

## 专利权利要求解释规则的新发展：权利要求中明显撰写错误的更正

发明与实用新型专利权的保护范围“以其权利要求的内容为准”，专利权利要求划定专利权的权利边界，界定专利权的保护范围。相同侵权是否存在以权利要求字面含义所界定的保护范围为基准，而要确定权利要求字面含义所界定的保护范围，就要解释权利要求，也就是解释权利要求中技术术语的含义。

权利要求解释的基本规则是：当对权利要求中的技术术语的含义有争议时，首先应当根据专利说明书及附图、专利授权审查过程中专利申请人的陈述、以及专利权人在无效宣告请求审查程序中的陈述（如果存在专利无效宣告请求审查程序的话）进行解释。这些解释技术术语的证据在美国法院判例中被称为内部证据（intrinsic evidence），只有根据内部证据仍不能确定技术术语的含义时，才允许借助外部证据（extrinsic evidence）确定技术术语的含义，外部证据包括专家证人的证词、字典与工具书的解释等。在双方当事人对权利要求中的某一技术术语的含义有争议时，之所以要在根据内部证据不能确定技术术语含义的情况下才允许借助外部证据确定技术术语的含义，原因在于技术术语的含义应以专利申请人或者专利权人自己的理解与界定为准，既然根据内部证据不能确定某一技术术语的含义，就应当推定专利申请人或者专利权人对该技术术语的含义理解就是所属技术领域技术人员通常的理解，故可借助外部证据确定所属技术领域的技术人员对技术术语的通常理解。

但如果权利要求中存在撰写错误，又应如何依据权利要求的内容来确定专利权的保护范围呢？

在申请再审人洪亮与被申请人国家知识产权局专利复审委员会、宋章根实用新型专利权无效行政纠纷案【(2011)行提字第13号】中，最高人民法院认为：“对于权利要求中存在的明显错误，由于该错误的存在对本领域技术人员而言是如此‘明显’，在阅读权利要求时能够立即发现其存在错误，同时更正该错误的回答也是如此‘确定’，结合其普通技术知识和说明书能够立即得出其唯一的正确答案，所以本领域技术人员必然以该唯一的正确解释为基准理解技术方案，明显错误的存在并不会导致权利要求的边界模糊不清。在无效宣告请求的审查过程中，如果不对权利要求中的明显错误作出更正性理解，而是‘将错就错’地径行因明显错误的存在而一概以不符合专利法第二十六条第四款的规定为由将专利宣告无效，将会造成专利法第二十六条第四款成为一种对撰写权利要求不当的惩罚，导致专利权人获得的利益与其对社会做出的贡献明显不相适应，有悖于专利法第二十六条第四款的立法宗旨”。

在申请再审人无锡市隆盛电缆材料厂、上海锡盛电缆材料有限公司与被申请人西安秦邦电信材料有限责任公司、原审被告古河电工（西安）光通信有限公司侵犯专利权纠纷案【(2012)民提字第3号】中，最高人民法院认为：“权利要求内容的确定，应当根据权利要求的记载，结合本领域普通技术人员阅读说明书及附图后对权利要求的理解进行。但是，当本领域普通技术人员对权利要求相关表述的含义可以清楚确定，且说明书又未对权利要求的术语含义作特别界定时，

应当以本领域普通技术人员对权利要求自身内容的理解为准，而不应当以说明书记载的内容否定权利要求的记载，从而达到实质修改权利要求的结果，并使得专利侵权诉讼程序对权利要求的解释成为专利权人额外获得的修改权利要求的机会。否则，权利要求对专利保护范围的公示和划界作用就会受到损害，专利权人因此不当获得了权利要求本不应该涵盖的保护范围。当然，如果本领域普通技术人员阅读说明书及附图后可以立即获知，权利要求特定用语的表述存在明显错误，并能够根据说明书和附图的相应记载明确、直接、毫无疑义地修正权利要求的该特定用

语的含义的，可以根据说明书或附图修正权利要求用语的明显错误”。

从前述两个案例件可以看出，最高人民法院的观点是：无论在专利无效宣告审查程序中，还是在专利侵权诉讼程序中，当权利要求中存在明显的撰写错误时，不能“将错就错”地以存在明显错误的权利要求的字面含义去界定权利要求的保护范围，而应当对明显的撰写错误进行更正性理解，进而以更正性理解后的权利要求去界定权利要求的保护范围。

王朝晖 合伙人 Tel: 8621 2208 6378 Email: wangzh@junhe.com  
张晓都 顾问 Tel: 8621 2208 6393 Email: zhangxd@junhe.com

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# JUN HE SPECIAL REPORT



November 20, 2013

## A New Development on Claim Construction of Patent: Corrections of Obvious Writing Errors in Patent Claims

The extent of protection of the patent right for invention or utility model shall be “determined by the terms of the claims.” Claims of a patent delineate the boundaries of patent rights and define the scope of patent protection. In order to examine whether a literal infringement is within the protected scope defined by the literal meaning of the claims of a patent, while determining the extent of protection defined by the literal meaning of the claims, it is necessary to interpret the claims, that is, to interpret the meaning of the technical terms of the claims.

The basic rule of claim construction is that when there is a dispute on the meaning of the technical terms of a claim, the interpretation should be based on the patent specification and drawings, the statements of the applicant during the patent application review process, as well as the patent holder’s statement in review process of the request for invalidation (if the situation presents a patent invalidation review process). Evidence for interpreting the technical terms is called intrinsic evidence under the courts of the United States. Only when intrinsic evidence cannot clear up the ambiguity of the meaning of the technical terms, extrinsic evidence is allowed to determine the meaning of the technical terms. Extrinsic evidence includes the explanation from expert witness testimonies, dictionaries, reference books and so forth. In the case where the parties have a dispute on the meaning of a particular technical term of a claim, the reason for allowing extrinsic evidence to determine the

meaning of the technical term when intrinsic evidence fails to do so, is that the meaning of the technical term shall be based on the patent applicant or patentee’s own understanding and interpretation. Such that when intrinsic evidence can not determine the meaning of a technical term, it should be presumed that the patent applicant or patent owner’s understanding of the meaning of the technical term is the general interpretation of a person skilled in the art, thus extrinsic evidence can be used to verify the common interpretation of a technical term by a person skilled in the art.

However, if there are written errors in the claims, then how should the scope of patent protection be determined according to the content of the claims?

In an administrative case involving a utility model patent invalidation proceeding, *Liang Hong (petitioner) v. Patent Reexamination Board of SIPO and Zhanggen Song* (Xing Ti Zi No.13 (2011)), the Supreme Court stated that “with regard to obvious errors in claims of a patent, due to the errors so ‘obvious’ to a person skilled in the art where the errors can be immediately identified after reading the claims, at the same time, a single correct answer can be unambiguously determined through common technical knowledge and instructions, therefore, a person skilled in the art is bound to determine the technical solutions based on the single correct answer. The existence of obvious errors will not blur the boundaries of claims. In the

review process of a request for invalidation, if the obvious errors in the claims are left unchanged rather than making corrective interpretation, due to the presence of obvious errors, the patent will be invalidated based on the incompliance with the provisions of Article 26.4 of the patent law, In that case, Article 26.4 of the Patent Law will result into a punishment for writing errors in claims, thus conflicting with the interests of patent holders on their contribution to society, and further in contrary to the legislative purpose of Article 26.4 of the Patent Law. "

In the *Wuxi Longsheng Cable Material Factory, Shanghai Xisheng Cable Materials Co., Ltd. (petitioner) vs. Xi'an Qinbang Telecom Materials Co., Ltd., (respondent) and Furukawa Electric ( Xi'an ) Optical Communication Co. (original trial defendant)* patent infringement dispute case (Ming Ti Zi No.3 (2012)), the Supreme Court stated, "the content of a claim shall be determined according to the claim language, combined with the interpretation by a person ordinarily skilled in the art after reading the description and drawings. However, when a person ordinarily skilled in the art can clearly identify the related meaning embodied in the claims, and also when the specification does not specifically defined the terms of the claims, then it should be the person ordinarily skilled in the art's own understanding of the content of

claims, and should not deny the claim language by following the content of the specification, so as to achieve a substantive result of amending the claims, which makes the patent infringement proceeding based on claim construction as an additional opportunity for patent holders to amend the claims. Otherwise, the purpose of claims, which is to publicize and define the protection scope of a patent, would be undermined; therefore, improperly obtained claims by the patent holder should not be covered by the protection scope of the patent. Certainly, if a person skilled in the art after reading the description and drawings can immediately identify any obvious errors of the terms in the claims, and amend the terms according to the specification and drawings clearly, directly, and unambiguously, then the obvious errors of the claims can be corrected according to claim specification and drawings."

From the above two cases, the Supreme Court's view is that whether in the patent invalidation review process or patent infringement proceeding, when there exists obvious errors in the claims, the language of the claims containing obvious error which defines the protection scope of the patent should be corrected rather than left alone, and corrective interpretation on the obvious written errors should be made so as to define the protection scope of the claims.

Wang Zhaohui	Partner	Tel: 8621 2208 6378	Email: wangzh@junhe.com
Zhang Xiaodu	Counsel	Tel: 8621 2208 6393	Email: zhangxd@junhe.com

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