

RESOLUTION 6/2020

6/2020 决议

COMMITTEE ON INTELLECTUAL PROPERTY AND PRIVATE INTERNATIONAL LAW

知识产权和国际私法委员会

The 79th Conference of the International Law Association, held in Kyoto, Japan, November 29 – December 13, 2020:

国际法协会第 79 届大会，自 2020 年 11 月 29 日至 2020 年 12 月 13 日于日本京都召开：

RECOGNIZING that the enforcement of intellectual property rights in the global context of the information society raises new challenges to the traditional models of structuring transactions and adjudicating international disputes;

认识到在全球信息社会中保障知识产权对传统的交易结构和国际争议解决的模式提出了新的挑战；

APPRECIATING the importance and benefits of providing legal certainty with regard to the jurisdiction of courts and the law applicable, as well as fostering cooperation to enhance the cross-border recognition and enforcement of judgments in civil and commercial matters involving intellectual property claims;

重视在法院管辖权和法律适用方面需要具有确定性，以及促进合作以加强涉及知识产权诉讼的民商事案件的跨境承认及执行等方面的重要性和好处

BELIEVING that the adoption of model provisions on the private international law aspects of intellectual property, which may guide the interpretation and reform of national legislation and international instruments, contributes to the building of a more reliable and predictable legal framework;

相信采用这些有关知识产权的国际私法示范条款可以指导国家立法和国际法律文件的解释及改革，从而有助于建立更可靠和更可预测的法律框架；

TAKING INTO ACCOUNT the development of international, regional and national rules, as well as the previous efforts to draft model provisions in this field, especially those undertaken by the American Law Institute, the European Max Planck Group on Conflicts of Laws in Intellectual Property, the Japanese Transparency Project, and members of the Private International Law Association of Korea and Japan;

考虑到国际、各地区和国家在相关规则方面的发展程度，以及之前在该领域起草示范条款的工作，特别是美国法律协会、欧洲马克斯·普朗克知识产权法律冲突小组、日本透明项目、韩日国际私法协会成员等方面所作出的贡献；

HAVING CONSIDERED the reports of the Committee on Intellectual Property and Private International Law;

考虑了知识产权及国际私法委员会的报告；

ADOPTS the Kyoto Guidelines on Intellectual Property and Private International Law annexed to this Resolution;

通过了《知识产权和国际私法京都准则》，并附于本决议后；

COMMENDS the Guidelines to organizations, States and interested groups that are working on national, regional or international initiatives in the field, with a view to foster international cooperation, achieve greater legal certainty and an adequate balance of all interests involved;

推荐该准则给正在国内、区域或国际层面上致力于该领域的组织、国家和有关团体，

旨在促进国际合作，提升法律确定性并充分平衡所有有关利益；

REQUESTS the Secretary-General of the International Law Association to forward a copy of this Resolution and its annex to appropriate international organizations, in particular the Hague Conference of Private International Law and WIPO;

请求国际法协会秘书长向合适的国际组织（尤其是向海牙国际私法协会和世界知识产权组织）转寄一份此决议及附件的副本；

RECOMMENDS to the Executive Council that the Committee on Intellectual Property and Private International Law, having accomplished its mandate, be dissolved.

建议执行委员会解散已经完成任务的知识产权和国际私法委员会。

ANNEX

附件

Guidelines on Intellectual Property and Private International Law (“Kyoto Guidelines”)

知识产权和国际私法准则 (“京都准则”)

GENERAL PROVISIONS

一般条款

1. Scope of the Guidelines

1. 准则之适用范围

- (1) These Guidelines apply to civil and commercial matters involving intellectual property rights that are connected to more than one State.**

(1) 本准则适用于涉及多个国家有关知识产权之民商事事宜。

- (2) These Guidelines may be applied mutatis mutandis to claims based on unfair competition, if the matter arises from the same set of facts as relating allegations involving intellectual property rights, and on the protection of undisclosed information.**

(2) 本准则经适当修改后，可以适用于不正当竞争之诉，若该诉讼请求基于的事实同时触发了关于知识产权的诉讼请求，并可以适用于基于保护未披露信息的诉讼请求。

2. Definitions

2. 定义

- (1) “Intellectual property right” means copyright and related rights, patent, utility model, plant breeder’s right, industrial design, layout-design (topography) of integrated circuits, trademark and similar rights.**

(1) “知识产权”指版权及相关权利、专利、实用新型、植物育种者权利、工业设计、集成电路布图设计（拓扑）、商标及类似权利。

- (2) “Judgment” means any judgment rendered by a court or tribunal of any State, irrespective of the name given by that State to the proceedings that gave rise to the judgment or the name given to the judgment itself, such as decree, order, decision, or writ of execution. “Judgment” also includes court-approved settlements, provisional and protective measures, and the determination of costs or expenses by an officer of the court.**

(2) “判决”指任何国家的法院或裁判庭作出的判决，无论该国家如何命名作出该判决的程序以及如何命名该判决本身，例如法令、命令、决定或执行令。“判决”亦指法院批准的和解、临时性和保护性措施、以及法院官员对费用或支出的决定。

JURISDICTION

司法管辖权

Basic Forum

基本法院

3. Defendant's Forum

3.被告法院

Unless otherwise provided for in these Guidelines, the defendant should be subject to the jurisdiction of the courts of the State in which he or she is habitually resident. The courts' jurisdiction shall be territorially unlimited.

除本准则另有规定外，被告应受其经常居所地所在国家法院的管辖。在此情况下，该法院的管辖权应不受领土限制。

Alternative Fora

其他法院

4. Contracts

4.合同

In disputes concerning intellectual property license or transfer contracts, a person may be sued in the courts of the State for which the license is granted or the right is transferred; the court's jurisdiction shall be territorially limited to the State in which the court is situated.

对于涉及知识产权许可或转让合同的纠纷，授予许可或转让权利的国家的法院可以行使管辖权；该法院的管辖权应受限于该法院所在国之领土。

5. Infringements

5. 侵权

In a case of an alleged infringement a person may be sued:

在涉嫌侵权的案件中，当事人可以在以下法院中被起诉：

- (a) In the courts of the States where the alleged infringer has acted to initiate or further the alleged infringement; the courts' jurisdiction to award remedies arising from those acts shall be territorially unlimited; or**

(a) 所指控的侵权人已经实施侵权行为或加深侵权行为地所在国的法院；该法院对此种侵权行为作出救济之管辖权不受所在国之领土限制；或者

- (b) In the courts of the States where the infringement may have caused direct substantial harm unless it could not be anticipated that the infringement would cause that harm there; the courts' jurisdiction shall be territorially limited to the State in which the court is situated.**

(b) 在该侵权行为可能造成直接实质损害的国家法院，除非无法预料到该侵权行为会在该国造成损害；该法院的管辖权应受到所在国之领土限制。

6. Statutory Remuneration for the Use of Works or Subject-Matter of Related Rights

6. 使用作品或相关权利标的之法定报酬

In cases concerning disputes on a statutory remuneration for the lawful use of copyrighted works or the subject-matter of related rights, a person may be sued in the courts of the State where the right to remuneration accrues; the court's jurisdiction shall be territorially limited to the State in which the court is situated.

对于涉及合法使用受到著作权保护的作品或相关权利标的之法定报酬的纠纷，产生应得报酬权的国家的法院可行使管辖权；该法院的管辖权应受到该法院所在国之领土限制。

7. Consolidation

合并诉讼

A plaintiff bringing an action against a defendant in a court of the State in which the defendant is habitually resident in accordance with Guideline 3 may proceed in that court against other defendants not habitually resident in that State if –

若满足以下条件，根据本准则第 3 条原告可在被告的经常居所地所在国家的法院提起诉讼，该诉讼可同时涵盖未经常居住于该国家的其他被告：

(a) The dispute involves the same or substantially related intellectual property rights granted for one or more States, and

(a) 该争议涉及向一个或多个国家授予相同或实质上相关的知识产权，并且

(b) The claims against the defendant habitually resident in that State and the other defendants are so closely connected that they should be adjudicated together to avoid a serious risk of inconsistent judgments, and

(b) 对于经常居所地不位于该国的被告的诉求和对于其他被告的诉求之间关系如此密切，以至于这些诉求应被一起裁决，以免产生判决不一致的严重风险，并且

(c) As to each defendant not habitually resident in that State, there exists a substantial connection between the intellectual property rights at issue and the dispute involving that defendant.

(c) 对于经常居所地不位于该国的每个被告，该被告所涉纠纷与知识产权问题之间存在着实质联系。

8. Title and Ownership

8. 产权和所有权

In cases concerned only with title and ownership, the court of the State where the intellectual property right exists or for which application is pending shall have jurisdiction.

对于仅涉及产权和所有权的案件，涉案知识产权所存在的国家或者正在审核该知识产权申请的国家的法院应享有管辖权。

Other Fora

其他法院

9. Choice of Court

9. 法院选择

The parties to a particular relationship may designate in an agreement a court to have jurisdiction over any dispute that has arisen or may arise in connection with that

relationship. The chosen court shall have jurisdiction to decide all contractual and non-contractual obligations and all other claims arising from that legal relationship unless the parties express their intent to restrict the court's jurisdiction. Such jurisdiction shall be exclusive unless the parties have agreed otherwise.

具有特定关系的当事方可以在协议中指定某法院对于该特定关系所产生的或者可能产生联系的任何争议具有管辖权。除当事各方作出了限制该法院的管辖权的意思表示之外，该法院对于所有该特定关系所产生的合同和非合同义务以及其他诉讼请求应享有管辖权。除当事各方另有协议之外，该管辖权为专属管辖权。

10. Submission and Appearance

10. 接受管辖及出庭

A court shall have jurisdiction if the defendant appears and does not contest jurisdiction in the first defense.

如果被告出庭并且没有在第一次抗辩中提出管辖权异议，则该法院享有管辖权。

11. Validity Claims and Related Disputes

11. 针对知识产权有效性的诉讼请求及相关争议

(1) In proceedings which have as their main object the grant, registration, validity, abandonment, or revocation of a registered intellectual property right the court of the State of registration shall have exclusive jurisdiction.

(1) 对于主要目的为知识产权之授予、注册、有效性、放弃或撤销注册等方面的案件，注册国家的法院应具有专属管辖权。

(2) Any other court having jurisdiction may decide on these matters when they arise in proceedings other than those referred to in paragraph 1. However, the resulting decision shall not have any effect on third parties.

(2) 任何其他具有管辖权的法院都可以对这些事项作出裁决若它们发生在第 1 段所列之外的案件中。但是，由此产生的裁决对第三方应没有效力。

12. Declaratory Actions

12. 确认之诉

A court may hear an action for a negative or a positive declaration on the same ground as a corresponding action seeking substantive relief.

法院可以采用受理寻求实质性救济的诉讼相同的理由来受理否定确认之诉或肯定确认之诉。

13. Provisional and Protective Measures

13. 临时性和保护性措施

(1) A court having jurisdiction as to the merits of the case shall have jurisdiction to order provisional and protective measures.

(1) 对于案件的实质争议具有管辖权的法院，应有管辖权决定采取临时性和保护性措施。

(2) Other courts shall have jurisdiction to order provisional and protective measures within their territory.

(2) 其他法院应有管辖权决定在其领土范围内采取临时性和保护性措施。

14. Scope of Injunctions

14. 禁令的范围

The scope of an injunction is limited by the extent of the jurisdiction of the court. In addition, the scope shall not be broader than necessary to protect the intellectual property rights enforced.

禁令的范围受法院管辖权的限制。此外，其范围不应超出保护所要实现的知识产权所必需的范围。

15. Counterclaims

15. 反诉

A court which has jurisdiction to determine a claim under these Guidelines shall also have jurisdiction to determine a counterclaim arising out of the same set of facts on which the original claim is based.

根据本准则对某项诉讼请求有权进行管辖的法院，也应对与原始诉讼请求具有相同的事实基础所引起的反诉享有管辖权。

16. Insufficient Grounds for Jurisdiction

16. 管辖权依据不足

Insufficient grounds for exercising jurisdiction include *inter alia*:

管辖权依据不足包括：

(a) the presence of (any) assets, physical or intellectual property, or a claim of the defendant in a State, except when the dispute is directly related to that asset;

(a) (任何)资产、实物或知识产权、或被告的诉讼请求位于一国境内，
除非争议与该资产直接相关；

(b) the nationality of the plaintiff or the defendant;

(b) 原告或被告的国籍；

(c) the mere residence of the plaintiff in that State;

(c) 原告在该国家仅有居所；

(d) the mere conduct of commercial or other activities by the defendant in that State, except when the dispute is related to those activities;

被告仅在该国进行商业或其他活动，除非争议与这些活动有关；

(e) the mere presence of the defendant or the service of process upon the defendant in that State; or

被告仅在该国出现或在该国被送达；或

(f) the completion in that State of the formalities necessary to execute an agreement.

在该国完成了执行协议的必要手续。

Coordination and Cooperation

协调与合作

17. Proceedings Between the Same Parties on the Same Cause of Action

17. 相同当事人之间因同一诉讼理由提起的诉讼

- (1) **Where proceedings between the same parties on the same cause of action are brought in the courts of more than one State, such courts shall consider the coordination of proceedings in the following terms:**

(1) 如果相同当事人之间基于同一诉讼理由在多个国家的法院提起诉讼，则这些法院应按以下条款考虑协调诉讼程序：

- (a) **Where the court that is not first seized has authority to suspend its proceedings on grounds of *lis pendens*, it shall do so until such time as the jurisdiction of the court first seized is established, and thereafter it shall terminate its proceedings. A suspension may be lifted if the proceedings in the court first seized does not proceed within a reasonable time or this court concludes that it is not the appropriate forum to hear the dispute.**

(a) 如果非首先受理的法院有权以未决诉讼为理由暂停诉讼程序，则该法院应暂停该诉讼程序直到首先受理的法院确认管辖权，且在此之后该法院应终止该诉讼程序。如果首先受理的法院未在合理时间内进行诉讼，或者认为其不适合审理此争议，非首先受理的法院可以取消暂停该诉讼的决定。

- (b) **Where the court that is not first seized has authority to dismiss on *forum non conveniens* grounds or to transfer to a more convenient forum, it shall consider which court is the most convenient forum, taking into account the private interests of the litigants, the interests of the public, and administrative issues. If the court first seized is more convenient, the court second seized shall dismiss or transfer the case unless the court first seized has dismissed or transferred the case.**

(b) 如果非首先受理的法院有权依据不方便法院原则驳回案件，或者有权将该案件移交更方便的法院，则该法院应当充分考虑后决定哪一个法院是该案件的最方便法院，考虑因素应当包括当事人的私人利益、公众利益以及行政管理问题等。如果首先受理的法院是更方便的法院，则第

二个受理的法院应当驳回或移交该案件，除非首先受理的法院已经驳回或移交了该案件。

(2) This Guideline does not apply if:

(2) 如果下列条件之一出现，则本准则不再适用：

(a) the proceeding is within the exclusive jurisdiction of the court subsequently seized;

(a) 非首先受理的法院对涉案诉讼程序享有专属管辖权；

(b) the proceeding is for provisional or protective measures; or

(b) 该诉讼程序是关于临时性或保护性措施的；或

(c) it is shown by the party invoking the jurisdiction of the court subsequently seized that a judgment of the court first seized would not be recognized in the State of the court subsequently seized.

(c) 申请非首先受理的法院行使管辖权的一方可以证明首先受理的法院所做之判决在非首先受理的法院所在国家不受承认。

18. Related Proceedings

18. 相关诉讼程序

Where related proceedings are pending in the courts of more than one State, any of the courts may take any step permitted by its own procedures that will promote the fair and efficient resolution of the related proceedings considered as a whole. The scope of this guideline includes both consolidating proceedings in one court and coordinating the conduct of proceedings in different courts.

如果相关案件正在一个以上国家的法院进行审理，这些法院均可以采取本国程序法允许的任何步骤，只要该步骤可以促进相关诉讼程序作为一个整体公正且有效的解决。本准则的适用范围既包括在一个法院中的合并诉讼程序，又包括在不同法院之间诉讼程序的协调。

APPLICABLE LAW

准据法

General Rules

一般性规则

19. Existence, Scope and Transferability (*lex loci protectionis*)

19. 存在、范围和可转让性（保护地法）

The law applicable to determine the existence, validity, registration, duration, transferability, and scope of an intellectual property right, and all other matters concerning the right as such, is the law of the State for which protection is sought.

涉及确定知识产权的存在、有效性、注册、期限、可转让性、知识产权的范围，和所有其他涉及该知识产权的事项的适用法律，是寻求保护的国家的法律。

20. Initial Ownership and Allocation of Rights

20. 初始所有权及权利分配

(1) (a) Initial ownership in registered intellectual property rights, unregistered trademarks and unregistered designs is governed by the law of the State for which protection is sought.

(1) (a) 涉及已注册的知识产权、未注册的商标以及未注册的外观设计的初始所有权的适用法律，是寻求保护的国家的法律。

(b) In the framework of a contractual relationship, in particular an employment contract or a research and development contract, the law applicable to the right to claim a registered intellectual property right is determined in accordance with Guidelines 21 to 23.

(b) 对于在合同关系的框架内的，特别是劳动合同或研究及开发合同，已注册知识产权的适用法应当根据本准则第 21 至 23 条确定。

(2) (a) Initial ownership in copyright is governed by the law of the State with the closest connection to the creation of the work. This is presumed to be the State in which the person who created the subject-matter was habitually resident at the time of creation. If the protected subject-matter is created by more than one person, they may choose the law

of one of the States of their habitual residence as the law governing initial ownership. This paragraph applies mutatis mutandis to related rights.

(2)(a) 版权的初始所有权受与该作品创作联系最密切的国家的相关法律管辖。

该国默认是创作该作品标的之人在创作时的经常居所地所在的国家。如果受保护的作品的标的是由多个人创作的，则他/她们可以选择其经常居所地所在的国家之一的法律作为管辖初始所有权的法律。本项条文经修改后适用于相关权利。

(b) If the underlying policy of the law of the State for which protection is sought so requires even in international situations, the allocation of rights which cannot be transferred or waived is governed by the law of that State.

(b) 即使在跨国案件中，寻求保护的国家的法律承载的政策有此要求，分配不能转让或放弃的权利受该国法律管辖。

Contracts

合同

21. Freedom of Choice

21. 当事人意思自治

(1) Parties may choose the law governing their contractual relationship.

(1) 合同缔约方可以选择管辖其合同关系的法律。

(2) Such a choice of law shall not, however, have the result of depriving the creator or performer of the protection afforded to him/her by the provisions that cannot be derogated from by agreement under the law that, in the absence of choice, would have been applicable pursuant to Guideline 22.

(2) 但是，上述的法律选择的结果不应剥夺给予创作者或表演者根据法律必须适用的条款应当享有的保护，这些法律指的是，在缔约方没有选择法律的情况下，根据本准则第 22 条所应当适用的法律。

22. Absence of Choice

22. 缔约方没有选择适用法

(1) In the absence of choice of law by the parties pursuant Guideline 21, a contract other than an employment contract shall be governed,

(1) 如果缔约方没有依据本准则第 21 条选择适用法，合同（除劳动合同外）应当适用如下法律：

(a) if the contract deals with intellectual property granted for one State only, by the law of this State, unless it is clear from all the circumstances of the case that the contract is manifestly more closely connected with another State. Then the law of that other State shall apply;

(a) 如果合同涉及只授予一国的知识产权，则适用该国的法律，除非所有与本案相关的情形都指出该合同与另一国家之间有明显的更密切联系。则另一国家的法律应当适用；

(b) if the contract deals with intellectual property granted for more than one State, by the law of the State with which the contract is most closely connected; in determining this State, the court shall take into consideration among other possible factors:

(b) 如果合同涉及授予多国的知识产权，则适用与该合同有最密切联系的国家的法律；在考虑决定哪一国与该合同有最联系密切时，法院的考虑因素中应当包括以下因素：

- the common habitual residence of the parties;

当事人的共同经常居所地；

- the habitual residence of the party effecting the performance characteristic of the contract;

影响该合同特征履行的当事人的经常居所地；

- the habitual residence of one of the parties when this habitual residence is located in one of the States covered by the contract.

如果当事人一方的经常居所地位于该合同所包含的国家时，该当事人的经常居所地。

(2) For the purpose of this provision, the habitual residence of a party shall be determined at the time of conclusion of the contract.

(2) 就本条而言，当事人的经常居所地应根据合同成立之时的条件确定。

23. Employment Contracts

23. 雇佣合同

(1) An employer and its employee whose efforts give rise to an intellectual property right may choose the law governing their contractual relationship in accordance with Guideline 21.

(1) 雇主和在知识产权创造过程中作出贡献的雇员，可以根据本准则第 21 条决定

合同适用法。

Such a choice of law shall not, however, have the result of depriving the employee of the protection afforded to him by the provisions that cannot be derogated from by agreement under the law that, in the absence of choice, would be applicable pursuant to paragraphs 2 and 3.

但是，上述法律选择结果不能剥夺雇员依据法律必须适用的条款提供的保护，这些法律指的是，在缔约方没有选择法律的情况下，根据下文第（2）和（3）段可以适用的法律。

- (2) In the absence of choice of law by the parties, the contractual relationship between employer and employee shall be governed by the law of the State in which or, failing that, from which the employee habitually carries out his work in performance of the contract.**

（2）在当事人没有选择法律的情况下，雇主和雇员之间合同关系应当适用雇员的经常工作地所在国，如果没有经常工作地的话，该雇员为工作目的经常旅行到访或者在此地工作的国家的法律。

The State where the work is habitually carried out shall not be deemed to have changed if the employee is temporarily employed in another State.

经常工作地所在国不会因为该雇员临时雇佣于另一国而改变。

- (3) Where it is clear from all the circumstances of the case that the contract is more closely connected with a State other than that indicated in paragraph 2, the law of that other State shall apply.**

（3）如果案件中所有情形均反映出涉案合同与某国家的联系明显密切于上文第

（2）段所述之国家，则具有更紧密联系的国家的法律应被适用。

24. Formal Validity

24.形式有效性

- (1) Any contract dealing with intellectual property rights shall be formally valid to the extent that it satisfies the formal requirements:**

（1）若满足以下形式要求，任何涉及知识产权的合同应当被视为形式上有效：

(a) of the law of the State which governs the contract pursuant Guidelines 21-23, or

（a）符合本准则第 21 至 23 条所确定的适用法所规定的形式要求；或者

(b) of the law of the State in which either of the parties has its habitual residence at the time of the conclusion of the contract, or

(b) 符合任何一方当事人在订立合同之时经常居所地的法律规定的形式要求；或者

(c) of the law of any other State with which the contract is connected.

(c) 符合与该合同有关系的其他国家的法律所规定的形式要求。

(2) This provision shall not deprive creators, performers and employees of the protection resulting from Guideline 21 paragraph 2 and Guideline 23, paragraph 1.

(2) 本条不能用于剥夺根据本准则第 21 条第 (2) 段和第 23 条第 (1) 段所给予创作者、表演者和雇员的保护。

Infringements

侵权

25. Basic Rule on Infringement

25. 侵权的基本规则

(1) The law applicable to the infringement of an intellectual property right is the law of each State for which protection is sought.

(1) 知识产权侵权行为所适用法律是寻求保护的每一个保护国的法律。

(2) The law applicable to the remedies for the infringement may be chosen by the parties.

(2) 侵权行为的救济所适用的法律可以由当事人选择决定。

26. Law Applicable to Ubiquitous or Multi-state Infringements

26. 适用于普遍存在的或涉及多个国家的侵权行为的法律

(1) When the infringement in multiple States is pleaded in connection with the use of ubiquitous or multinational media, the court may apply to the infringement as a whole the law or laws of the State(s) having an especially close connection with the global infringement. Relevant factors to determine the applicable law (or laws) in these situations include:

(1) 如果主张发生在多个国家的侵权行为与普遍的或者跨国媒体有关，则法院可以将与该全球化侵权行为有着极为密切联系的国家的法律适用于该侵权行为的整体。判断这种情况的法律适用时，可考虑的因素包括：

- the place where the harm caused by the infringement is substantial in relation to the infringement in its entirety;

就整体侵权行为而言，重大损害所在地；

- the parties' habitual residences or principal places of business;

当事人的经常居所地或者主要营业地；

- the place where substantial activities in furthering the infringement have been carried out.

导致侵权的实质行为发生地。

(2) In situations where paragraph (1) is applied, any party may prove that, with respect to particular States covered by the action, the solution provided by any of those States' laws differs from that obtained under the law(s) chosen to apply to the case as a whole. The court must take into account such differences when fashioning the remedy.

(2) 在适用第（1）段的情况下，任何一方均可证明，就该诉讼所涵盖的特定国家而言，这些国家的法律所提供的解决方案与选择适用到整体案件的法律所获得的解决方案不同。则法院在决定救济时，必须考虑到这种差异。

(3) Paragraphs (1) and (2) above may apply mutatis mutandis in cases of secondary or indirect infringements of intellectual property rights.

(3) 上文第（1）和（2）段，经修改后，均可适用于涉知识产权的二次或间接侵权行为。

27. Collective Rights Management in the Field of Copyright and Related Rights

27. 版权和相关权的集体权利管理

(1) The law of the State where a collective rights management organization has its actual seat of administration shall govern

(1) 集体权利管理组织在其实际管理地所在国的法律应适用于：

(a) the requirements for the specific corporate structure of collective rights management organizations;

(a) 集体权利管理组织所要求具备的特定公司架构；

(b) the rights, conditions and principles concerning the relationship of the right holder, as well as of another collective rights management organization representing right holders, vis-à-vis a collective rights management organization, such as

(b) 一集体权利管理组织同权利人，以及代表权利人的另一个集体权利管理组织，之间关系的有关权利、条件和原则，例如：

(i) the right and conditions for becoming a member of this organization;

(i) 成为该组织成员的权利和条件；

(ii) the right and conditions for entrusting rights to this organization;

(ii) 将权利委托给该组织的权利和条件；

(iii) the rights and conditions for withdrawing the management of rights from this organization;

(iii) 从该组织撤回管理权利的条件和权利；

(iv) the requirements regarding the calculation and distribution of the organization's revenue to the right holders and other collective rights management organizations representing right holders; and

(iv) 向权利人和代表权利人的另一个集体权利管理组织计算和分配该组织收入的要求；

(v) the rights and conditions on access to alternative dispute resolution to be offered by the collective rights management organization; and

(v) 该组织提供的替代性争议解决途径之使用的权利和条件；以及

(c) in absence of a choice of law by the parties, the contract under which the right holder entrusts rights to this organization.

(c) 在当事人没有选择适用法时，权利人将权利委托给该组织的合同。

(2) The law of the State for which protection is sought shall govern

(2) 寻求保护国的法律应适用于：

(a) the presumption that a collective rights management organization is empowered to seek protection for certain works or subject-matter of related rights;

(a) 集体权利管理组织有权为某些作品或相关权利标的寻求保护的推定；

(b) mandatory collective rights management;

(b) 强制性集体权利管理；

- (c) the power of an individual collective rights management organization to grant licenses or collect statutory remuneration without prior consent of the right holder;**

(c) 某一集体权利管理组织不经权利人事先同意，进行授权许可或者收取法定报酬的权力；
 - (d) the issue of whether and under which conditions a collective rights management organization has to license rights to users; and**

(d) 集体权利管理组织是否以及在什么条件下必须向用户许可权利的问题； 和
 - (e) the requirements regarding the calculation of the royalty rates and statutory remuneration.**

(e) 特许权使用费率和法定报酬的计算要求。
- (3) The law of the forum shall govern legal standing of a collective right management organization before a court.**
- (3) 法院所在地法应当适用于集体权利管理组织在法院的当事人资格问题。
- (4) This guideline applies without prejudice to the applicable competition law rules.**
- (4) 本准则的使用不影响竞争法的适用。

Other Provisions

其他条款

28. Public Policy

28. 公共政策

The application of the law determined under these Guidelines may be refused only to the extent that its effects would be manifestly contrary to the public policy of the forum.

根据本准则所确定的适用法仅在其适用后果明显违背法院所在地的公共政策时，才可以在相抵触的范围内不以适用。

29. Overriding Mandatory Provisions

29. 强制性规则

(1) Nothing in these Guidelines shall restrict the application of the overriding mandatory provisions of the law of the forum.

(1) 本准则并不限制法院地的强制性规则的适用。

(2) When applying under these Guidelines the law of a State to a contract, the court may give effect to the law of another State where the obligations arising out of the contract have to be or have been performed.

(2) 在根据本《准则》对合同适用一国的法律时，若合同义务必须或已在另一国履行法院可考虑适用该另一国法。

30. Renvoi

30. 反致

The application of the law of any State determined under these Guidelines means the application of the rules of law in force in that State other than its rules of private international law.

本准则所确定的任何国家的法律适用均指该国在国际私法规定之外的其他法律。

31. Arbitrability

31. 可仲裁性

When assessing the arbitrability of disputes concerning intellectual property rights, courts and arbitral tribunals shall take into consideration the law of the arbitration, to the extent that the rights in dispute have a close connection with it, and that of the State

of protection, particularly insofar as the award has to be recognized and enforced in that State.

在评估涉及知识产权争议的可仲裁性时，法院和仲裁庭应当考虑适用（1）仲裁适用的法律，若争议的权利与之有密切的联系，和（2）寻求保护国的法律，特别是在裁决必须在该国得到承认和执行的情况下。

RECOGNITION AND ENFORCEMENT

承认和执行

32. Object of Recognition and Enforcement

32. 承认和执行的对象

(1) A foreign judgment may be recognized and enforced in accordance with this part of the Guidelines.

(1) 可以根据本准则此章节承认和执行外国判决。

(2) If a judgment is still subject to appeal in the State of the rendering court, or if the period for launching ordinary review has not expired in that State, the requested court may stay the recognition and enforcement until the appeal is decided or the period expires, or may make it a condition of the recognition and enforcement that the party seeking it provide security.

(2) 如果判决仍可在作出判决的法院所在国被上诉，或者该国的通常复审的期限未过，被请求承认和执行的法院可以中止承认和执行直到上诉已被裁定或该复审期限已过，或者可要求当事人提供保证作为承认和执行的条件。

(3) Provisional and protective measures adopted without prior hearing of the adverse party and enforceable without prior service of process to that party shall not be recognized or enforced.

(3) 若临时性和保护性措施被采取之前并未听取对方当事人的抗辩，并且实施该措施无需事先送达该当事人，则该措施不应被承认或执行。

33. Effects of a Foreign Judgment

33. 外国判决的效力

The effects of a foreign judgment, including its enforceability, in the requested State shall to the extent possible be the same, and under no circumstances greater, than in the State of origin.

外国判决在被请求承认和执行国的效力，包括其执行力，应当尽可能等同与，在任何情况下不应当大于，其在判决作出国所产生的效力。

34. Grounds for Non-Recognition and Non-Enforcement

34. 不承认和执行的理由

(1) A court shall not recognize and enforce a foreign judgment if:

(1) 如果存在下列条件，则法院可以不承认和执行外国判决：

(a) such recognition or enforcement would be manifestly incompatible with a fundamental public policy of the requested State;

(a) 承认或执行判决与被请求国的基本公共政策明显不符；

(b) the proceedings leading to the judgment were manifestly incompatible with the fundamental principles of procedural fairness of the requested State;

(b) 作出该判决的程序与被请求国程序公正的基本原则明显不符；

(c) the judgment was rendered by default where

(c) 该判决是缺席判决，若

i) the defendant to the proceeding was not adequately and timely notified of the proceeding, or

i) 该诉讼的被告没有被充分且及时地接到该诉讼的通知；或者

ii) the defendant was deprived of an adequate and meaningful opportunity to present its case before the rendering court;

ii) 被告被剥夺了充分且有意义的在作出判决的法院出庭的机会；

(d) the judgment is inconsistent with a prior judgment rendered in the requested State that has preclusive effect;

(d) 该判决与被请求国作出的具有排他效力的在先判决不一致；

(e) the judgment is inconsistent with an earlier judgment given in another State between the same parties and having the same cause of action, provided that the earlier judgment fulfils the conditions necessary for its recognition in the requested State;

(e) 该判决与同一当事人在另一国因相同诉讼理由得到的在先判决不一致，且该在先判决符合被请求国承认所必需的条件；

(f) the rendering court exercised jurisdiction in violation of the rules of jurisdiction under these Guidelines.

(f) 作出判决的法院行使的管辖权违反了本准则的管辖权规则。

- (2) A court may decline to recognize and enforce a foreign judgment if the rendering court designated the applicable law in violation of the rules in Guidelines 20 – 24 protecting creators, performers and employees.**

(2) 法院可以拒绝承认和执行判决，如果作出判决的法院所适用的法律违反了本准则第 20—24 条有关对于创作者、表演者和雇员保护的规定。

- (3) In assessing the rendering court's jurisdiction, the requested court is bound by the findings of fact made by the rendering court in the original proceeding.**

(3) 在评估作出判决的法院的管辖权时，被请求承认和执行的法院受作出判决的法院在判决程序中所查明的事实约束。

- (4) Without prejudice to such review as may be necessary for the application of Guidelines 33 and 34, the requested court shall not review a foreign judgment as to its merits.**

(4) 在不影响依据本准则第 33 条和第 34 条可能需要进行审查的情况下，被请求法院不应审查外国判决的实体问题。

35. Partial and Limited Recognition and Adaptation

35. 部分和有限的承认和调整

- (1) If a foreign judgment contains elements that are severable, one or more of them may be separately recognized and enforced.**

(1) 如果外国判决包含可分割的要素，其中一个或多个要素可被单独承认和执行。

- (2) If a foreign judgment awards non-compensatory, including exemplary or punitive, damages that are not available under the law of the requested State, recognition and enforcement may be refused if, and only to the extent that, the judgment awards damages that do not compensate a party for actual loss or harm suffered and exceed the amount of damages that could have been awarded by the courts of the requested State.**

(2) 如果外国判决授予了根据被请求承认和执行国的法律无法获得的非补偿性赔偿，包括惩戒性或惩罚性赔偿，该判决不被拒绝承认和执行的范围仅限于该判决裁定的赔偿不能补偿一方当事人所遭受的实际损失或伤害，且超过被请求国法院可能裁定的赔偿金额。

- (3) If a judgment contains a measure that is not known in the law of the requested State, that measure shall, to the extent possible, be adapted to a measure known in the law**

of the requested State that has equivalent effects attached to it and that pursues similar aims and interests.

(3) 如果外国判决中含有被请求承认和执行国的法律所缺少的措施，那么该措施应尽可能地被请求国调整为该国法律所允许的具有同等效力且追求类似目的与利益的措施。

(4) If a foreign judgment includes a decision concerning the validity of a registered intellectual property right and the rendering court is not a court of the State of registration, the decision on the validity shall be effective only between the parties to which the foreign judgment pertains.

(4) 如果外国判决决定了有关已登记的知识产权的效力，而作出判决之法院并非登记国之法院，则有关效力的决定仅在该外国判决所涉及之当事人间有效。

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