

论文

论知识产权行政执法的限制----以知识产权最新修法为背景

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摘要:

知识产权行政执法自知识产权法律制度产生之初即已存在,是我国知识产权法律制度上的特色制度,也是知识产权行政保护的重要组成部分。我国三部主要知识产权法律的最新修改显示,行政执法呈现出扩张趋势,但无论是从比较法的角度进行考察,还是从知识产权本身特有的属性、法经济学的成本效益分析、服务型政府的职能转变、行政权扩张本性的抑制、社会条件的变迁等角度着眼,知识产权行政执法都应当受到严格限制。我国知识产权法律在修改时可适当保留知识产权行政执法的内容,但应当对其进行严格限制并逐步弱化。具体而言,修法时应弱化对知识产权纯民事纠纷的行政裁决,提倡行政调解,并适时调整行政查处的范围和力度。

关键词: 知识产权 行政执法 行政执法限制 行政调解 私权

On the Restrictions to Administrative Law Enforcement of Intellectual Property: Against the Background of the Latest Revision of Intellectual Property Laws

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Abstract:

This paper dwells on the comparative law basis and theoretical basis that the intellectual property administrative law enforcement should be strictly restricted, which is on the background of the latest revision of the three main intellectual property laws in our country and the perspective of the expansion trends of intellectual property administrative law enforcement in the latest revision. Focusing on the latest revision of intellectual property laws in our country, this paper not only points out the drawbacks in reference to the current revision drafts from both the views of theory and practice, but also provides suggestions for the subsequent revision of intellectual property laws. Intellectual property administrative law enforcement is an important part of the administrative protection of intellectual property rights. Being different from the administrative management and the administrative service, it is the distinctive contents of the intellectual property legal system of our country, which consists of administrative handling and administrative disposal. Recently, our country's three main intellectual property laws are being revised, and the expansion trends of intellectual property administrative law enforcement is rather obvious. However, whether considering from the perspective of comparative law studies, or from the unique nature of intellectual property rights, the cost-benefit analysis of law and economics, the transformation of service-oriented government functions, the expansion nature of executive power, and the change of social conditions, the intellectual property administrative law enforcement should be strictly restricted. As to the comparative law perspective, the administrative protection in other countries is mainly reflected on the administrative management and the administrative service, with few contents about intellectual property administrative law enforcement. And even if there exist something relevant, the powers of the executive branch of government are never as heavy as in our country. As to the unique nature of intellectual property rights, intellectual property rights are private rights, and the majority of the intellectual property rights disputes belong to the pure civil disputes between civil subjects, so executive power should stick to the principle of moderation and should not interfere arbitrarily. The public right nature of intellectual property rights also requests the restriction to administrative law enforcement. As to the cost-benefit analysis of law and economics, the administrative law enforcement is not dominant on cost saving and efficiency increase when compared to judicial litigation. As to the transformation of service-oriented government functions, the government administrative system reform emphasizes the transformation of government functions, which means from the omnipotent government to the limited government and the service government, so the

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administrative organization should provide more service for the public rather than intervene the disputes of civil subjects through the methods of administrative law enforcement. As to the expansion nature of executive power, it has the characteristics of expansion and perishes ability, so it should be restrained in a reasonable range. As to the change of social conditions, the emergence and existence of administrative law enforcement has its certain historical conditions, which has changed now, and the construction objective of the rule of law society also requires the check and balance between authority. So it is necessary to restrict the administrative law enforcement. However, it is undeniable that the administrative law enforcement has played a significant role in the establishment and development of the legal system of intellectual property, the disposal and containment of intellectual property infringement and illegal behavior, and the improvement of protection level of intellectual property rights. TRIPs does not exclude the application of the administrative law enforcement. Therefore, the administrative law enforcement can be reserved properly in intellectual property laws in our country, but it should be strictly restricted in the subsequent revision as well. In general, the administrative law enforcement should be gradually weakened, and the judicial protection of intellectual property should be given priority to the administrative protection. It is necessary to treat differently the different types of administrative law enforcement behaviors, i.e., the administrative adjudication to pure civil disputes of intellectual property should be weakened and even abolished wholly, the administrative mediation could be promoted, and the administrative disposal should be timely adjusted both in scope and strength.

Keywords: intellectual property the administrative law enforcement the restrictions to administrative law enforcement the administrative mediation private right

收稿日期 修回日期 网络版发布日期

DOI:

基金项目:

通讯作者:

作者简介:

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