Research on Management of the Design Patent: Perspective from Judgment of Design Patent Infringement

Li Ming, Xu Zhinan
School of Arts and Law, Wuhan University of Technology, Wuhan, P.R.China, 430070
(E-mail: liming@whut.edu.cn, cinderella-0424@163.com)

Abstract This paper attempts to use the infringement judgement of design patent as a perspective, through analyzing the process of design patent infringement and the recognized standard general, The authors propose that the effective way to solve the problem that current management is not standardized should be based on innovation theory, abandon similar products identified as infringing the premise, identify whether there is aesthetic sense as the standard, and bring establishing partial design patent system into the scope of patent management.
Key words Design; Patent infringement; Patent management; Infringement judgement

1 Introduction

Level of the development of industrial design, to a certain extent, reflected the level of the industrial development of a country. Nowadays, the scope of design patent protection is expanding; the level of it is increasing and the competition about patent design is intensifying. Patent design is an intelligent creative work which was easy to be imitated and difficult to be managed, compared with the invention and utility model. Throughout China's design patent management, all the patent management departments are focused on how to increase patent applications and grant authorization, but the management of design patent infringement was hasn't involved. On the one hand, for the management of design infringement is lack of legal basis and theoretical explanation that makes the practice hard to start. On the other hand, identity of infringement of design patent was lack of specific executable regulations; therefore the results are uncertainty and unpredictability that make the management become more difficult. In practice, when identified an infringement of design patent, firstly have to find if the allegedly infringing product and design patents whether similar products and then from the perspective of ordinary consumers, observed with whole or use important part determine method to find if both are same or similar in aesthetic feelings, finally identified the allegedly infringing product infringed the design patent or not. Every aspect of this process is lack of identification of the statutory standard. This lack of authority and impartiality of the infringement found to some extent condoned the violations, harmed profits of a patent designer; the most important is a disadvantage for the management of Chinese patent design and its development.

2 The Theoretical Foundation of Design Patent Infringement Judgment

At the present time, there lay two theories concerning the preservation of design patent, Confusion theory and Innovation theory. The first holds this opinion that, functions of design patent are reflected in unique layouts rather than those distinctive technique uses different from other industry outputs. Therefore, the designs of physical form in confusion theory mainly effect in distinguishing two different products, similar with brands. Innovation theory considers that, as a kind of design, physical form designs should be protected by the patent right. Distinctive from brands, physical form designs are a promethean intelligent work in the product design itself, just like inventions and practical patents. The fundamental account of the design patent's arise must be to encourage innovations, to promote designs` enhancement, and to accelerate the development of society. Generally, the protection of design, using variety of theories, correspondingly, infringement judgments could have different standards. In the infringement judgment standards, there are novelty standard and creativity standard. Generally speaking, those infringement judgments corresponding to the Confusion theory are novelty ones. The novelty one, taking the common consumers as the observed crowd, uses integrated observation and important part determination to judge those infringements. Right now, though the worldwide have multiple design preservation modes, most have accepted the Confusion theory, whichever the countries using patent mode, copyright mode, or laws to protect, including China. However, with the development of design patent institutions, especially after United States started to let in the "novel point of law" of innovation part of design [1], the infringement judgement theory from Confusion theory transition to Innovation

theory.

3 The Premise Issue of Design Patent Infringement Judgement: Similar Products

In judicial practice of infringement of design patents identified, generally, the first thing to do is to determine that "the allegedly infringing products and patented product are the similar product or not, only if their similar products, then the infringement judgement could work, otherwise, infringement should not be judged[2]." Judge the accused infringing products and patented products whether the similar products could be an important prerequisite of proceed identify of infringe design patent. However, what should be the standard of judge infringe products and patented products whether the similar products or not, there was no authoritative and detailed standard in practice. Currently, there are two points for the standard, a view that, in judging whether the similar products, the standards should as same as the standard of the patent administration taken when they authorization the design, which is simply using the standard of category for the products in International Design Classification. Another view was that, International Design Classification is the standard use for the patent administration authorizing the licenses, but not representative of the public criterion. Therefore, when making judgement of similar products should be in accordance with actual product performance, use, materials, shape, distributions and other combination of factors, and take the common standards which widely received and recognized by Chinese consumer.

In the first point of view, even the International Design Classification defined classifications of the products, taking this as the standard will be more convenience, simple and easy to use, also it make the infringement standard, authorize and examine standards become a unified standard, but the classified of products in International Design Classification is different with the classified of products in industrial or commercial systems, even though has great difference with consumer's habits and normal recognized[3], these cannot really solve the problems of infringe judgement in practice. In the International Design Classification, those similar products may not have any similarities, but the products in different categories may have similar or even same appearance. For instance, in the digital market, there is a very serious problem called "cottage", such as, mobile phones, digital cameras, mp3 or mp4 player, PSP games, electronic dictionaries and other products, these products are different, even though their not belong to the same category, but they could be imitate appearance of any other products, infringe the patent. If just because of these products do not belong to the same sort of category then judge the infringement is not valid, is clearly inappropriate. The second point of view, although its taken into account our actual business practices, avoid the first rigid criteria for judging the issue, but lack a unified standards is the biggest flaw of this view. In judicial practice, if only in accordance with the judge's personal experience and habits to judge the classification of products, the results of judgement will be so subjectivity and uncertainty. Therefore, judge the infringing design patent in practice when there haven't a specific executable classification standard currently, they have to combine the first point and the second point, then reference the classification in International Design Classification as basis, considerate the features of products, the actual sales and the use in specific focus, to sort of the alleged infringement of design patent products and judge them become the method of practice, but it is still just an expedient measure.

Make similar products as the premise of the judgement of infringe design patent is not conducive to the protection of innovation, this should be abolished. Design patent protection is an innovative, practical, industrial product design. As the availability of this feature, it has to attach to a certain design of specific industrial products, but the main protection is the specific content of the design rather than the products. The reason of infringe a design patent not because of the products a re same, but because of they have the same content. The range of design patent right should not limit by the product categories. Without the permission of rights holders, use the design of patentees should be an infringement, including the use of same products categories and the use of different products categories[4].

4 The Perspective Issue of Design Patent Judgement: Normal Consumers' Observation

It is generally recognized, "when defining the design patent infringement, that is to determine whether there is similarity or it is the same between the accused of infringing products and products incorporating patented design, the standard should be made by normal consumers' observation and the ability of aesthetic rather than that of the professional designers'." [5]Chinese patent review guidelines

also adopted the same standard, that is the perspective of the normal consumers to judge whether the two products the same or similar design. In accordance with this standard, if a normal consumer confuses the accused infringing product and the patented design product, it is regarded that the accused infringing products and patented products are the same or similar products.

However, the perspective of the normal consumers is not proper. First problem is how to define the consumers. The concept of consumers here is not exactly the same as that in the Consumer Protection Law. Designs for daily necessities can be directly applied to the concept of consumers in Consumer Protection Law. But for the designs of non-daily necessities and raw materials for manufacture of daily necessities, the consumers will not but these products for daily use, thus they can not be the consumers in Consumer Protection Law. Therefore, using the concept of consumers in Consumer Protection Law is clearly inappropriate. Secondly, the "ordinary consumer perspective" is not a unified standard scale. Considering what is now been accepted by scholars, the "ordinary consumers" should be regarded as a special consumer group, that is the buyers or users of a particular commodity[6]. This definition may seem to obtain a fixed and uniform range for "ordinary consumers", but in practice, if we follow this perspective, there will be no unity since each product has its own special view of the infringement. Moreover, in real life, only a very small part of the design is completely different from the design being made public. Most designs are based on the design being made public and have new shape and pattern, or combine the color, shape, and pattern, or some modification, where the modified parts are the key parts that differ from other design. General people as "ordinary consumers", due to their cognitive level, are difficult to find out the key parts. Therefore, it is not conducive to the protection of the designers if the design pattern infringement totally depends on the perspective of "ordinary consumers[7]". Finally, the identified design perspective impairs the encouraging of innovation and development. The reason that "general consumer perspective" theory is supported is because of confusion theory is introduced in China's current design patent infringement, that is, the design will not cause confusion between this product and other products by the consumers. This theory is concerned only with the design to help differentiate the products, but ignores the real reason of the design patent protection. The main reason that a design protected by the patent law is, it introduces innovation and progress in practical use. It makes the daily products more attractive, in that sense, to improve people's living quality. It is the intellectual invention of the designer which monopoly protected by the patent, because it can promote the development of technology. It is against the original purpose of patent protection to consider the design equivalent to trade mark that does not have intellectual invention to avoid consumers' confusion. It is adverse to the development of design in China.

Therefore, with the purpose of encouraging design innovation, the perspective of design patent infringement should adopt the perspective of common designers or common technical staffs in the corresponding area of the innovation theory. This will not only enhance the quality of our design patent, but also standardize the perspective of design patent infringement with authority and science.

5 The Recognized Standards Issue of Design Patent Infringement Judgement: the Standards of Aesthetic Feelings

Patent Law of the P. R. China Article 2 said: "design means, the shape, pattern of the products or their combination, as well as color, shape and pattern combine which made a new design that beautiful and suitable for industrial applications." This provision obtained the legal status of aesthetic feeling in the authorization and infringement of appearance design. In judicial practice, it becomes a generally recognized and accepted standard that whether there exists the same aesthetic of appearance design between the accused infringing product and the patent product.

However, in trial practice, aesthetic criterion has led to confusions of the law enforcement standard of design patent infringement. The emergence of this confusion, needless to say, is mainly because the subjective ambiguity of aesthetics. What is 'aesthetics'? Ci Hai explains, "Aesthetics, specifically to the aesthetic feeling, that is, people's subjective feelings, experience, and mentally joy constitute the basis of aesthetic consciousness. Aesthetics is produced and developed in aesthetic practice. Its basic psychological factors contain feelings, perception, representation, association, imagination, emotion, thought, volition ect." People from different ages, classes, nationals and regions, as well as individual difference, result in aesthetic difference because of different ideas, habits, literacy, personality, hobbies and so on. Thus, "aesthetics" as one's subjective feeling of "beauty", is the eyes of the beholder wise see wisdom in personal knowledge. Defining a such strong personal subjective term as one of the standards to identify the design patent infringement, undoubtedly make the design patent infringement full of

randomness and uncertainty, which does not meet the requirements of legal authority.

Design patent protect the new design in industrial products. The expressions of the new design is in the products shape, pattern or other combination, as well as color and shape, pattern combined with the presentation of the new state. These are the objective reality, and there is no 'aesthetics' as such subjective factor. When identifying the design patent infringement, the accused infringing product will be compared to the design patent product shown in pictures or photos to decide whether they are identical or similar. There is only objective comparison no matter overall judgement method is used or partial comparison is used. Introducing "aesthetics", such subjective feelings, into the objective judgement, will not only unclear infringement, but also bring out evidence, cross-examination can not during the trial, ultimately lead to referee can not. As a standard, it should first be quantified and operable, yet "aesthetics" standard clearly does not meet this condition. Therefore, during the determination of infringement of design patent, aesthetic standards should be canceled.

6 The Comparison Methods Issue of Design Patent Infringement Judgement: the Important Part Compare Method

There are two different methods when compared the allegedly infringing products and patent products. One is overall comparison method that can identify the allegedly infringing design as identical or similar design just when it same or approximate with the entire design patent. The other is important part compare method which through comparing the most important part that cohesion the major intellectual of design patentee determine whether the two designs same or similar. In practice, only use an overall comparison or just the important part compare, either ignore the innovative part of design patent, either ignore the overall effect of design, both seem too one-sided. Therefore, judge a design patent infringement case in practice, combine those two methods above, and produce a "compare in whole, focus on observation and comprehensive judgments" method.

The important part compare method of "Focus on observation" caused some controversy. The Guidelines for Patent Examination amended by Intellectual Property Bureau of China in 2004, mentioned that, there are some products have some of the parts which easier to get consumer's attention than other part of the products, this part call the "important part" of the products. However, the Guidelines for Patent Examination released in 2006 delete the concept of "important part" and the regulations of how to identify an "important part". The main reason is in the process of invalidation announce and judicial review proceedings, the Patent Reexamination Board and the courts are not unified to the understanding of the "important part", it made the rules of identify have some conflicts. The Patent Reexamination Board thought, "important part" is a part that can get consumer's attention, one design patent product only can have one "important part". The court believes that "important part" should be the new point of a design, one design patent can have many "important part". Moreover, because when submitting application documents do not require the brief description of design, then different person will have different understanding for which part of the design is "important part". In the cases of infringement of design patent, disagreement on "important part" is disagreement on objects which on compare, this kind of disagreement will directly influence legal and social effects of the design patent trial.

The identification of "important part" is the inevitable process of a infringe design patent case, currently, China adopt the overall protection mode on design enables the "important part" identification become a troublesome problem. To solve this problem and improve the protection of China's design, drawing some of the foreign protection system of design is an effective way. In the partial design protection system, applicant have to submitted a patent application document including a brief description of the design, and the design chart have to reflect the range need to be protect which have to present by solid and dotted lines, that means the solid lines for the protection parts which is the important part of the design, and dotted lines represents the parts that does not require to protect which is the part that public known. The solid line represents the part design of the products. Combine this system with the overall protection system, on the one hand, when identified infringement, "important part" identification will be easier, and make the range of protection more clear; there won't any disagreement in the compare process. On the other hand, establish an important part design protection system will be better protecting the design innovation and effectively contain the design infringements which help to improve the quality of design patents, and promote the patent development in China.

Implementing Regulations of the Patent Law of P.R.China released in 2010, Article 2 said: "The brief explanation of the design shall include the name of the product design, purpose, main point of

design, and appoint the picture or photo which can presents the main point of design. The Guidelines for Patent Examination released in 2010, mentioned that change the concept of "main point of design" to: "Distinguished from the existing product design the shape, pattern and combination, or color and shape, the combination of patterns, or parts". Can be seen from these changes, China is gradually identified some of the design patent protection in the position to quickly solve some negative impact for overall protection.

7 Conclusions

Infringement of design patent is considered the foundation of the in-depth and effective management of the design patent. With the continuous development of design patent system in China, design protection will be based on the innovation theory and the corner stone of design patent infringement should be reflected the protective for design innovation that use the perspective of common designers; cancel the prerequisite of judgement about whether the products are similar products; cancel the aesthetic criterion and established partial design patent protection system. Certain and easy judgement of infringement always help the emphasis of design management changing from the number of management in form to the stop of patent infringement in substantial, it will satisfied the needs of patent management of marketing competition, attain the purposes of "protecting the legitimate interests of patent holders, encouraging invention and creation, promoting the application of inventions, improving the capacity of creation, and accelerating the technological progress and social development".

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