TRIPs 架構下智慧財產權司法救濟程序之研究：

以美台現行實務運作模式之比較分析為核心

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摘　要

關於對智慧財產權之救濟，應包含實體部分與程序部分兩個層次，以往多數之研究係專注於實體的層面，較少涉及救濟程序相關議題之探討。本研究係採取定軸性的比較研究，以世界貿易組織「與貿易有關的智慧財產權協定」(Agreement on Trade-Related Aspects of Intellectual Property Rights，以下均簡稱 TRIPs)中有關智慧財產權司法救濟程序之程序保障、迅速簡要、證據調查、終局救濟、刑事制裁等五大重要架構為軸心，對美國及台灣與智慧財產權有關之司法救濟在法制與實務上之運作模式分別進行探討與比較之研究。

本論文係先就研究動機、範圍、方法及論文架構作一介紹，再進而說明 TRIPs 之產生過程與重要義務遵守原則，接著則就 TRIPs 有關司法救濟程序中相關條文之具體規定與規範目的，逐一加以探討。繼之則以上述架構為軸心，分別研究目前美國及台灣與智慧財產權有關之司法救濟程序。最後則擬透過學理與實務裁判之檢視，就上述美台有關智慧財產權之司法救濟程序在 TRIPs 架構下進行比較。

基於上述之分析與探討，本論文從承審法官個人即可開始參考採行到必須涉及整體司法體系制度上之變革，認為我國：（1）為兼顧聲請人、相對人兩造及公共之利益，實務界應重建核發定暫時狀態假處分之標準。（2）法院何時始應於訴訟進行中為保障訴訟當事人營業秘密之裁定，以及該裁定之實質內涵為何，法院之認定標準與實質內涵均應予以精確化。（3）由於涉及智慧財產權之訴訟兼具複雜性與時效性，故應儘量將訴訟資源集中於訴訟雙方當事人有爭議的部分，法院可逕就實體無爭議之案件為法律上之裁判。（4）為避免聲請人濫用聲請保全證據之權利，聲請證據保全之一造應釋明在實體訴訟案件中勝訴之可能性並繳交擔保金。（5）為期有效率地解決具複雜性的智慧財產權案件，法院實可考慮先行要求兩造參與可促進解決爭端、或至少可有效整理爭點的「先行中立評估」制度。（6）

由於台灣現行專利法第八十五條第一項之規定忽略專利權人於專利被侵害期間尚有其他原因可能造成營業損失，違反損害賠償之基本原則，故建議應予刪除該項之規定，修正現行專利權被侵害時計算損害額度之方式。（7）爲期充分保障專利案件當事人之權益，並幫助法院瞭解相關特殊之技術，實有必要建立專利律師制度。又爲防止侵權人輕率並明知地侵害有效之專利權，並回復被侵害之一造至被侵害前之狀態，法院在侵權行爲係出於明知之情形下，應得判給勝訴之一造合理的律師費用。（8）爲避免與智慧財產權有關的單一案件因司法二元化下產生雙頭馬車的現象，並就司法資源爲更有效之利用，實有成立智慧財產權之專業法院的必要。

The Research on Intellectual Property Litigation in the Framework of the TRIPs -Focusing on the Analysis and Comparison of the Practice Models of the U.S. and Taiwan

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ABSTRACT

With regard to the remedies of the intellectual property rights, a thorough study should contain a substantive part and a procedural part. Many studies focus on the substantive issues, while few researches have paid attention to the procedural issues in the past. This study uses the comparative method under fixed frameworks – using five of the most important frameworks of the enforcement part of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs). These five parts are procedural safeguards, the swiftness and briefness of proceedings, discovery of the evidence, final remedies, and criminal proceedings. This study is a comparative research on the legal systems and the practice models of the intellectual property litigation of the United States and Taiwan.

At first, the author will introduce the motive, scope, approach, and framework of this thesis, and then turn to the negotiation process of TRIPS and the important national obligations under TRIPs. The following chapter will explore the specific stipulations and objectives of the enforcement provisions of TRIPs. Under the framework mentioned above, the author will research contemporary intellectual property litigation in the U.S. and Taiwan. Finally, through the survey of academic issues and judicial practices, this study will make a comparison between the intellectual property litigation system of the U.S. and that of Taiwan's under the framework of TRIPs.

Based on these analyses and discussions, and from the perspective of what a judge can do immediately by himself/herself to improve the judicial system, the study draws the following conclusions for Taiwanese law: (1) The judge should reestablish the standard of granting the injunctive order to protect the interests of all the parties and the public. (2) The law should be more precise as to when a protective order should be awarded during litigation and what the content of the order should be. (3) Due to the requirement of speediness and the complexity of intellectual property litigation, the judicial resources should be concentrated on the issues over which the parties are disputing, and thus the court could be able to make a judgment directly, as a matter of law, where no genuine issue of material fact is present. (4) For fear that a party may abuse the right to request for production of documents and real evidence, the moving party must demonstrate that the movant will probably succeed on the merits and provide security. (5) To effectively solve complicated disputes over intellectual property rights, it is advisable for the courts to require the parties to participate in an "early neutral evaluation," in order to facilitate settlements or at least to narrow the issues. (6) Because the Paragraph 1 of Article 85 of Taiwan's Patent Law omits some other causes that may cause injury to the patentee, and hence violates the basic principle of compensatory damages, this thesis suggests that this Paragraph should be deleted and the method of calculating damages also be revised. (7) To protect the parties' rights and help the judge to know the special technology involved in patent litigation, it is essential to establish the mechanism of "patent attorney." Also, to prevent willful and reckless infringement of valid patents, and to return the injured party to the position before injury, the court should be able to award reasonable attorneys' fees to the prevailing party where the infringement is willful. (8) To avoid disagreement between two different court systems involving in the same case, and to make more effective use of judicial resources, it is imperative to create a special court for intellectual property cases.

誌　謝

感謝主，讓我有幸得因許多貴人在各方面的幫助而能完成本篇碩士論文。

首先，衷心感謝所長劉尚志老師的栽培與關懷，使我得以一窺堂奧，踏進這令人期待的新天地並能持續不懈。也因所長及王敏銓老師兩位指導教授就論文架構及內容悉心指導，始能去蕪存菁，符合學術的基本要求。特別感激台灣大學法律學院蔡明誠老師於口試時賜予我字字珠璣、萬金難得的寶貴意見與斧正，使我就此研究心得更具信心。

在美國史丹福大學法學院蒐集論文資料期間，LAWRENCE M. FRIEDMAN 教授、PAUL GOLDSTEIN 教授、JOHN H. BARTON 教授的指點，表姊熊傳義與主恩基督教會孫雅各牧師、瞿珍恩師母的照顧，以及在美國哥倫比亞大學法學院研究智慧財產權期間，BENJAMIN L. LIEBMAN 教授的指教，讓我受益匪淺，謹致上最深謝意。

為能兼顧工作與學業，過程的確艱辛；承蒙長官台灣台北地方法院林院長錦芳的愛護，同事蕭法官忠仁、熊法官自強、吳法官孟良、朱法官漢寶、洪法官純莉、傅法官中樂、蘇法官嘉豐等過去在工作上之慨然協助，以及本所同學張主任檢察官紹斌、蔡法官惠如、孫法官曉青、蔣律師瑞琴等予我學業上之熱誠幫忙，與大哥張宇能博士專業資料之提供，個人點滴在心，永誌難忘。

另外，眾達國際法律事務所黃律師日燦的提攜，德律聯合法律事務所劉律師緒倫、信和國際法律事務所張律師世柱的鼎助，導航法律事務所陳律師惠生的鼓勵，以及好友李律師秀芬、胡老師伯貴、蘇醫師夫妻的指引，使我能有從泥沼中再站起來，奮力完成本論文的機會，內心萬分感謝。

當然，最感謝父親，多年來他父兼母職，在人生路上引領我向前，不論我成功或失敗，榮耀或低潮，總是在我身邊支撐著，他是我的精神支柱、心中永恆的大樹。尤其感謝在天國慈愛的母親，一生犧牲奉獻，給了我最美好的童年，沒有他們的撫育教養，我不可能一步步實現人生夢想。感謝為人寬厚信實的岳父、岳母大人，多年來待我更勝己出，無以回報，只有聊表感恩。容我一提愛兒楚珩，他天真可愛、善良又貼心，是激勵我為未來繼續打拼的原動力。

最後但卻最重要的，是感謝神恩賜我此生最珍貴的禮物—讓我能與美麗賢淑、慈悲智慧、亦師亦友的愛妻南均相伴；一路走來，她始終給予我最大的支持、體諒及包容，使我無後顧之憂，並仍有足夠的勇氣向著標竿直跑；沒有她，我不敢奢望會在經歷風浪及走過死蔭幽谷後仍有看到陽光的一天。

在至高之處榮耀歸與　神、在地上平安歸與他所喜悅的人。