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中国知识产权法比较法案例分析 (第二册)

CHINESE INTELLECTUAL PROPERTY LAW

COMPARATIVE CASE STUDIES

PART TWO



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张玉卿 葛 毅 主编

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Preface

Intellectual Property Law (IP Law) comprises a variety of legal aspects which are of ever growing importance in China where trade and cultural exchange with countries all over the world is rapidly growing. IP Law protects the rights of those who invent products, establish trade marks or perform intellectual work for example by composing music. Trademark Law, Patent Law, Copyright Law, Right of Name and Unfair Competition Law are all parts of Intellectual Property Law. The origins of Chinese IP Law date back to 1982 and 1984 when the Trademark Law respectively the Patent Law were issued by the Standing Committee of the National People's Congress. In recent years China has promulgated a lot of other laws dealing with Intellectual Property such as the revised Copyright Law in 2001. IP Law has to be permanently adjusted, because a lot of new technical methods of using intellectual property have emerged, for example the internet. International aspects of IP Law are mainly covered by international agreements like the Paris Convention or the Nice Agreement. In recent years China acceded to many of these treaties, especially to meet the criteria of the World Trade Organisation (WTO) which China entered on December 11, 2001. To illustrate the relevance of IP Law: only in the first half of 2000 665 cases involving violation of foreign trademarks were recorded in the PRC.

Theoretical knowledge of the law is not enough for lawyers. Every practicing lawyer needs to know how to apply the law; i.e. how to put the facts of his or her case together with the rule, which may be a legal

provision or a precedent. Such procedures could also be referred to as rule handling or how to deal with legal provisions. The present book intends to introduce both Chinese and German substantial IP Law in theory and in practice. In order to accomplish this objective, the book consists of three components: introduction to techniques for implementation of the law, theoretical introduction to Chinese and German IP Law, and 6 case studies. Each case study offers a solution according to Chinese and German law. Every case study serves as an example of how rule handling works, and thus demonstrates implementation of the law in action.

The present book has been written as a study book. It has been designed for judges, practicing attorneys, and in-house counsels; as well as for academics, scholars, and law students, who already have at least a basic knowledge of IP Law. Practicing lawyers will probably benefit most from the implementation techniques, which will facilitate their daily work and will make them more efficient. Academics, scholars, and law students can furthermore take advantage of the comparative legal approach of the book. Legal systems can be best compared by confronting the solutions each legal system provides for a concrete case study. Moreover, law instructors may use the book as a teaching device. Each case study can serve as one teaching unit. Students can be asked to prepare the solution for a case study as homework, and the solution can be discussed subsequently in class. There are various ways of making use of this book. I hope our readers will find it beneficial and enjoyable.

This book is based on training materials developed for a series of courses, jointly organized by the Legal Cooperation Office Beijing of Deutsche Gesellschaft für Technische Zusammenarbeit (GTZ) GmbH and the Treaty and Law Department of the Ministry of Commerce (MOFCOM) of

the PRC in their Joint Project "Training and Advisory Service on Commercial Laws at MOFCOM." GTZ acts on behalf of the German Federal Ministry of Economic Cooperation and Development. This Project commenced in 1997 and arranges approximately twenty weeks of training annually. This includes training courses at the Law School of Peking University where the present case studies have been tested. Moreover, several draft laws and regulations have received advice from GTZ; for example on Foreign Trade Law, Law on Evidence, and Export and Import Regulations.

GTZ possesses more than twenty years of experience in drafting and implementing legal projects in developing countries and countries in transition. In the PRC, GTZ has been implementing legal advisory projects as early as 1985, and it has been supporting legal reforms in the PRC continuously since then. A strong emphasis has been placed on economic laws including Labour and Social Security Law, and since 1999 GTZ also provided advice on Administrative Law. Currently, GTZ's Legal Cooperation Office in Beijing in cooperation with its Chinese partners, implements the following projects:

- Training and Advisory Service on Commercial Laws at MOFCOM
- Advisory Service to the Financial and Economic Committee of the National People's Congress (NPC)
- Advisory Service to the Ministry of Labour and Social Security
- Advisory Service to the Legal Affairs Commission of the Standing Committee of the NPC

For further information regarding our cooperation, please contact GTZ's Legal Cooperation Office in Beijing at Ta Yuan Diplomatic Office Building 1-13-2, No. 14 Liangmahe Nanlu, Beijing 100600, phone (86)

10 - 85321401, fax (86) 10 - 85321405, e-mail gtznpc@netchina.com.cn or visit our website at www.gtz-legal-reform.org.cn.

I want to thank my partner Zhang Yuqing, Director General of the Treaty and Law Department of MOFCOM. Furthermore, I thank all contributors for their precious participation. MOFCOM's support of our training courses by Li Ling, Zhou Xiaoyan, Zhao Hong, Han Liang, Lu Tao and Wang Yang was essential for their success. Last but not least, this publication would not have been possible without the effort of all members of our Legal Cooperation Office, especially Hu Lan, Dr. Alexander von Reden, Regine Reim, Wu Nan, Liu Wei and Wang Jing.

Immanuel Gebhardt

Director, GTZ Legal Cooperation Office Beijing

前 言

知识产权法由在与世界各国的贸易和文化交流飞速发展的中国日益重要的多个法律方面组成。知识产权法保护发明产品、创设商标或从事智力劳动(例如音乐创作)的人们的权利。商标法、专利法、著作权法、姓名权和不公平竞争法都是知识产权法的组成部分。中国知识产权法的起源可以追溯到1982年和1984年,当时全国人民代表大会常务委员会分别颁布了商标法和专利法。近年来,中国颁布了许多规定知识产权的其他法律,例如在2001年修改了著作权法。知识产权法在不断进行调整,因为大量利用知识产权的新兴技术手段不断涌现,例如互联网。知识产权法的国际层面主要表现为国际协定,例如巴黎公约或尼斯公约。近年来中国加入了许多这样的公约,尤其为了达到中国2001年12月11日成为世界贸易组织(WTO)成员的标准。关于知识产权法的实用性可以举例来说:仅在2000年上半年,记录就表明中国有665个案件涉及侵害外国商标。

对于从事法律工作的人而言,仅仅理论知识是不够的。他们每个人都需要知道如何适用法律,也就是如何将他所遇到的案件的事实与法律规范放在一起,这里的法律规范既有可能是一个法律条文,也有可能是一个判例。这一过程也可以被称为法律规范处理或者说如何对待法律规定。本书希望能够从理论和实践两个角度介绍中国和德国的实体知识产权法律制度。为了实现这个目标,这本书包括三部分内容:法律适用技术的介绍,中国和德国知识产权法理论介绍,以及6个案例分析。每个案例分析都分别提供了中国法和德国法的解决方案,都可以单独作为规范处理如何运作的范例,从而展示了法律在实践中的适用过程。

这本书是作为学习用书编写的,对象是至少已经具备基础知识产权法律知识的法官、职业律师以及公司法律顾问,还包括学者和法学院的学生等。职业律师可能是这种法律适用技术的最大受益者,因为这种技术可以为他们的日常工作提供便利,提高工作效率。本书运用的比较法研究方法还有助于学者的研究和法学院学生的学习,而比较不同法律制度的最好方式就是直接

对照各个法律制度为一个具体案例提供解决方案。此外，法律教师还可以拿这本书作为辅助教学工具，其中每个案例分析都可以作为一个教学单元，也可以从中选择案例作为作业要求学生提供解决方案，然后在课堂上讨论。利用这本书的方式有很多种，我希望读者觉得它还有用，也比较有意思。

这本书是以德国技术合作公司(GTZ)法律合作项目北京办公室与中华人民共和国商务部条约法律司在“商务部经济法培训与咨询”合作项目下共同举办的系列课程所使用的培训材料为基础编写的。德国技术合作公司代表的是德国联邦经济合作与发展部。它与商务部这一合作项目始于1997年，每年安排大约20个星期的培训课程，其中在北京大学法学院开设的课程用本书中这些案例进行了试验教学。此外，中国一些法律草案和法规的草拟与制定也得到了德国技术合作公司提供的咨询服务，比如外贸法、证据法和进出口条例等。

在拟定与执行发展中国家和转型国家法律项目方面，德国技术合作公司已有20多年的经验。德国技术合作公司早在1985年就开始在中华人民共和国执行法律咨询项目，并从此对中国法律改革提供了持续不断的支持。合作项目的重点是包括劳动法和社会保障法在内的经济法律。从1999年开始，德国技术合作公司也开始就行政法提供咨询服务。现在，德国技术合作公司法律合作项目北京办公室与合作伙伴共同执行以下几个项目：

- 商务部中德经济法培训与咨询项目
- 全国人大财经委经济法咨询项目
- 劳动与社会保障部法律咨询项目
- 全国人大常委会法制工作委员会行政法律咨询项目

有关合作项目的进一步信息可以浏览我们的网页 www.gtz-legal-reform.org.cn，或者联系德国技术合作公司法律合作项目北京办公室：

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在这里我想向我的合作伙伴、商务部条法司张玉卿司长表示感谢。此外，我还要感谢以前所有参与并为这本书的最终出版奉献心力的人。其中，商务部的李玲女士、周晓燕女士、赵宏女士、韩亮先生、路焘先生以及王洋

女士对历次培训班提供了这些活动的成功所必不可少的支持。最后提及但决非最不重要的一点是，没有我们法律合作项目办公室全体同仁的努力，本书是不可能出版的，在此尤其要感谢胡兰、Alexander von Reden 博士、Regine Reim、吴楠、刘巍、杨军以及王静等人。

德国技术合作公司法律合作项目北京办公室负责人

葛毅(Immanuel Gebhardt)

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