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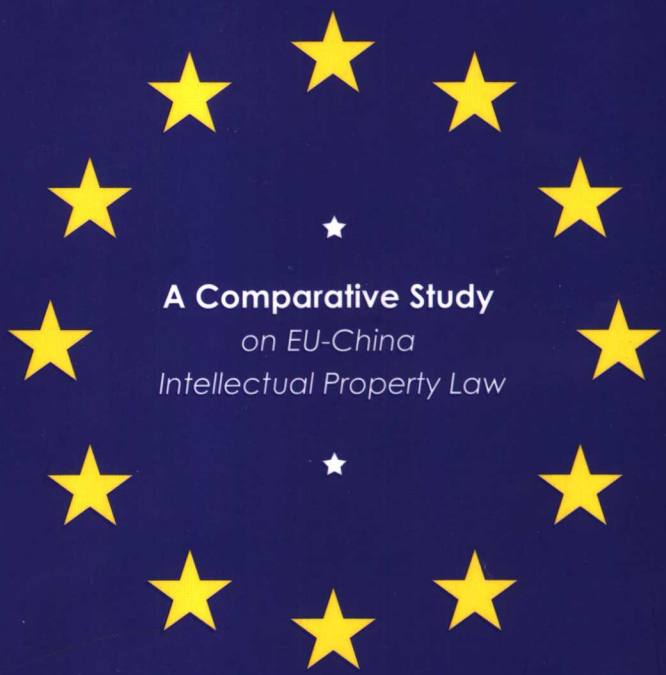
中国-欧盟法律和司法合作项目

中国欧盟
知识产权法比较研究

张玉敏 主编



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中国·欧盟法律研究系列

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总　序

自欧洲共同体成立来，欧洲就有了广义和狭义之分。狭义的欧洲其实就是欧共体(EC)，而欧盟(EU)有取代欧共体的趋势。欧盟的成立极大地促进了欧洲的统一，这种统一进程还远没有完结，欧盟由西欧向中东欧扩展就是例证。作为当今最大的经济与政治实体，欧盟以追求共同市场(common market)与政治统一为终极目标，同时也是维护世界和平的重要一极。在经济全球化与多元化并存的国际政治与经济格局中，对任何国家或国际组织而言，关注与研究欧盟都具有战略意义。

属于这种战略研究之重要组成部分的，当属对欧盟及其成员国法律的探索，原因在于欧盟的统一正是在国际条约以及欧盟自身的立法推动下逐步实现的。

由国际法以观，欧盟在性质上仍属于国际组织。不过，欧盟所实现的国家联合与统一是任何国际组织无法比拟的。欧盟不但建立了三个共同体，即经济共同体、钢煤共同体与原子能共同体，也不仅形成了统一的货币体系，而且其成员国在外交与安全、治安与司法协作方面有着共同的对外政策。这三个共同体与两大共同的对外政策就构成了欧盟的“五大支柱”。不仅如此，欧盟还享有自身的立法权与欧洲法院为标志的司法权。可见，欧盟属于名副其实的“超级国际组织”。作为一个单独的法律学科，欧盟法业已成为成员国内的法律系学生的必修课。

依据欧盟条约，欧盟自身的立法主要分为条例与指令两种。其中，条例(Regulation)在成员国直接生效，而无须成员国转化为国内法。由于各成员国的法律尤其是私法相差较大，如果只能取得最低

限度的协调，欧盟一般采用指令(Directive)形式。成员国必须在规定的期限内将欧盟的指令转化为国内法，这样可以使得各成员国的法律维持一定的共性，同时又得以保留一定的差异性。从这些条例与指令中，其他国家可以发现法律发展的动向，原因不仅在于欧盟成员国包括了大陆法系与英美法系国家，还在于欧盟成员国均是发达国家并有着悠久的法律传统。欧盟及其成员国法律间的协调与发展在一定程度上代表了世界法律发展的趋势。研究欧盟法不仅具有国际法意义，而且对完善本国的法治也具有他山之石的功效。我们注意到，中国民商法、刑法、经济法、社会法、环境保护法与诉讼法都不同程度地受到欧盟法律的良性影响。此外，随着中国的和平崛起，欧盟也越来越关注中国法律的发展。

中国与欧盟在国际经济与政治舞台上均扮演着重要角色。在多元化的国际格局背景下，中国与欧盟展开了全方位的合作，二者间的战略伙伴关系也趋于明朗。而中国—欧盟合作项目的启动，正是双方良性互动的见证。作为该项目的子项目之一的中国—欧盟法律和司法合作项目的启动，无疑为二者间的法律文化交流架起了桥梁。

在中国—欧盟法律和司法合作项目的推动下，西南政法大学致力于欧盟与中国法律的比较研究及译介。为此，我们十分感谢中国—欧盟法律和司法合作项目管理办公室，尤其是欧方主任 Stephan Forbes 先生、中方主任赵林娜女士以及合作伙伴法律出版社的大力支持。我们也对丛书主编兼欧盟法律研究所主任吴越教授富有成效的协调工作表示赞赏。

最后，我们祝愿“中国·欧盟法律研究系列”丛书的出版能够为推动中国与欧盟的法学交流作出贡献。

龙宗智	Rudolf Steinberg
法学博士、教授、博士生导师	Dr. iur., Professor
西南政法大学校长	President, J.W. Goethe University
西南政法大学欧盟法律研究所荣誉所长	Honorable Director, Institute of EU Law, SWUPL
2004 年春于重庆歌乐山	Frankfurt am Main, Spring 2004

Preface

The foundation of the EU (European Union) has accelerated the process of European integration. Starting with six member states, it, by now, extends to 25 countries from the Atlantic far into the former Soviet Bloc, from the Mediterranean to Artic Sea. With the ultimate aims of establishing a single market and an ever growing union, the EU has evolved as a major factor in maintaining world peace. In an era of economic globalisation and political pluralism, any state or international organisation should be attentive to the development in the EU. In other words, studies of the EU are of global strategic importance.

Research on the laws of the EU and its member states is essential. The integration process cannot be understood without a thorough knowledge of its founding treaties and EU legislation. The EU consists of three communities, namely the European Economic Community, the Steel and Coal Community, and the Atomic Energy Community. The EU has attained a level of integration incomparable to any other organisation of states. It has even established a single currency system adopted by the majority of the old member states. The member states are held to coordinate both foreign policy and defence policy. The three communities and two common policies constitute the "five pillars" of the EU. In addition the EU has its own legislature and judiciary, i.e. the European Court. A European Constitution is presently being prepared. Consequently, the EU is worthy of the name "supranational organization". The study of EU laws is compulsory in law schools in all

member states.

According to its founding treaties, EU legislation can be either regulations or directives. Regulations are immediately applicable law in all EU member states. More commonly used is the legislative tool of the directive which addresses the member states. This allows the national legislatures to pursue the regulatory aims set out by the directive in a manner more compatible with the respective national legal systems. The member states must transform directives into national laws within given periods.

Other countries may discover general tendencies of modern legislation by studying EU regulations and directives. This is particularly relevant since EU member states include both common law and continental law countries. Moreover, the laws of each EU member state have evolved through a long process of legal development. One can say that the coordination of laws between the EU member states is exemplary of the developmental tendency of world laws. The study of EU law is of great significance not only for the field of international law but also for the legal developmental process of China. It is noted that EU laws have positively effected Chinese civil law, criminal law, economic law, social law, environmental law and procedural law. On the other hand, the EU is paying attention to developments of Chinese Law due to the peaceful development of China.

Both the EU and China play an important part on the international economic and political stage. In this era of globalisation and pluralism, the EU and China have been cooperating in all fields. A strategic partnership between the EU and China is taking shape. The start of the EU-China Programme is a good example of this cooperation. As one of its sub-programmes, the EU – China Legal and Judicial Cooperation Programme has set up a bridge of communication between legal cultures.

Within the context of the EU-China and Judicial Cooperation Programme, the Southwest University of Political Science and Law (SWUPL) and the Johann Wolfgang Goethe- University School of Law commit themselves to bi-directional translation and comparative studies on European and Chinese laws. We acknowledge our thanks to the Project Management Office, especially European director Mr. Stefan Forbes and the Chinese director Madame Zhao Linna and our partner Law Press · China for their generous support. We also appreciate the effective coordination of editor-in-chief Prof. Dr. Helmut Kohl, Johann Wolfgang Goethe University, and Prof. Dr. Wu Yue, director of Institute of EU Law, SWUPL. We commend the publication of EU-China comparative law studies series.

Rudolf Steinberg
Dr. iur., Professor
President
J.W. Goethe University
Honorable Director
Institute of EU Law, SWUPL
Chongqing, Spring 2004

Long Zongzhi
Dr. iur., Professor
President
SWUPL
Honorable Director
Institute of EU Law, SWUPL
Frankfurt am Main, Spring 2004

前　言

时今，知识产权已经成为全球性的论题。在实践层面，它改变着人们的生活方式；在理念层面，它置换着人们的生存感受。作为一种话语，知识产权不仅维持着自身，同时还维持着关涉到相关领域里的制度、机构的生产与再生产。在这个意义上，与知识产权有关的制度、机构、人员组成乃至课程设置都是结构性的。正因为如此，知识产权在国际范围内才获得了非同寻常的地位。

尽管知识产权面临着全球化的趋势，但主权观念、民族性、文化认同等都在一定程度上决定着知识产权的地域特征。事实上，知识产权与全球化的关系在一定程度上再现了大写的权利与其实现程序之间的关系。如何在自身能力的基础上充分保护知识产权是每个国家和地区都面临的任务，也成为学者们思考的问题。本课题正是这种思考、努力的结果。

从大处着眼，本书主要采用了比较的研究方法。诺瓦里斯(Novalis)说，比较可以使我们获得认识和知识。正是通过比较，我们才得以发现他者之长、吾人之短。比较既可以在制度之间进行，也可以在文化理念之间展开。尽管比较有把被比较对象类型化的倾向，但在韦伯看来，它仍对我们认识对象大有裨益。基于这种考虑，本课题组成员有选择地挑选了具有特色的内容并在中国欧盟的法律框架乃至文化传统中进行了论述。我们既希望通过比较获得对欧盟知识产权法的深刻认识，借鉴他们的成功做法；也希望通过比较向他人展现我们的知识产权法律制度，并论述这些制度在中国语境下的合理性。

本课题为“中国—欧盟法律和司法合作项目”的子项目，在具体设计上，受吴越先生的惠泽，在此深表谢意！

张玉敏

2005 年 1 月 16 日

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知识产权的概念和法律特征

张玉敏*

Abstract There exist some misleading ideas about the basic theory studies of IPR in China. Some scholars parrot the views of others, and the erroneous message is incorrectly relayed so that it becomes increasingly distorted. This situation has prevented people from further studying intellectual property law. After analyzing and criticizing some popular concepts and legal characteristics of IPR, the author proposes her own definition: IPR are the civil subjects' rights to control and use their intellectual works, trademarks and other information of commercial values, and the rights to exclude other people from using them without authorization of the obligees. The legal characteristics of IPR are as follows: (1)The subject matter of protection is immaterial information; (2)IPR are rights against the world at large (jus in re) and the rights to dispose of that which is in the possession; (3)It can be obtained and used territorially. Furthermore, the author analyzes and denies the so-called characteristics, such as exclusiveness, space limits, legal time limits and state grant, etc.

随着高新技术的迅速发展,知识产权在国民经济发展中的作用日益受到各方面的重视,知识产权的理论和实务也成为法学研究的

* 张玉敏,西南政法大学教授,博士生导师,西南政法大学知识产权法研究中心主任,市场交易法律制度研究基地副主任。

一个热点，新的著述如雨后春笋，目不暇接。但是，对于知识产权的一些基本理论问题，如知识产权的概念和法律特征、权利人利益和社会公共利益的协调、知识产权保护程度和经济发展的关系等问题，国内学界并未取得共识，不同利益集团之间由其自身利益所决定更是存在相互冲突之主张。因此，对知识产权的基本理论进行深入研究仍有重要的现实意义。本文试图运用民法的基本原理，对知识产权的概念和法律特征作出自己的解释，求教于同仁。

一、知识产权的概念

我国的著述中有两种具有代表性的关于知识产权的定义。一种将知识产权定义为人们对其创造性的智力成果依法享有的专有权利；另一种将知识产权定义为人们对其创造性的智力成果和商业标记依法享有的专有权利。早期的著述均采第一种定义，目前极力坚持这一定义的是郑成思先生。如他在其主编的《知识产权法教程》中给知识产权下的定义是："知识产权指的是人们可以就其智力创造的成果所依法享有的专有权利。"〔1〕为了说明这一定义的正确性，郑成思先生在多部作品中反复论证、强调知识产权的客体，包括商业标志，都是具有创造性的智力成果。〔2〕近年来，随着对知识产权研究的深入，取第二种定义的人渐多，如刘春田主编的《知识产权法教程》的定义是"知识产权是智力成果的创造人依法享有的权利和生产经营活动中标记所有人依法享有的权利的总称。"吴汉东主编的《知识产权法》的定义是"知识产权是人们对于自己的智力活动创造的成果和经营管理活动中的标记、信誉依法享有的权利。"

一个法学上的定义，必须准确揭示出定义对象的本质特征，以区别于其他类似的事物。按照这一要求，笔者认为，以上两种定义都没有准确反映知识产权的本质特征，不但无助于人们对知识产权的研究，反而会造成思想的混乱，影响对知识产权法的学习和研究。因

〔1〕 参见郑成思：《知识产权法教程》，法律出版社，1993年，第1页。

〔2〕 参见郑成思："再论知识产权的概念"，载《知识产权》，1997年第1期。