

人类的聪明才智是一切艺术成果和发明成果的源泉。这些成果是人们美好的生活的保证。国家的职责就是要保证坚持不懈地保护艺术和发明。

Protection of  
Intellectual Property  
Right in China

知识产权保护  
在中国

斯伟江 詹毅 袁洋 吴鹏彬/著 李丹/译



法律出版社  
LAW PRESS · CHINA

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# PREFACE

As Dan Piccuta, deputy chief of mission of USA, states in one of his articles' title that intellectual property protection is as important to China as to USA.

When China's economy has achieved unprecedented development, at the same time the intellectual property protection in China has drawn unprecedented attention before.

This book elaborates in detail on the intellectual property legal system, the judicial practice in present China and the issues that exist in the intellectual property protection in real life. From this book, it can be learned that intellectual property protection in China is no longer a mess and China, especially after joining WTO, has established a system with Chinese characteristic for intellectual property protection, even though such a system still needs to be perfected. This book gives readers a good access to the legislation, jurisdiction of Chinese intellectual property protection system and what happens so far in the protection of intellectual property in China, especially to the understandings of the courts and authorities related with intellectual property in China for the intellectual property protection.

This book is constituted of copy right, trademark, patent and unfair competition four parts. Each part covers, apart from brief introductions of the legal systems in the four areas in China, a good number of mile stone cases. From this book, you can also see that intellectual protection in China is long and ever developing, a course from chaos to order. It is hoped that this book will give those, who wants to know or who does not know or who wants enter into China, a good chance to understand that China has his own intellectual property protection and such protection has its own rule to follow. Meanwhile, it is also hoped that this book will teach.

This book is a piece of master work by attorneys at Shanghai DeBund Law Offices and it takes them one and a half hours to complete the book. All the authors are attorneys with rich experiences in practice and it is believed that this book will definitely have some non pure academic taste.

Shanghai Debund Law Offices  
Weijiang Si  
October 10th,2009

# 前言

正如美国驻华使馆临时代办彭达(Dan Piccuta)的文章标题一样,“知识产权保护对中国和美国同样重要”。

中国的经济取得前所未有的发展的同时,中国的知识产权保护也得到了前所未有的关注。

本书全面介绍了中国目前的知识产权法律制度、司法实践及现实中知识产权保护存在的问题。通过本书我们可以看到,中国的知识产权保护不再是“一团糟”,特别是在加入WTO后,已经初步形成了一套具有中国特色的知识产权保护体系,尽管还有很多不完善和不尽如人意的地方。通过本书,读者可以了解到当今中国的知识产权立法、司法和实践现状,特别是法院和中国涉及知识产权的行政机构对于中国知识产权保护的认识和理解。

本书涵盖了著作权、商标、专利、反不正当竞争,每一部分除了简要阐述中国在这些领域内的法律体系外,还贯穿了大量具有里程碑性质的案例。从本书中,你也可以了解到中国知识产权的保护是一个不断发展演变和漫长的过程,一个从杂乱无章到有序变化的过程。通过本书,希望进入中国、希望了解或者不了解中国知识产权保护的读者可以意识到中国有自己的知识产权保护,中国的知识产权保护是有规律可循的;同时,我们也希望通过本书,教会大家如何在中国法律下创造和保护属于自己的知识产权。

本书为上海大邦律师事务所诸多律师历经一年半时间完成的一部力作,作者均是有丰富实践经验的律师,故相信此书是将别有一番非学院派的趣味。

上海大邦律师事务所  
斯伟江  
二〇〇九年十月十日

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# **Protection of Intellectual Property Right in China**

**知识产权保护在中国**

# Chapter 1 Chinese Copyright Legal Practice

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He graduated from East China University of Political Science and Law with the degree of Master of Civil Law and Commercial Law. Then he worked in the administrative department of patent in Shanghai Municipal Government, and was mainly in charge of the administration and law enforcement in the area of intellectual property. He is now working in Debund as a qualified lawyer. At the same time he is a member of Shanghai Law Society.

He has rich practical experience in protecting intellectual property rights especially the protection of copy right. Many of his theses have been published in *Intellectual Property Law Study*, *Journal of Shanghai Institute of Political Science*, *Shanghai Law Study and Shanghai Trial Practice*, etc.

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## Preface

“The intelligence, wisdom and talent of humankind are the origin of all artistic fruits and invention which constitutes the assurance of better life. Protection of them consistently and persistently is the responsibility of a country.” This is Dr. Arpad Bogsch’s words engraved on the top of the dome of WIPO (World Intellectual Property Organization)’s headquarter in Geneva. It points out that protection of intellectual properties, including copyright [ FNI ]\* protection, is of vital importance for the development of economy, society and culture. Copyright is the result of modern civilization and contemporary economical development. It is also a basic element of the invention, production, transaction, dissemination, usage of the works of fine art, audio-visual works, and computer software. The purpose of copyright is to protect the intellectual creations, which reflects the core value of the copyright-related industries and hence, its protection level is the essential

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\* For editing and type setting’s convenience, the English version of this book has used endnote which is different from what the Chinese version has used.

We hereby give the special notice.

# 第一章 中国版权法律实务

## 詹毅律师

毕业于华东政法学院,毕业后在上海市相关政府部门工作多年,主要从事著作权等知识产权的管理和行政执法工作,现为大邦律师事务所执业律师,上海市法学会会员,民商法学硕士。

詹毅律师在知识产权尤其是著作权保护方面具有丰富的实践经验,在实务工作的同时还在《知识产权法研究》、《上海政法学院学报》、《上海法学研究》、《上海审判实践》等学术刊物上发表法学论文多篇。

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## 引言

“人类的聪明才智是一切艺术成果和发明成果的源泉。这些成果是人们美好的生活的保证。国家的职责就是要保证坚持不懈地保护艺术和发明。”这是阿帕德·鲍格胥博士在世界知识产权组织日内瓦总部大楼大厅圆顶的题词,这段话指出了包括版权<sup>[1]</sup>在内的知识产权保护对于经济、社会和文化发展的重要意义。版权是现代文明和现代产业经济发展的产物,是文学艺术作品、视听作品、计算机软件等版权作品创作、生产、交易、传播、使用的基础要素,版权保护的是知识创新成果。版权体现了版权相关产业的核心价值,版权相关产业的发展水平是衡量一个国家或地区创新能力和核心竞争力的基本标尺,随着数字技术和内容经济的发展,版权相关产业从传统的新闻出版、广播影视、广告宣传到软件开

[1] 根据《中华人民共和国著作权法》第56条的规定,著作权即版权。



standard to evaluate the creation ability and main competitive ability of a country or an area. With the development of the digital technologies and the content-economy, copyright-related industries have expanded from the traditional areas like news publication, broadcasting, films and advertisement to new industries like software development, internet dissemination, new idea design and digital service. It plays a more and more important role in the social development. Therefore, in the modern society, protection of the copyright owner's rights, right to secure the public to take part in economical and cultural life to enjoy the intellectual property creations, and the promotion of the technology and society development become inseparable to the operation of copyright-related industries. Based on the above, this chapter focuses on the legal practices of the copyright protection. In this chapter, we mainly discuss four areas of copyright practices, including the touchstone of copyright protection, copyright exploitation contract, industrial copyright and information-internet copyright. Firstly, the touchstone of copyright protection with regard to the entry criteria of legal protection is the basic question for a copyright. Secondly, copyright exploitation contract is the basic content for the traditional copyright transaction, and also is the main approach both for the copyright owner to realize the creation benefits and for the public to share the work. Thirdly, except for the traditional copyright protection and exploitation, technology development challenges this area by various new situations. As to the evolution of the right types and creation of protection models, the industrial copyright which reflects the overlaps of works of fine art's right and industrial right attracts more and more attention. The legislations in different countries are different and this chapter will give a simple discuss on this point, including some introduction of the current situation of Chinese industrial copyright protection. Finally, the flourish of the digital internet makes internet copyright protection become a new area, of which the introduction of its legislations and cases can be found in this chapter.

## **Section 1 The Touchstone of Copyright Protection**

### **1.1 Case: Educational Testing Service (ETS) v. New Oriental School**

[ (2003) High Court Civil Final No. 1393 ] (copyright & trademark) [ FN2 ]

Founded in 1948 and since then, American Educational Testing Service (ETS) develops and presides over the TOEFL (Test of English as a Foreign Language) test. From 1989 to 1999, ETS had filed applications of copyright registration of 53 sets of its developed testing questions at American copyright authority. New Oriental School is a private school located in Hai-Dian district of Beijing and its business is in the area of foreign language education and service. On 17 August 1997, the copyright agent of ETS in mainland China and New Oriental School went into agreements named "License Agreement of Cassette Copyright Use" and "License Agreement of Literary