

国家知识产权局软科学研究课题

INTELLECTUAL PROPERTY RIGHT SYSTEM  
CHALLENGE AND COUNTERMEASURE

# 知识产权制度 挑战与对策

吕薇 等著

知识产权出版社

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## 图书在版编目 (CIP) 数据

知识产权制度挑战与对策/吕薇等著. —北京: 知识产权出版社, 2004.5

(中国知识产权保护制度与市场环境研究)

ISBN 7-80011-766-9

I. 知… II. 吕… III. 知识产权—研究—中国  
IV. D923.404

中国版本图书馆 CIP 数据核字 (2004) 第 024408 号

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## 知识产权制度挑战与对策

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责任出版: 杨宝林

知识产权出版社出版、发行

地址: 北京市海淀区马甸南村 1 号

通信地址: 北京市海淀区蓟门桥西土城路 6 号 邮编: 100088

http: //www.cnipr.com

(010) 82000893 (010) 82000860 转 8101

知识产权出版社电子制印中心印刷

新华书店经销

2004 年 4 月第一版 2004 年 4 月第一次印刷

850mm × 1168mm 1/32 印张: 7.875 字数: 180 千字

印数: 1 ~ 4 000 册

ISBN 7-80011-766-9/D·123

定价: 18.00 元

如有印装质量问题, 本社负责调换。

## 内 容 提 要

本书涉及的内容十分广泛，采取了宏观与微观相结合、理论与实践相结合、国内外经验相比较的研究方法。作者站在国家整体的角度，围绕创造、保护和利用知识产权的各个环节，研究与知识产权相关的制度、政策体系和市场环境；从为实施知识产权法律和制度提供组织保证出发，研究建立知识产权管理协调机制和预警机制；重点探讨了知识产权制度如何与国家技术发展战略结合，对如何完善我国的知识产权制度、优化市场环境提出了一系列建议。同时，又从一些具体问题入手，研究了知识产权权属政策、行业、企业和大学的知识产权保护与利用问题。既从理论上探讨了知识产权制度的运作机制，又介绍和分析了大量国际上的通行做法，深入浅出地介绍了如何利用知识产权制度为现实经济、技术和社会发展服务，提出了许多具有可操作性的政策建议，不仅为知识产权管理部门提供了有针对性的决策参考，而且便于企业和机构了解如何运用知识产权制度和有关政策，为实施知识产权战略服务。

## 前 言

随着经济全球化和贸易自由化进程的加快，知识产权成为重要的产业竞争工具。特别是进入 WTO 以后，我国知识产权制度面临新的形势和问题。一方面，我国是发展中国家，正在进入加速工业化的阶段，如何利用好知识产权制度，提高国家整体竞争力是一个亟待解决的问题。另一方面，改革开放以来，我国逐步建立起比较完整的知识产权法律体系和管理工作体系，如何贯彻落实，提供制度、组织和政策保障，成为知识产权管理工作的重要任务。

在这样的背景下，2002 年，国务院发展研究中心技术经济研究部受国家知识产权局的委托，开展了“知识产权保护制度与市场环境研究”。本书是在这一研究成果的基础上充实、修改完成的。本书的作者都是课题组成员和研究报告的撰写者。

### 研究方法 with 基本结论

本书围绕创造、保护和利用知识产权的各个环节，研究与知识产权相关的制度、政策体系和市场环境；从为实施知识产权法律和制度提供组织保证出发，研究建立知识产权管理协调机制和预警机制；重点探讨了知识产权制度如何与国家技术发展战略结合，对如何完善我国的知识产权制度、优化市场环境提出了一系列建议。

本书涉及的内容广泛，采取宏观与微观相结合，理论与实践相结合，国内外经验相比较的研究方法。在历时一年多的研究过程中，课题组实地调查了北京、上海、广东、深圳、浙江等地，还多次组织专家座谈会，掌握了第一手资料。本书从国家整体的角度研究了与知识产权制度有关的政策体系，同时又从一些具体问题入手，研究了知识产权权属政策及行业、企业和大学的知识

产权保护与利用问题；既从理论上探讨了知识产权制度的运作机制，又介绍和分析了大量国际上的通行做法，深入浅出地介绍了如何利用知识产权制度为现实经济、技术和社会发展服务，提出了许多具有可操作性的政策建议，不仅为知识产权管理部门提供了有针对性的决策参考，而且便于企业和机构了解如何运用知识产权制度和有关政策，为实施知识产权战略服务。

我们在研究中提出了一系列重要观点。比如，（1）建立与国家发展阶段相适应的知识产权保护制度。知识产权保护制度与市场经济发达程度和发展水平密切相关，知识产权保护标准并不是越先进越好。中国是发展中国家，在制度和规则上与国际接轨，具体标准要体现国情，不搞赶超，不照搬；利用 WTO 的政策空间，在满足 TRIPS 最低保护标准的前提下，制定切合实际的保护标准。（2）分层次建立全社会的知识产权战略体系。国家知识产权战略是解决全局性、制度性和政策性问题，为企业创造良好的制度和市场环境。（3）建立协调机制，采取多种方式加强各知识产权管理部门与行业协会和企业的联系，建立知识产权预警机制和体系。（4）加强对知识产权国际纠纷的协调处理机制，建立专门负责机构，代表国家和企业的利益协调贸易中的知识产权保护问题。（5）制定统一适用的限制滥用知识产权的反垄断法规，在合理保护知识产权的同时，促进知识产权的公平竞争。（6）建立创造、保护和利用知识产权的政策体系，坚持保护权利人利益与保护公共利益相结合；保护与鼓励创新并举；保护与合理利用、扩散并举；市场选择与重点扶持相结合；普遍性与特殊性相结合。（7）健全知识产权权属政策体系，重视职务发明人作用。对职务发明人的激励不是简单的收入分配问题，应提高到增强国家创新能力的高度来认识，必须在法律和制度上给予保证。（8）加大政府对保护知识产权和知识产权公共信息网络建设、服务的投入。（9）充分发挥行业协会的作用。发挥行业组织的自律作用，

解决知识产权纠纷和争端；发挥政府与企业之间的桥梁作用，建立行业协会与主管部门的沟通机制。（10）从普及教育和专业培训两方面入手，加快知识产权专门人才培养。（11）加强国际合作和理论研究，参与国际规则的制定等。

### 本书结构与分工

本书共分为九章。第一章重点阐述了我国知识产权工作面临的形势与问题。第二章用大量的统计数据分析了我国技术创新与技术引进的现状，知识产权对技术进步的作用，并阐述了进入WTO以后，知识产权制度对技术创新和引进政策的影响。第三章知识产权制度的配套政策与市场环境，系统分析了创造、保护和利用知识产权各个环节的政策内容与特点，知识产权管理、保护、创新，技术引进和技术扩散政策的关系，以及在创新政策体系中的作用。第四章集中探讨了保护知识产权中的反垄断问题，介绍了国际上的通行做法以及我国应采取的对策。第五章专门讨论了知识产权权属政策，重点讨论了职务发明专利的权属政策如何平衡发明人与雇主之间的权利和利益，介绍了有关国家的具体做法，并按资金来源、机构性质等分类介绍了职务发明权属政策的特点与区别。第六章系统介绍了美国与日本的知识产权管理体制。第七章从系统介绍和比较日、美的知识产权战略入手，探讨如何分层次建立我国的知识产权战略体系。第八章研究了大学经营知识产权的问题，比较研究了美国、英国和日本大学经营知识产权的管理制度与操作办法，并就我国如何发挥大学在基础研究和扩散中的作用，提出了具有针对性的建议。第九章讨论了中药知识产权保护问题，研究了中药知识产权保护特征与保护体系，分析了我国中药知识产权保护存在的问题，提出了有针对性的建议。

吕薇撰写第一章、第三章、第五章、第七章，并参与第四章的撰写；林平撰写第二章和第四章；李志军撰写第六章；罗涛撰

写第八章；李广乾撰写第九章。

### 致谢

在完成“知识产权保护制度与市场环境研究”课题的过程中，我们始终得到国务院发展研究中心和国家知识产权局领导的关心和支持，国家知识产权局邓军、韩秀成、周民、薛丹、刘洋等同志多次与课题组座谈讨论，并提供有关资料，特别是周民同志多次陪同课题组调研，付出了心血和汗水。广东省知识产权局、北京市知识产权局、上海市知识产权局、广州市知识产权局、温州市知识产权局、深圳市知识产权局、宁波市知识产权局、顺德市科技局、北京大学、清华大学、华南理工大学等单位对课题组的调查研究给予全力支持和帮助。在2003年7月召开的课题评审会上，陈美章、刘东威、李顺德、毛金生、周民、孙永俭、杨一平、马燕等专家学者对研究成果给予充分肯定，并提出很好的建议。在此，我们对上述单位和同志表示衷心的感谢！

作者

2004年1月

# PREFACE

## 1. Background

In 2002, the Technology Economy Research Department of the Development Research Center (DRC) of the State Council of China carried out a research project to study the protection system and the market environment concerning the intellectual property in China, which is sponsored by the State Intellectual Property Office. The purpose of the project is to integrate the Intellectual Property Rights (IPRs) institution research with the national innovation system and technology strategy.

In the research we looked into the situations and major challenges in China's industries and administration in the IPRs area, focused on the policy systems concerning the creation, protection and utilization of the IPR, and studied the coordination and precaution mechanism in the IPR administration based on the lessons and experiences of the other countries. In the study of the Intellectual Property management in China's universities, we explored a way of how to promote their technology diffusion. Furthermore, from different perspectives of strengthening the roles of the IPR, promoting its fair competition, preventing the abuse in the IPR application and perfecting China's IPR juristical system, we made a comprehensive research over the impacts of the technology advancement and innovation, and discussed the Intellectual Property protection institution for Chinese traditional medicine as an example.

During the research period of more than one-year, the research team made many field investigations. We visited cities and provinces such as Beijing, Shanghai, Guangdong, Shenzhen, and Zhejiang, and interviewed with the IPR administration departments, some industrial associa-

tions, and many medicinal, electronic and home apparatus enterprises. We collected a lot of first-hand materials through visiting and statistical analysis.

In the research, we applied a lot of international experiences in the IPR institution and administration for reference, and made a comparative study between domestic and overseas experiences. The international experiences enriched the research.

The research, which was completed in early 2003, is composed by a main report and six sub-reports:

The Main Report: To Strengthen the establishment of the Institutions and Market Environment related with IPRs in China, and to implement the national strategies of IPRs.

The Sub-reports:

- 1) A study of assorted policies and market environment related with IPRs
- 2) A study of the IPRs regimes in USA and Japan
- 3) To strengthen the coordination mechanism and to perfect its IPR administrative system of China's IPRs
- 4) How to operate the Intellectual Property in the universities
- 5) The Intellectual Property protection and the fair competition in IPRs under the WTO rules
- 6) The Intellectual Property protection for Chinese medicine
- 7) China's technology innovation and technology import

## **2. Conclusions**

The main conclusions and viewpoints of the research report are presented as following:

### **1. China facing new challenges in the IP's administration**

With the development of economic reform in China, the economy

globalization and trade liberalization, the Intellectual Property has become an important tool for industry competition. China's companies are facing an intensive global competition in IPRs, and the administration of IPRs is facing new challenges in China.

However, a large amount of China's companies are in disadvantage position in the domestic and international markets, due to the inability of innovation and lack of self-independent intellectual property. In the new and high technology industries, the foreign companies dominate the local patent application and granting. China's traditional industries with competitive advantages are also facing threats from the competition in IPRs. For example, the exportations of Chinese manufactured products are blocked by the importing countries at times because of the IPRs issues, which lead to the advantages arising from cheap labor forces weakened. Some companies and industries that are very famous in the local market involved in the dissension of IPRs.

In the past 20 years, China has established a relatively complete legal system of IPRs, and is becoming in compliance with international rules. The next task for Chinese administration of IPRs is how to implement these rules. Currently, main obstacles remain such as rigid execution of the rules, slack punishment and shortage of executive resources. Some developed countries take China as a closely watched target. The situation also frustrates the local companies' enthusiasm for innovation.

One of important conclusions in the reports is: The intellectual property Protection is not only the need of improving investment environment inducing foreign capital, more importantly, it will encourage the local companies' innovation. The Chinese administration of IPRs is facing double tasks: strengthening intellectual property protection and safe-

guarding the domestic consumers and producers. Therefore, we must learn how to better use the institutions of IPRs in global competition, maintain the fairness of competition, and enhance the national competitive advantages as a whole. Meanwhile the IPR institution would adapt to the national development stage and technology strategy.

## **II. The problems in the IPR administration**

China has experienced a short period of the institution construction in the intellectual property. There are some institutional and administrative deficiencies as following:

1) The administration of IPRs is decentralized with the lack of coordinating mechanism. Because of lack of effective communicating channels and coordinating mechanisms in the current segmented administrative system, the policies are dissevered from the management, which results in the dispersing of the limited resources.

2) The precaution system for the intellectual property management is not yet in place. Since there are few communicating channels between the administrative authorities of IPRs, companies and consumers, the IP information flow is slowly or blocked.

3) The legislation authorities pay much more attention to the law-making specialty itself than the industry competition and development, and pay much more attention to the Product supply side than consumers and users. Some rules and protection standards are unpractical.

4) Financial and human resources are in shortage. Currently, both the justice executive and the administrative authorities are deficient in human resources, financing and material resources. The lack of talented human resources has become a bottleneck to improve Chinese IP administration.

5) The antitrust measures to maintain the fairness in the competition of intellectual property are necessary. For the time being, China has nei-

ther antitrust laws nor operable antitrust rules in the intellectual property protection codices. For the illegal monopolistic behavior of abusing intellectual property, there are no measures compliant with market economy can be taken to safeguard the consumers and local companies' interests.

6) The intellectual property ownership policies are unsystematic, and the institution constructions lag behind the needs. Firstly, as for service inventions, the ownership policies overemphasize the benefits of the hirers while ignoring the role of service inventors. The incentive mechanism for the service inventors is too weak to encourage the service inventors. Secondly, in the management of the intellectual property of public resources, the owner's right protection is overemphasized while diffusion is paid little attention. The obligations, rights and benefits are confused in the projects in the government sponsored technology programming. While the intellectual properties nominally belong to the state, actually they are possessed by the project fulfilling units. There is no one who is responsible for the utilization and transformation of the innovations.

7) There are urgent need to improve the laws, regulations and market environment assorted with institution of IPRs.

The institutions of IPRs, in fact, can't function in isolation. China is in the transition from planned economy to market economy. The incomplete laws, policies and market environment about intellectual property weakened the effectiveness of the IP institutions, such as, disorder in market competition, incompleteness in the credit institution which results in the deficiency of social credits and unsuitable technology administration system for market economy, etc.

### **III. Suggestions for improving the administrative system and the market environment of IPRs**

China has established a relatively complete legal system for intellec-

tual property. The next task is to implement these rules and provide institutional, organizational and policy guarantee.

1) To set up the intellectual property protection institutions compliant with the national development stage. The institutions of IPRs must be closely correlated with the development level and stage of market economy. Being a developing country, China should be compliant with the world in the institutions and rules building, and constitute protection standards in accordance with the reality on the precondition that they satisfy minimum protection standards of TRIPs. Making good use of policies space allowed by WTO, protection standards should embody according to the development situation of the country, cannot be overtaken or rigidly copy other countries' experiences.

2) To build a nation wide intellectual property strategy system. The national intellectual property strategy should be focused on the overall, institutional and policy-oriented issues, aiming at creating favorable institutions and market environment for enterprises. The industrial intellectual property strategy should be focused on fulfilling the common interests of the companies in the industry, providing guidelines for their joint actions, and aiming at settling the problems of their common interests. The companies, intellectual property strategy aims at promoting its competitive advantages, and maximizing its own profits under the restriction of the national laws and by utilizing the rules of the institutions of IPRs.

3) To set up the coordination mechanism and the precaution mechanism of intellectual property management system. Set up an authoritative and efficient coordinating organization under the direct leadership of the central government to coordinate the relationship between the different departments and supervise the fulfillment of the policies. Adopt manifold ways to reinforce the contacts between the administrative authorities of

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IPRs and industry associations and enterprises, and build the precaution system of IPRs.

4) To reinforce the settling system for the international disputes of IPRs. A special organization that can stand for the state and companies as well should be set up in order to deal with the IP protection issues in global trade.

5) Constitute a uniformly applicable antitrust law to restrict the abuse of the IP, which can rationally protect the intellectual property and meanwhile promote fair competition in using IPRs. The state should establish a special antitrust directory as soon as possible to protect IPRs, and prevent the abuse of IP rights in the technology licensing in order to promote the fairness of IP competition. The sleeping patents with malice aforethought should be disposed, and concerning policy would be made to accelerate technology application and patent utilization. The items that prevent the abuse of IP rights should be added to the future antitrust laws.

6) To establish the policy system for creating, protecting and utilizing IPRs. The benefits of the innovators should be balanced with the public interest. The protection should be balanced with encouraging the innovation, and with the rational utilization and diffusion as well. Market selection should be combined with pivot support. Universality should be combined with specialty.

7) To Perfect the intellectual property ownership policy system, revaluing the roles of official innovators. The intellectual property ownership arrangement fiscally sponsored by the government should be in favor of technology diffusion in order to improve the social benefits of the public resources. The incentive system for the service inventors is not just a problem of income distribution. It should be looked up as a mechanism to strengthen national innovation abilities and should be guaranteed by laws

and institutions.

8) To increase the investment in IPRs protection from the government, and establish special funds. The funds will be mainly used to increase the special outlay for executing the laws of IPRs and to enlarge the investment for the constructions and services of the public intellectual property information networks.

9) To facilitate the role of industry associations to settle the disputes of IPRs through their self-discipline. The industry associations should serve as a bridge between government and companies. The communicating channels between the industrial associations and the authorities are needed.

10) To boost the training of the talented human resources in the IPRs area, which has become an urgent need for implementing the intellectual property strategies in China. Specifically, we should reinforce the training of the personnel in incumbency, establish intellectual property major in colleges and above. Engineering colleges should take patent courses as basic majors. Actively popularizing the IPRs education, and commencing the general knowledge education in elementary and high schools.

11) To reinforce the international cooperation and theory research, and participate in constituting the international rules.

### **3. The structure of the Book**

Nine Chapters compose the book. In the first chapter, we mainly illustrated current situations and problems administration of China's IPRs. In the second chapter, by using abundant statistical data, we analyzed the actualities of China's technology innovation and technology importation, the impacts of the IPRs on the technology advancement, innovation and import policies. In the third chapter, we discussed the auxil-

itary policies and market environment for the IPR institutions, and we systematically analyzed the meaning of policy and characteristics of every aspect from the IPRs creation and protection to its utilization, and investigated the relationship of the management and protection of IPRs with technology import and diffusion policies, and its role in the innovation policies system as well. In the fourth chapter, we focused on antitrust problems in the protection of the IPR by introducing accustomed practices in the world and China's actual countermeasures. Generally, people will consider the protection of IPRs when they talked about the IPRs. Actually, there existed another important facet, the prevention of the abuse IPRs. The fifth chapter specially concentrated on the IPR ownership policies. By introducing some countries' practices, we discussed how to use the ownership policies of professional innovation to balance the rights and interests of innovators and their employers. Furthermore, we introduced the characteristics and differentiations of ownership policy of service invention according to the funding sources and the organization's ascription. The sixth chapter systematically introduced the IPRs regime of USA and Japan. In the seventh chapter, beginning with introducing and comparing USA and Japan's IPR strategies, we investigated China's strategy systems of IPRs and proposed that China should set up a layered IPRs strategy. In the eighth chapter, we studied the management problems of college's IPR. And by comparing the intellectual property management institutions and operating practices of the colleges in USA, UK and Japan, we made some pertinent proposals for strengthening the role of China's colleges in basic research and technology diffusion. In the ninth chapter, we discussed another important issue about IPRs protection, the protection for IPRs of Chinese traditional medicine. By studying the features and the systems, and analyzing existing problems in Chinese traditional