级科研课题。目前，学院拥有本科生 1 500 多人，研究生 200 多人。在广东省人民政府外事办公室、广州市外事办公室、广州市中级人民法院、深圳市中级人民法院、佛山市人民检察院、佛山市人民法院、广州市白云区人民检察院、广州市白云区人民法院、广州市海珠区人民法院、广东国鼎律师事务所等单位建立了稳定的校外实习基地。

法学院践行“明德尚行、学贯中西”的校训，坚持融法律专业

教学和外语教学于一体的办学模式，经过多年的探索，已经形成“专业+外语”的复合型人才培养特色。法学院注重理论联系实际，培养学生分析问题和解决问题的能力。毕业生普遍受到用人单位的好评。

《广外法律文库》是广东外语外贸大学法学院的系列丛书，是老师们在各自的专业方向上、在长期的教学与科研工作的基础上获得的成果。本文库坚持真知灼见、有的放矢的写作原则，就专业教师最有体会、最有见地的问题进行写作，以期对相关法学领域的研究作出积极的贡献。事实上，已经完成书稿的各位作者倾注了大量的心血，进行了长时间的艰苦写作，精益求精。当值浮躁之风横行之时，这种治学态度愈显珍贵。

广东外语外贸大学法学院作为一个成立时间不长的学院，出版文库并非易事，个中艰辛，学人自能理解，其中反映出来的不畏艰辛、敢于探索、敢于担当的精神情操更值得称道。希望能够持之以恒，坚持文库的后续出版，推动学科建设实现更高水平的跨越。

广东外语外贸大学法学院

院长：蔡镇顺教授

2012年4月于广州

序

近年来，艾滋病、禽流感、甲型 H1N1 流感等全球公共健康危机频发，高昂的药价与贫困的病患之间的矛盾空前尖锐，如何在保护知识产权与维护社会公共利益之间达至平衡，成为摆在世人面前的一个重要课题。其实，知识产权法律制度从其诞生之时起，就被赋予了双重使命，即既要保护知识产权人的利益，也要保障社会公众接触和利用知识产品的自由。早在 1883 年《保护工业产权巴黎公约》中就设置了强制许可等限制知识产权的制度，《与贸易有关的知识产权协议》（以下简称 TRIPs 协议）更是在其“总条款与基本原则”中专门对知识产权保护与社会公众利益平衡问题作出了规定，其第 7 条阐明了协议的目的不是保护知识产权本身，而是促进技术进步与技术贸易，进而发展各国经济；第 8 条则确立了防止滥用权利原则，要求知识产权保护的程度及范围不能有害社会公众利益，而且权利人在行使权利时，不能采用限制贸易行为。

为了应对近年来全球公共健康危机频发的挑战，《世界贸易组织》（以下简称 WTO）在 2001 ~ 2005 年先后通过了《关于 TRIPs 协议与公共健康的宣言》《关于执行 TRIPs 协议与公共健康多哈宣言第 6 段的决议》和《修改 TRIPs 协议议定书》，完成了对 TRIPs 协议第 31 条关于专利强制许可规定的修订。我国于 2008 年年底通过的专利

法第三次修订，专利强制许可制度也是重点修订的内容之一。新挑战的出现以及相应的国际、国内法律制度的新变化，使得强制许可成为知识产权领域中一个引人注目的热点问题，非常值得进行系统、深入的研究。

本书以专利强制许可制度作为研究重点，兼顾其他知识产权领域的强制许可问题，整合了专利权、著作权、技术秘密权、植物新品种权和集成电路布图设计权等领域的强制许可制度进行系统的梳理和研究。作者通过横向的比较分析 TRIPs 协议和各国知识产权法的不同规定，并分别选取若干发达国家和发展中国家实施强制许可的案例，分析不同国家对强制许可的具体适用情况，试图从中揭示知识产权强制许可制度的产生原因、发展规律及未来发展趋势。作者还针对我国虽然已有较为完整的立法却没有具体实践的专利等强制许可制度，分析其存在的不足之处，并提出完善建议；针对我国著作权和技术秘密权强制许可制度缺失的现状，论证建立强制许可制度的必要性和可行性，并提出具体构建思路。作者所提出的这些建议具有较高的理论价值和实践意义，对我国相关制度的完善和有效运行当有助益。

本书作者黄丽萍曾是我指导的博士研究生，本书是在其博士论文基础上修改而成的，她为此书的写作付出了艰苦的努力，我为它的出版感到高兴。相信她会不断努力，争取有更多更好的研究成果面世。

温世扬

2012年2月6日

中文摘要

知识产权法一方面通过赋予知识产权人专有权，以保护知识产权人的利益，另一方面又对知识产权人行使其专有权加以一定的限制，以保障广大公众对知识产品的合理需要能够得到满足，从而实现知识产权法的公平价值目标。知识产权强制许可制度就是其中一种重要的知识产权限制制度，它赋予知识产权主管机关可以不经知识产权人同意，依法定条件和程序直接授予申请者对知识产品进行特定使用的权利，但是获得强制许可使用权的一方必须向知识产权人支付强制许可使用费。强制许可制度是在维系知识产权人的获酬权的条件下，保证知识产品使用人对知识产品利用的数量与方式的需要，其实质在于对知识产权这种私权的保护和保障社会公众对以知识产权为基础的知识和信息接近的权利之间进行平衡，使得知识产权法在充分保障知识产权人的私权利的同时，能够兼顾社会公众的需要，最终达至促进整个社会经济文化进步的目标。

本书拟通过对强制许可制度进行法理探索、立法考察和比较分析，较为深入系统地研究知识产权强制许可制度的理论基础、强制许可的事由、对强制许可的限制，以及强制许可的程序，并以此反思和检讨我国现行法中的强制许可制度，以求得其完善的有效途径。

本书共分为五章。

第一章“知识产权强制许可制度的理论基础”：任何一项法律制度的产生和确立，必须对其存在的正当性进行解读。本章从法理学、法律经济学和人权保障理论等多维角度对知识产权强制许可制度的理论基础进行探寻。

在法理分析方面，首先，从分析知识产权的权利属性入手，指出知识产权是一种具有较强的公共利益属性的私权利。其次，探讨了知识产权强制许可制度与禁止权利滥用原则的关系，指出两者是具体制度与指导原则的关系。禁止权利滥用原则要求人们行使权利时不得超越法律所允许的范围或正当的界限，而强制许可就是知识产权人超越界限不正当行使权利时可能承担的一种后果。最后，从利益平衡机制入手，探讨知识产权强制许可制度的制度理性和价值结构，并进一步分析利益平衡的实现模式。

在法律经济学分析方面，首先从分析知识产品在经济学上所具有的独特性质和特点入手，探讨知识产品的产权形式安排，指出公有不是知识产品真正理想的产权形式，给予知识产品私权保护的同时加以适当的限制，才能既激励知识产品的生产，又有利于促进知识的传播和利用。其次对强制许可制度的经济合理性进行分析，论证强制许可制度不仅有利于促进知识的传播和利用，以及降低交易费用，而且依然能够为知识创新提供足够动力，因而具有经济合理性。

在人权理论分析方面，首先对知识产权的人权属性进行分析，指出知识产权的人权含义应当包含两个方面：一是知识产权人对其知识财产所享有的独占权利；二是其他人所享有的利用知识产品的权利。其次针对近年来艾滋病、SARS、禽流感等全球公共健康危机频发所引起的有关生命健康权与知识产权孰轻孰重的争论，专门选

择知识产权与健康权的冲突作为研究知识产权与人权冲突的切入点，探讨两者的冲突与协调，从而解读了知识产权强制许可制度的正当性。

第二章“知识产权强制许可的事由”：本章对知识产权人未实施或未充分实施其知识产品、国家出现紧急状态或者非常情况、非商业性公共使用、纠正反竞争行为的需要、存在依赖性专利和公共利益需要等六大强制许可事由进行深入的研究，分析有关事由的产生原因、发展规律及未来发展趋势，以及通过横向的比较分析 TRIPs 协议和各国专利法对颁发强制许可理由的不同规定，并分别选取若干发达国家和发展中国家实施强制许可的案例，分析不同国家对强制许可事由的具体适用情况。

第三章“知识产权强制许可的限制与补偿”：知识产权强制许可制度是一把“双刃剑”，它在维护公共利益的同时，在一定程度上损害了知识产权人的利益。如何维持公共利益需要和知识产权人利益保护之间的平衡，避免矫枉过正，是构建知识产权强制许可制度时面临的一个重要课题。本章从颁发强制许可的范围限制、效力限制和强制许可使用费的支付三个方面探讨对知识产权强制许可的限制和补偿：第一，范围限制，为了保障强制许可制度不被滥用，国际公约和各国法律都对强制许可的知识产权客体和内容加以严格限制。第二，效力限制，将强制许可使用权局限为一种非独占且不得转让的使用权，而且实施强制许可所生产的产品应主要供应国内市场。第三，强制许可使用费的支付，强制许可制度在剥夺知识产权人的许可权的同时，保留了他的获得报酬权，因此，获得强制许可实施权的一方必须支付强制许可使用费。本章就如何确定强制许可使用费的标准、确定使用费时应考虑的因素和使用费的计算方法

等问题进行了较为深入的研究。

第四章“知识产权强制许可的程序”：一个健全的法律，如果使用武断的、专横的程序去执行，不能发生良好的效果。而一个不良的法律，如果用一个健全的程序去执行，可以限制或削弱法律的不良效果。^①因此，程序的重要性不容忽视。本章以专利强制许可程序为主要研究对象，采用比较分析的方法，对知识产权强制许可的申请、审查和决定，以及终止强制许可请求的审查和决定等各个环节进行全方位的研究。

第五章“完善我国知识产权强制许可制度的思考”：本章在比较研究与现实考量的基础上，提出我国建立或者完善相关强制许可制度的建议。在专利权强制许可方面，针对我国虽然已有较为完整的专利强制许可制度却没有具体实践的现状，分析其原因，指出仍然存在的不足之处，并提出完善建议。在著作权强制许可方面，针对我国著作权强制许可制度缺失的现状，论证建立强制许可制度的必要性和可行性，并提出具体构建建议。在其他知识产权强制许可方面，研究重点放在技术秘密权强制许可制度的具体构建上，同时对我国现行的集成电路布图设计权和植物新品种权强制许可的完善提出建议。此外，本书还探寻构建统一的知识产权强制许可程序制度和在司法审判程序中实施强制许可的可能性。

① 王名扬主编：《美国行政法》，中国法制出版社2005年版，第41页。

Abstract

For one thing, in order to protect the interests of the intellectual property owner, the Intellectual Property Law grants a license of the exclusive right to the owner of the intellectual property; for another, it limits the intellectual property owner's exercise of the exclusive right, so as to ensure that the public's demand for intellectual products can be satisfied and to realize the goal of fairness of the Intellectual Property Law. The compulsory licensing system of intellectual property is one of the important restrictive systems of intellectual property. It grants the intellectual property authority the right to directly give the applicants access to intellectual products based on legal conditions and procedures, without the permission of the intellectual property owner. However, the one who has obtained the right to use compulsory license must pay the intellectual property owner. While maintaining the owner's right to be paid, the system of compulsory licensing guarantees the users' need for the quantity and mode of using the intellectual products. Its essence lies in balancing two aspects: protecting the private right - intellectual property and maintaining the public's right to approach the knowledge and information on the basis of intellectual property. This enables the Intellectual Property Law not only to

fully ensure the private right of the intellectual property owner, but also give consideration to the public interest, thus promoting the economic and cultural progress of the whole society.

By means of jurisprudence probe, legislative investigation and comparative analysis of the compulsory licensing system, the present paper intends to thoroughly and systematically carry out a study on the theoretical basis, causes of issuing the compulsory license, restrictions on compulsory licensing, and procedures of issuing the compulsory license concerning the system of compulsory licensing of intellectual property. At the same time, reflections are made in terms of the compulsory licensing system in China's current laws, and effective approaches are sought for its improvement.

Chapter One A basic theoretical analysis of the compulsory licensing system of intellectual property. It is compulsory to assess the legitimacy of a legal system once it is established. This chapter probes the theoretical basis of the compulsory licensing system of intellectual property from several aspects like jurisprudence, economics of law and theories on protection of human rights, etc. .

From the perspective of legal analysis, the paper begins with the analysis of the right attribute of intellectual property, and points out that intellectual property is a kind of private right with a distinct attribute of public interest. Then it discusses the relationship between the compulsory licensing system of intellectual property and principles of prohibiting abuse of rights, with the former as the specific system while the latter as guidelines. Principles of prohibiting abuse of rights require that people cannot o-

verstep the legal scope or proper limit when exercising their rights, while the compulsory licensing refers to the consequence when the owner of intellectual property illegally exercises his or her rights by exceeding the limit. Finally, by analyzing the mechanism of balance of interests, it investigates the system rationality and value structure of the compulsory licensing system of intellectual property. A further analysis of the implementation model of balance of interests is conducted.

Regarding economics of law, the paper initially analyzes the distinctive characteristics of intellectual products in economics, and then probes the arrangement of property type of intellectual products. It points out that the publicly – owned type is not the ideal one of intellectual products. Only by giving protection as well as restrictions to the private right of intellectual products, can it both encourage the production of intellectual products, and promote the spread and use of knowledge. Next, an analysis of economic rationality of compulsory licensing system is conducted. It argues that the compulsory licensing system cannot only promote the spread and use of knowledge, and reduces transaction costs, but also provide enough incentive for knowledge innovation, thus it is economically legitimate.

In terms of theories on human rights, an analysis of human rights attributes of intellectual property is done, taking two aspects regarding human rights of intellectual property into consideration. The first one is that the intellectual property owner enjoys the exclusive right; the second is that others have the right to use the intellectual products. In recent years, such public health crisis has been frequently occurring as AIDS, SARS, bird flu etc. , thus causing much debate about which one is more impor-

tant: the right of life and health or the intellectual property. Based on the disputes, this paper regards the conflict between intellectual property and health right as the cut – in point to study the conflict between intellectual property and human rights. Through the discussion of their conflicts and coordination, the legitimacy of compulsory licensing system of intellectual property is justified.

Chapter Two Causes of issuing the compulsory license. This chapter thoroughly investigates six major causes of compulsory licensing. They are addressed as follows: no or no complete implementation, occurrence of emergency in the country, non – commercial public use, demand for correcting anti – competitive behavior, dependency between two patents and need for public interest. It analyzes the reasons of the relevant causes, the law of development and the future trend of development. In addition, by means of comparative analysis of TRIPs agreements and different regulations that state the causes of issuing the compulsory license from different countries, this chapter selects several cases of compulsory licensing in developed and developing countries and analyzes specific applications of causes of compulsory licensing in different countries.

Chapter Three Restrictions on compulsory licensing of intellectual property. The compulsory licensing system of intellectual property is a double – edged sword. On the one hand, it protects public interest; on the other hand, it does harm to the intellectual property owner's interests. It is an important issue to construct the compulsory licensing system of intellectual property with regards how to maintain the balance between the need of public interest and protection of the owner's interests with the avoid-

ance of overcorrection. This chapter discusses the restrictions on compulsory licensing of intellectual property from three perspectives: scope restrictions and efficacy restrictions on issuing compulsory license, and payment of compulsory licensing costs. The first one is scope restrictions. In order to avoid abuse of compulsory licensing system, the international conventions and laws from different countries have imposed strict restrictions on the objects and contents of the compulsorily licensed intellectual property rights. The second one is the efficacy restrictions. The right to use compulsory licensing is confined as non - exclusive and non - transferable. Additionally, the products produced by compulsory licensing should mainly supply the domestic market. The third one is payment of compulsory licensing costs. At the mean time of depriving the intellectual property owner of his or her licensing rights, the compulsory licensing system maintains his or her right to get paid. Therefore, the one who has got the implementation right of compulsory licensing must pay the costs of compulsory license. This chapter is an in - depth research concerning such issues as how to determine the standard of compulsory licensing costs, factors involved in determining the costs and the calculating methods of costs.

Chapter Four The procedures for issuance of compulsory licensing. A sound law, if implemented in a dogmatic and dictatorial procedure, can never receive favorable effects, while an imperfect law carried out in a sound procedure will have less harmful effects than it should have had. Therefore, the importance of procedures shall never be neglected. Taking compulsory licensing of patent as the main research subject, this chapter, by means of comparative analysis, makes a thorough re-

search on the application, examination and decision making of compulsory licensing of intellectual property and on every step concerning the examination and decision making of terminating a compulsory licensing request.

Chapter Five Thoughts on improving China's compulsory licensing system of intellectual property. Based on comparative analysis and current situations, this chapter proposes some suggestions on establishing or improving relevant compulsory licensing systems. As far as patent compulsory licensing is concerned, this chapter, in view of the current situation that our country has already had a relatively complete patent compulsory licensing system but no concrete practice, analyzes its reasons, points out the existing defects and makes suggestions on improvement. With regard to the compulsory licensing of copyright, the necessity and feasibility of establishing compulsory licensing system which is now missing are demonstrated, and constructive suggestions are given. With reference to compulsory licensing of other intellectual property, emphasis is attached to the practical construction of compulsory licensing system of technical secret right, and advice is made on improving our current compulsory licensing of interchange layout design right and new plant species right. Furthermore, this chapter makes a tentative study on the possibility of establishing a unified compulsory licensing system of intellectual property and the possibility of implementing compulsory licensing in judicial proceedings.