



研究生教学用书

Specific Issues of Intellectual Property Rights 知识产权法专论

朱榄叶 (Zhu Lanye) 编



北京大学出版社
PEKING UNIVERSITY PRESS



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总 序

这是为研究生专门编写的一套教学用书。

研究生是否需要编写教学用书？研究生教学活动中采取教学用书的做法是否会束缚研究生的思维？是否会影响教师开展更加具有创造性的研究生教学与培养活动？研究生教学用书能够在多大程度上面对并且促进研究生培养质量的提高与研究生教育事业的发展？尽管这些问题尚有争议，但我们仍然选择了启动研究生培养改革项目。我们相信，随着研究生人数的扩张、专业学位的发展、研究生培养单位的增加，随着知识的膨胀与研究成果的不断更新以及因此导致的社会对于人才的需求标准的变化，越来越需要有一种能帮助教师与研究生及时对话、沟通信息渠道，同时为研究生展开思考与深入研究提供必要的指引的工具。

在编写过程中，我们形成了几点想法，希望与同行共享：

一、研究生教学用书依然具有教学用书的特点。

研究生教学用书应当是个什么样子呢？这可能是一个仁者见仁、智者见智的问题。有的学者理解，编写教科书，是一门学科里的学问臻于成熟、教学自成体系的显著标志，在某些时候，也是创建、恢复或移植学科体系的便捷方式。本科教材就给很多人这样的预期：教材是通说或定论的载体，是理论大厦的地基，是知识宝库的钥匙。我们认为，尽管研究生教育的知识深度有所不同，研究生培养仍需承载类似的任务，研究生教学用书仍应具有这种功能。有鉴于此，系列用书将充分正面肯定各个专业领域已有的研究成果，适当阐述该学科的基础理论知识体系。读者通过研读这些著作，有望对相关学科领域的研究成果特别是研究现状形成一个较为便捷、全面、系统、权威的把握。

二、研究生教学用书要充分体现研究生培养的特殊性，凸现研究生教育的特点与规律。

研究生培养不同于本科生，研究生教学用书也不同于本科生教材。通常的教材编写惯例与研究生的培养目标不甚兼容。有的院校坚持“百花齐放”，不统一使用研究生教材，有的慎重出版了具有特色的研究生教材。这些做法都值得我们借鉴。研究生教育素有专题、互动、讨论、指导与学生自主学习相结合等的经验，以更加个性化的方式与创新思想、创新知识、创新技能培养目标等为核心介绍相关问题的研究方法和理论成果，强调教学内容的创新价值和启发意义。

我们力图在内容、体例和使用方法等方面拥有自己的不同特色：更多是专题

性的、启发性的、创新性的,注重反映法学不同学科教学科研的最新成果和发展方向;更多地反映方法论的价值与相关研究专题的核心内容,而不拘泥于体例统一,不强求观点一致,目的是启发或帮助研究生培养学习的方法和研究的激情,培养不懈钻研的精神气质和严谨周详的思维习惯;更多地引导研究生通过教学用书的使用拓展学习、研究与思考的空间,鼓励使用本教学用书的老师和学生及其他有兴趣的同行可以灵活使用此教材的各个章节;教师不必单纯以此教材作为教学的基础,学生也不能仅以此教材作为学习的主要内容。

华东政法大学是新中国创办的第一批高等政法院校,由原圣约翰大学、东吴大学等9所院校的法律系、政治系和社会系等合并组建成立。经过几代华政人的努力,华东政法大学现已发展为一所以法学学科为主,兼有经济、管理、金融、外语等专业的多科性院校,成为享誉海内外的“法学教育的东方明珠”。自1981年起创办研究生教育以来,目前已设有法学博士后科研流动站,拥有法学一级学科博士学位授予权。如果说可以把这套系列研究生教学用书大致看成是我们在研究生教育培养方面阶段性研究成果的汇总和多年研究经验的结晶的话,我们愿意与大家共同努力,进一步繁荣我国的法学研究生教育事业。

我们也希望研究生们能够踩在我们以本系列教材这种形式提供的这个肩膀上,将兢兢业业、勤勤恳恳,大胆反思、小心求证,竭力超越、求真务实的学术火炬代代相传、越烧越旺。如果说可以把这套系列教材形象地比喻为全体编者虽已经殚精竭虑、精挑细选但却仍然忐忑不安地播下的一粒粒种子的话,我们希望:在我们祖国法治春风的吹拂下,它们能够慢慢长成一株又一株嫩芽,将来还会茁壮成长、硕果累累……

是为序,并共勉。

何勤华

2007年1月20日

Content

Unit 1 General Introduction	1
Unit 2 Balance of Interest	26
Broadcast Music, Inc. , et al. , Petitioners, v. Columbia Broadcasting System, Inc. , et al. American Society of Composers, Authors and Publishers, et al. , Petitioners, v. Columbia Broadcasting System, Inc. , et al.	26
Dyson Ltd v. Registrar of Trade Marks	56
Unit 3 Parallel Importation	67
Quality King Distributors Inc. v. L'anza Research International Inc.	67
Boehringer Ingelheim KG, Boehringer Ingelheim Pharma KG and Swingward Ltd, and between Boehringer Ingelheim KG, Boehringer Ingelheim Pharma KG and Dowelhurst Ltd, and between Glaxo Group Ltd and Swingward Ltd, and between Boehringer Ingelheim KG, Boehringer Ingelheim Pharma KG and Dowelhurst Ltd, and between Glaxo Group Ltd, The Wellcome Foundation Ltd and Dowelhurst Ltd, and between SmithKline Beecham plc, Beecham Group plc, SmithKline & French Laboratories Ltd and Dowelhurst Ltd and between Eli Lilly and Co. and Dowelhurst Ltd	82
Unit 4 Patentability	99
State Street Bank & Trust Co. v. Signature Financial Group, Inc.	99
Unit 5 Trademarkability	112
Koninklijke Philips Electronics NV v. Remington Consumer Products Ltd	112
Unit 6 Copyrightability	130
Feist Publications, Inc. v. Rural Telephone Service Company, Inc.	130
Unit 7 Domain name	148
Educational Testing Service v. TOEFL	148
Educational Testing Service (ETS) v. Morrison Media LLC	157

Unit 8 Liability of Internet Service Providers	165
Metro-Goldwyn-Mayer Studios Inc. , et al. , Petitioners v. Grokster, Ltd. , et al.	165
Cooper v. Universal Music Australia Pty Ltd	199
Sony Corp. of America v. Universal City Studios, Inc.	245
Unit 9 Geographic Indication	254
Beringer Blass Wine Estates Ltd v. Geographical Indications Committee	254
References	293

Unit 1 General Introduction

What are Intellectual Property Rights?

Intellectual property rights are the rights given to persons over the creations of their minds. They usually give the creator an exclusive right over the use of his/her creation for a certain period of time.

Intellectual property rights are customarily divided into two main areas:

(i) Copyright and rights related to copyright.

The rights of authors of literary and artistic works (such as books and other writings, musical compositions, paintings, sculpture, computer programs and films) are protected by copyright, for a minimum period of 50 years after the death of the author.

Also protected through copyright and related (sometimes referred to as “neighbouring”) rights are the rights of performers (e. g. actors, singers and musicians), producers of phonograms (sound recordings) and broadcasting organizations. The main social purpose of protection of copyright and related rights is to encourage and reward creative work.

(ii) Industrial property.

Industrial property can usefully be divided into two main areas:

One area can be characterized as the protection of distinctive signs, in particular trademarks (which distinguish the goods or services of one undertaking from those of other undertakings) and geographical indications (which identify a good as originating in a place where a given characteristic of the good is essentially attributable to its geographical origin).

The protection of such distinctive signs aims to stimulate and ensure fair competition and to protect consumers, by enabling them to make informed choices between various goods and services. The protection may last indefinitely, provided the sign in question continues to be distinctive.

Other types of industrial property are protected primarily to stimulate innovation, design and the creation of technology. In this category fall inventions (protected by patents), industrial designs and trade secrets.

The social purpose is to provide protection for the results of investment in the development of new technology, thus giving the incentive and means to finance research and development activities.

A functioning intellectual property regime should also facilitate the transfer of technology in the form of foreign direct investment, joint ventures and licensing.

The protection is usually given for a finite term (typically 20 years in the case of patents).

While the basic social objectives of intellectual property protection are as outlined above, it should also be noted that the exclusive rights given are generally subject to a number of limitations and exceptions, aimed at fine-tuning the balance that has to be found between the legitimate interests of right holders and of users.

A More Detailed Overview of the TRIPS Agreement

Overview: the TRIPS Agreement

The TRIPS Agreement, which came into effect on 1 January 1995, is to date the most comprehensive multilateral agreement on intellectual property.

The areas of intellectual property that it covers are: copyright and related rights (i. e. the rights of performers, producers of sound recordings and broadcasting organizations); trademarks including service marks; geographical indications including appellations of origin; industrial designs; patents including the protection of new varieties of plants; the layout-designs of integrated circuits; and undisclosed information including trade secrets and test data.

The three main features of the Agreement are:

Standards. In respect of each of the main areas of intellectual property covered by the TRIPS Agreement, the Agreement sets out the minimum standards of protection to be provided by each Member. Each of the main elements of protection is defined, namely the subject-matter to be protected, the rights to be conferred and permissible exceptions to those rights, and the minimum duration of protection. The Agreement sets these standards by requiring, first, that the substantive obligations of

the main conventions of the WIPO, the Paris Convention for the Protection of Industrial Property (Paris Convention) and the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention) in their most recent versions, must be complied with. With the exception of the provisions of the Berne Convention on moral rights, all the main substantive provisions of these conventions are incorporated by reference and thus become obligations under the TRIPS Agreement between TRIPS Member countries. The relevant provisions are to be found in Articles 2.1 and 9.1 of the TRIPS Agreement, which relate, respectively, to the Paris Convention and to the Berne Convention. Secondly, the TRIPS Agreement adds a substantial number of additional obligations on matters where the pre-existing conventions are silent or were seen as being inadequate. The TRIPS Agreement is thus sometimes referred to as a Berne and Paris-plus agreement.

Enforcement. The second main set of provisions deals with domestic procedures and remedies for the enforcement of intellectual property rights. The Agreement lays down certain general principles applicable to all IPRs enforcement procedures. In addition, it contains provisions on civil and administrative procedures and remedies, provisional measures, special requirements related to border measures and criminal procedures, which specify, in a certain amount of detail, the procedures and remedies that must be available so that right holders can effectively enforce their rights.

Dispute settlement. The Agreement makes disputes between WTO Members about the respect of the TRIPS obligations subject to the WTO's dispute settlement procedures.

In addition the Agreement provides for certain basic principles, such as national and most-favoured-nation treatment, and some general rules to ensure that procedural difficulties in acquiring or maintaining IPRs do not nullify the substantive benefits that should flow from the Agreement. The obligations under the Agreement will apply equally to all Member countries, but developing countries will have a longer period to phase them in. Special transition arrangements operate in the situation where a developing country does not presently provide product patent protection in the area of pharmaceuticals.

The TRIPS Agreement is a minimum standards agreement, which allows Members to provide more extensive protection of intellectual property if they so wish. Members are left free to determine the appropriate method of implementing the provisions of the Agreement within their own legal system and practice.

Certain General Provisions

As in the main pre-existing intellectual property conventions, the basic obligation on each Member country is to accord the treatment in regard to the protection of intellectual property provided for under the Agreement to the persons of other Members. Article 1.3 defines who these persons are. These persons are referred to as “nationals” but include persons, natural or legal, who have a close attachment to other Members without necessarily being nationals. The criteria for determining which persons must thus benefit from the treatment provided for under the Agreement are those laid down for this purpose in the main pre-existing intellectual property conventions of WIPO, applied of course with respect to all WTO Members whether or not they are party to those conventions. These conventions are the Paris Convention, the Berne Convention, International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (Rome Convention), and the Treaty on Intellectual Property in Respect of Integrated Circuits (IPIC Treaty).

Articles 3, 4 and 5 include the fundamental rules on national and most-favoured-nation treatment of foreign nationals, which are common to all categories of intellectual property covered by the Agreement. These obligations cover not only the substantive standards of protection but also matters affecting the availability, acquisition, scope, maintenance and enforcement of intellectual property rights as well as those matters affecting the use of intellectual property rights specifically addressed in the Agreement. While the national treatment clause forbids discrimination between a Member's own nationals and the nationals of other Members, the most-favoured-nation treatment clause forbids discrimination between the nationals of other Members. In respect of the national treatment obligation, the exceptions allowed under the pre-existing intellectual property conventions of WIPO are also allowed under TRIPS. Where these exceptions allow material reciprocity, a consequential exception to MFN treatment is also permitted (e. g. comparison of terms for copyright protection in excess of the minimum term required by the TRIPS Agreement as provided under Article 7(8) of the Berne Convention as incorporated into the TRIPS Agreement). Certain other limited exceptions to the MFN obligation are also provided for.

The general goals of the TRIPS Agreement are contained in the Preamble of the Agreement, which reproduces the basic Uruguay Round negotiating objectives

established in the TRIPS area by the 1986 Punta del Este Declaration and the 1988/89 Mid-Term Review. These objectives include the reduction of distortions and impediments to international trade, promotion of effective and adequate protection of intellectual property rights, and ensuring that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade. These objectives should be read in conjunction with Article 7, entitled "Objectives", according to which the protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations. Article 8, entitled "Principles", recognizes the rights of Members to adopt measures for public health and other public interest reasons and to prevent the abuse of intellectual property rights, provided that such measures are consistent with the provisions of the TRIPS Agreement.

Substantive Standards of Protection

Copyright

During the Uruguay Round negotiations, it was recognized that the Berne Convention already, for the most part, provided adequate basic standards of copyright protection. Thus it was agreed that the point of departure should be the existing level of protection under the latest Act, the Paris Act of 1971, of that Convention. The point of departure is expressed in Article 9.1 under which Members are obliged to comply with the substantive provisions of the Paris Act of 1971 of the Berne Convention, i. e. Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto. However, Members do not have rights or obligations under the TRIPS Agreement in respect of the rights conferred under Article 6bis of that Convention, i. e. the moral rights (the right to claim authorship and to object to any derogatory action in relation to a work, which would be prejudicial to the author's honour or reputation), or of the rights derived therefrom. The provisions of the Berne Convention referred to deal with questions such as subject-matter to be protected, minimum term of protection, and rights to be conferred and permissible limitations to those rights. The Appendix allows developing countries, under certain conditions, to make some limitations to the right of translation and the right of reproduction.

In addition to requiring compliance with the basic standards of the Berne Convention, the TRIPS Agreement clarifies and adds certain specific points.

Article 9.2 confirms that copyright protection shall extend to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such.

Article 10.1 provides that computer programs, whether in source or object code, shall be protected as literary works under the Berne Convention (1971). This provision confirms that computer programs must be protected under copyright and that those provisions of the Berne Convention that apply to literary works shall be applied also to them. It confirms further, that the form in which a program is, whether in source or object code, does not affect the protection. The obligation to protect computer programs as literary works means e. g. that only those limitations that are applicable to literary works may be applied to computer programs. It also confirms that the general term of protection of 50 years applies to computer programs. Possible shorter terms applicable to photographic works and works of applied art may not be applied.

Article 10.2 clarifies that databases and other compilations of data or other material shall be protected as such under copyright even where the databases include data that as such are not protected under copyright. Databases are eligible for copyright protection provided that they by reason of the selection or arrangement of their contents constitute intellectual creations. The provision also confirms that databases have to be protected regardless of which form they are in, whether machine readable or other form. Furthermore, the provision clarifies that such protection shall not extend to the data or material itself, and that it shall be without prejudice to any copyright subsisting in the data or material itself.

Article 11 provides that authors shall have in respect of at least computer programs and, in certain circumstances, of cinematographic works the right to authorize or to prohibit the commercial rental to the public of originals or copies of their copyright works. With respect to cinematographic works, the exclusive rental right is subject to the so-called impairment test: a Member is excepted from the obligation unless such rental has led to widespread copying of such works which is materially impairing the exclusive right of reproduction conferred in that Member on authors and their successors in title. In respect of computer programs, the obligation does not apply to rentals where the program itself is not the essential object of the rental.

According to the general rule contained in Article 7(1) of the Berne Convention

as incorporated into the TRIPS Agreement, the term of protection shall be the life of the author and 50 years after his death. Paragraphs 2 through 4 of that Article specifically allow shorter terms in certain cases. These provisions are supplemented by Article 12 of the TRIPS Agreement, which provides that whenever the term of protection of a work, other than a photographic work or a work of applied art, is calculated on a basis other than the life of a natural person, such term shall be no less than 50 years from the end of the calendar year of authorized publication, or, failing such authorized publication within 50 years from the making of the work, 50 years from the end of the calendar year of making.

Article 13 requires Members to confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder. This is a horizontal provision that applies to all limitations and exceptions permitted under the provisions of the Berne Convention and the Appendix thereto as incorporated into the TRIPS Agreement. The application of these limitations is permitted also under the TRIPS Agreement, but the provision makes it clear that they must be applied in a manner that does not prejudice the legitimate interests of the right holder.

Related Rights

The provisions on protection of performers, producers of phonograms and broadcasting organizations are included in Article 14. According to Article 14.1, performers shall have the possibility of preventing the unauthorized fixation of their performance on a phonogram (e. g. the recording of a live musical performance). The fixation right covers only aural, not audiovisual fixations. Performers must also be in position to prevent the reproduction of such fixations. They shall also have the possibility of preventing the unauthorized broadcasting by wireless means and the communication to the public of their live performance.

In accordance with Article 14.2, Members have to grant producers of phonograms an exclusive reproduction right. In addition to this, they have to grant, in accordance with Article 14.4, an exclusive rental right at least to producers of phonograms. The provisions on rental rights apply also to any other right holders in phonograms as determined in national law. This right has the same scope as the rental right in respect of computer programs. Therefore it is not subject to the impairment test as in respect of cinematographic works. However, it is limited by a so-called

grand-fathering clause, according to which a Member, which on 15 April 1994, i. e. the date of the signature of the Marrakesh Agreement, had in force a system of equitable remuneration of right holders in respect of the rental of phonograms, may maintain such system provided that the commercial rental of phonograms is not giving rise to the material impairment of the exclusive rights of reproduction of right holders.

Broadcasting organizations shall have, in accordance with Article 14. 3, the right to prohibit the unauthorized fixation, the reproduction of fixations, and the rebroadcasting by wireless means of broadcasts, as well as the communication to the public of their television broadcasts. However, it is not necessary to grant such rights to broadcasting organizations, if owners of copyright in the subject-matter of broadcasts are provided with the possibility of preventing these acts, subject to the provisions of the Berne Convention.

The term of protection is at least 50 years for performers and producers of phonograms, and 20 years for broadcasting organizations (Article 14. 5).

Article 14. 6 provides that any Member may, in relation to the protection of performers, producers of phonograms and broadcasting organizations, provide for conditions, limitations, exceptions and reservations to the extent permitted by the Rome Convention.

Trademarks

The basic rule contained in Article 15 is that any sign, or any combination of signs, capable of distinguishing the goods and services of one undertaking from those of other undertakings, must be eligible for registration as a trademark, provided that it is visually perceptible. Such signs, in particular words including personal names, letters, numerals, figurative elements and combinations of colours as well as any combination of such signs, must be eligible for registration as trademarks.

Where signs are not inherently capable of distinguishing the relevant goods or services, Member countries are allowed to require, as an additional condition for eligibility for registration as a trademark, that distinctiveness has been acquired through use. Members are free to determine whether to allow the registration of signs that are not visually perceptible (e. g. sound or smell marks).

Members may make registrability depend on use. However, actual use of a trademark shall not be permitted as a condition for filing an application for registration, and at least three years must have passed after that filing date before failure to realize an intent to use is allowed as the ground for refusing the application

(Article 14.3).

The Agreement requires service marks to be protected in the same way as marks distinguishing goods (see e. g. Articles 15.1, 16.2 and 62.3).

The owner of a registered trademark must be granted the exclusive right to prevent all third parties not having the owner's consent from using in the course of trade identical or similar signs for goods or services which are identical or similar to those in respect of which the trademark is registered where such use would result in a likelihood of confusion. In case of the use of an identical sign for identical goods or services, a likelihood of confusion must be presumed (Article 16.1).

The TRIPS Agreement contains certain provisions on well-known marks, which supplement the protection required by Article 6bis of the Paris Convention, as incorporated by reference into the TRIPS Agreement, which obliges Members to refuse or to cancel the registration, and to prohibit the use of a mark conflicting with a mark which is well known. First, the provisions of that Article must be applied also to services. Second, it is required that knowledge in the relevant sector of the public acquired not only as a result of the use of the mark but also by other means, including as a result of its promotion, be taken into account. Furthermore, the protection of registered well-known marks must extend to goods or services which are not similar to those in respect of which the trademark has been registered, provided that its use would indicate a connection between those goods or services and the owner of the registered trademark, and the interests of the owner are likely to be damaged by such use (Articles 16.2 and 3).

Members may provide limited exceptions to the rights conferred by a trademark, such as fair use of descriptive terms, provided that such exceptions take account of the legitimate interests of the owner of the trademark and of third parties (Article 17).

Initial registration, and each renewal of registration, of a trademark shall be for a term of no less than seven years. The registration of a trademark shall be renewable indefinitely (Article 18).

Cancellation of a mark on the grounds of non-use cannot take place before three years of uninterrupted non-use has elapsed unless valid reasons based on the existence of obstacles to such use are shown by the trademark owner. Circumstances arising independently of the will of the owner of the trademark, such as import restrictions or other government restrictions, shall be recognized as valid reasons of non-use. Use of a trademark by another person, when subject to the control of its

owner, must be recognized as use of the trademark for the purpose of maintaining the registration (Article 19).

It is further required that use of the trademark in the course of trade shall not be unjustifiably encumbered by special requirements, such as use with another trademark, use in a special form, or use in a manner detrimental to its capability to distinguish the goods or services (Article 20).

Geographical Indications

Geographical indications are defined, for the purposes of the Agreement, as indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin (Article 22.1). Thus, this definition specifies that the quality, reputation or other characteristics of a good can each be a sufficient basis for eligibility as a geographical indication, where they are essentially attributable to the geographical origin of the good.

In respect of all geographical indications, interested parties must have legal means to prevent use of indications which mislead the public as to the geographical origin of the good, and use which constitutes an act of unfair competition within the meaning of Article 10bis of the Paris Convention (Article 22.2).

The registration of a trademark which uses a geographical indication in a way that misleads the public as to the true place of origin must be refused or invalidated ex officio if the legislation so permits or at the request of an interested party (Article 22.3).

Article 23 provides that interested parties must have the legal means to prevent the use of a geographical indication identifying wines for wines not originating in the place indicated by the geographical indication. This applies even where the public is not being misled, there is no unfair competition and the true origin of the good is indicated or the geographical indication is accompanied by expressions such as "kind", "type", "style", "imitation" or the like. Similar protection must be given to geographical indications identifying spirits when used on spirits. Protection against registration of a trademark must be provided accordingly.

Article 24 contains a number of exceptions to the protection of geographical indications. These exceptions are of particular relevance in respect of the additional protection for geographical indications for wines and spirits. For example, Members