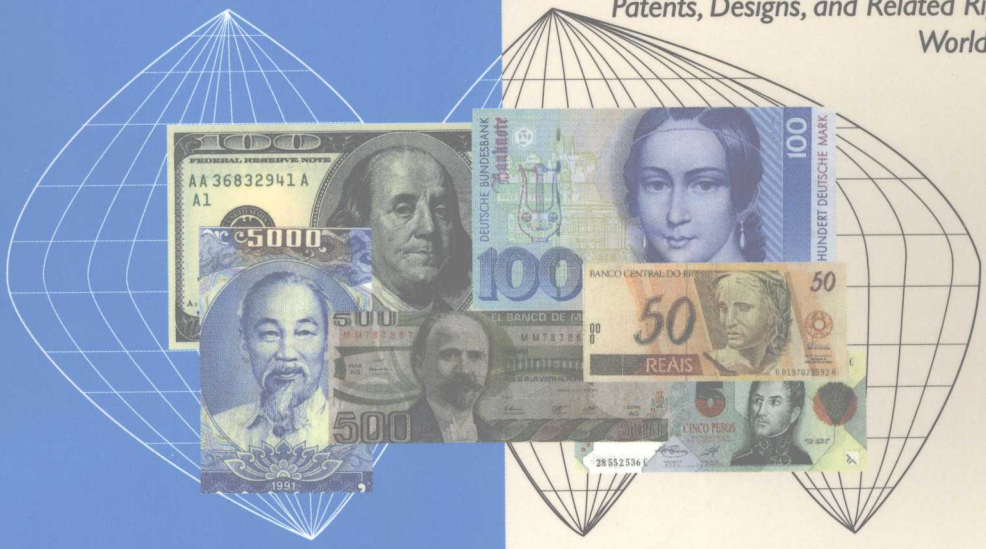
简明商务英语系列教程 ⑦

A SHORT COURSE IN

INTERNATIONAL INTELLECTUAL PROPERTY RIGHTS

国际知识产权

Protecting Your Brands, Marks, Copyrights, Patents, Designs, and Related Rights Worldwide



KARLA C. SHIPPEY, JD

导读　张佐成

THE SHORT COURSE IN INTERNATIONAL TRADE SERIES

上海外语教育出版社

外教社 SHANGHAI FOREIGN LANGUAGE EDUCATION PRESS

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The Short Course in International Trade Series

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出版前言

截至2008年，教育部已批准对外经济贸易大学、广东外语外贸大学和上海对外贸易学院三所高校设立商务英语本科专业。目前，全国已有近700所院校开设了商务英语专业方向或课程，商务英语教学内容由语言能力、跨文化交际、商科知识、人文素养四个课程群组成，如何建设和完善商务英语教材已成为办好商务英语专业的关键因素之一。

上海外语教育出版社经过精心策划，适时推出了商务英语知识群的教材——“简明商务英语系列教程”。这套原版商务英语专业知识阅读教材从美国世界贸易图书出版社最新引进，共12本，涉及商科知识的各个领域，包括国际经济学、国际贸易、管理学、营销学、国际商法、商务谈判、商业伦理、商业文化、商业合同、商业支付等。本系列教材的特点是：知识体系完整，内容简明扼要，语言文字流畅，理论联系实际。为了帮助读者更好地理解商务英语学习所必备的商务专业知识，本套教材组织了阵容强大的专家委员会，还特邀对外经济贸易大学商务英语的专家教授为本系列教材撰写导读，相信一定会对学习者大有裨益。

本系列教材可以作为大专院校商务英语、国际贸易、工商管理等专业学生的相关课程的教材，同时也可作为企业各类管理人员的培训教材或辅导资料，以及广大商务英语学习者的自学教程或阅读丛书。

“简明商务英语系列教程”专家委员会

2008.10

导　读

张佐成

1　本领域的现状概述

知识产权是一种无形财产权，是从事智力创造性活动者对自己的创造专有的权利。人们把知识产权作为一种财产权来对待历史不算太长。随着知识经济的发展，知识产权的重要性日益凸现，知识产权正成为企业最大的财产。国际贸易正在从货物贸易向服务贸易和知识产权贸易的重心转移，发达国家十分重视知识产权和知识产权的保护。美国提出要发展支持市场驱动型的知识产权制度，日本提出知识产权立国的口号。

我国自20世纪80年代开始建立知识产权制度，先后制定颁布了保护知识产权的《商标法》、《专利法》、《版权法》等法律法规，知识产权逐步为企业家和普通民众所接受和重视。但是，在知识产权的保护意识和使用上我们和发达国家还有很大的差距。中国经济全球化的进程不断加快，了解最新的知识产权理论和实务无疑是中国企业提高对知识产权的认识和利用能力的前提。

2　本书特色

1) 作者简介

本书由法学博士卡拉·C·希比（KARLA C. SHIPPEY）所著。希比博士是一位专门为开展国际商务的公司提供知识产权和相关交易咨询的律师。在法律和国际商务领域著书立说，她有15年的经验。本系列中的《国际商务合同》也是她的作品。她还是加利福尼亚州奥兰治市安德森和希比法律事务所的合伙人。

2) 本书特色

本书的一大特色是实用。知识产权涉及的范围广，内容复杂，法律性强。作者用简明的语言清晰地介绍了各种知识产权在国际商务中的具体运作、可能存在的问题和解决的方法。另外一个特色是作者在叙述过程中的审慎态度。

由于知识产权会因文化差异而产生不同的认识，各国的知识产权法律法规也不尽相同，作者反复提醒读者需要具有文化敏感性，不要照搬书中的做法，要细致了解目标市场的有关情况，具体的事务要向律师咨询。

3) 使用对象

本书是开拓国际市场的企业家和商务人士了解知识产权和运用的一本非常有用的参考书；也可供大专院校商务英语、国际贸易、工商管理专业学生学习，以及企事业各类管理人员培训使用。

3 本书主要内容

本书的目的是向即将或正在从事国际商务的企业家和商务人士提供系统的关于知识产权的创造、使用的实用知识。主要内容包括知识产权的概念、知识产权对国际商业的作用和价值、影响知识产权的国际因素、知识产权的各相关人、如何确保知识产权的价值等等。

全书内容包括一篇导言和24章正文。

导言介绍了本书的写作目的、基本内容、读者对象等。其他章节深入讨论具体的知识产权话题。

第一章 知识产权的基本知识

知识财产和土地、楼房、车辆、衣服这些有形财产不同，它是无形的。在变成有形商品之前，它只存在于创造者的头脑中。知识产权为创造者所专有。不同国家对知识产权的立法和司法解释不同，不同文化对知识产权的认识也不同。知识产权处于不断的发展变化之中。

知识产权分为传统的知识产权，如专利、版权和商标权，和非传统的知识产权，如商号、商业秘密、品牌名、设计、域名等。

第二章 知识产权在国际商务中的作用和知识产权价值的评估

知识产权是企业最有价值的资产之一。保护知识产权能鼓励创造性的发挥，企业和企业的产品或服务也能通过它区别于其他企业和其他产品，增加赢利性，使企业不断发展。因此，世界各国的知识产权法律都会保护知识产权人对创造的独有权。但由于知识产权和信息自由的公共利益之间存在矛盾，对知识产权又有所限制。这就使得知识产权必须积极主张。

知识产权价值的评估方法较多，最好由专家来进行。随着企业和市场的变化，知识产权的估价也要定期调整。

第三章 影响知识产权的国际因素

对知识产权是否认可和认可程度因各地文化而异。有些文化不接受知识产

权，有些文化对知识产权有所偏好。有些国家知识产权法律已经完善，而有些国家这方面较弱，对知识产权的侵犯行为处置比较困难。因此，知识产权所有人要具有对不同地区文化的敏感性，防止别人侵权，或者至少降低别人对自己知识产权的侵害程度。

第四章　知识产权的有关方（之一）：所有权人、消费者、被授权使用人、被许可人、律师

拥有人既可以是知识产权的创造者，也可以是创造者的雇主，还可以是受让人。使用人可以是知识产权的购买人，也可以是一个拷贝的购买人。作者提醒读者注意：知识产权的拥有人和知识产权产品的拥有人是不同的。拷贝的拥有者可以转卖、租赁、出借拷贝，但不允许复制。

授权使用人或使用许可人只拥有知识产权的一部分，知识产权人并没有把全部知识产权转让给他们。

律师对上述各利益方都非常重要。各利益方要明白什么时候去咨询律师，以及律师可以提供哪些具体服务。

第五章　如何在创建知识产权时确保它的价值

在制订企业规划书时就要把无形财产加入进来，制订知识产权战略，评估企业对知识产权的需求，拿出需求清单，安排适当的预算，使知识产权和企业战略结合起来，选择各种预防侵权措施。

第六章　如何在知识产权创建后确保它的价值

由于知识产权是积极的权利，不是防御性的，因此需要积极去保护。本章介绍知识产权的注册过程、如何使用知识产权、以及如何防止和处理对自己知识产权造成的侵害。

第七章　知识产权的有关方（之二）：对弱者和强者的保护

介绍创造人、使用许可人、受让人或特许经营人如何保护自己的权益以及各自的律师可以提供的服务。

第八章　保证对知识产权明晰的合同保护

本章以一个计算机软件的使用许可协议条款为例，介绍知识产权各利益人在订立合同或协议时如何把自己的意愿明确地陈述在协议或合同的条款中。条款要明确，把可能预见到的各种情况都包括在内，语言要简明，尽可能避免法律术语。

第九章　知识产权的有关方（之三）：公共发布之前对所有权和使用权的把关

介绍在前面几章讲述的工作完成后创造者、使用许可人、特许经营人或受让

者及其律师还需要做的以保护自己权益的事情。

第十章 与知识产权有关的几个关键国际因素

其一是目标市场对知识产权的认可情况，其二是全球化和共同化的趋势对企业知识产权的影响，其三是政治因素，其四是管制性的法律，最后是互联网因素。

第十一章 国际性、地区性法律中的知识产权保护

介绍各种国际性、地区性的保护知识产权的条约、协议和公约。

第十二章 国际上的几种主要法律体系

介绍了如普通法体系、大陆法体系、伊斯兰法体系等，以及这些不同的法律体系在知识产权保护方面的特点。

第十三章 知识产权在各国（地区）的有效性：详情说明

本章讲世界主要国家的专利法、版权法和商标法的特点。

第十四章 获得知识产权：指示函

介绍申请注册知识产权时向律师或代理人发的指示函，还讨论了法律术语在不同语言中含义的差别。

第十五章 获得知识产权：共同合作成果协议

合作作品知识产权协议的范本

第十六章 获得知识产权：职务作品协议

涉及职务作品(work made for hire) 的知识产权协议

第十七章 保护知识产权：知识产权的保密协议

介绍包括发明人和知情者(confidant) 之间的协议、著作者和出版商之间的协议、雇主和雇员之间的协议。

第十八章 保护知识产权：警告函

向侵权者发出的停止侵权函(cease and desist letter) 的范本

第十九章 保护知识产权：和解备忘录的范本

第二十章 知识产权转让：合同范本

第二十一章 知识产权转让：使用许可协议范本

第二十二章 知识产权转让：转让契约或使用许可契约的范本

第二十三章 知识产权转让：未备案的转让或使用许可补遗的范本

4 推荐参考书

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INTRODUCTION

A SHORT COURSE IN INTERNATIONAL INTELLECTUAL PROPERTY RIGHTS was conceived for the purpose of demystifying a concept that is intangible at best—the rights of a creator to a monopoly over the creation.

WHY DEMYSTIFY?

Protection of intellectual property (IP) rights, legal constraints on owners and traders in these rights, and wheeling and dealing in these rights have spawned specialized legislation, judicial and administrative departments, and private commercial registries and protective agencies. And (of course) law firms have expanded to provide departments of attorneys with IP expertise. What does all this mean to the average commercial trader who just wants to make a profit? Our first chapter briefly describes what IP means, the second chapter gives you the short answers, and the rest of the book is a guide to making your IP profitable for you. You will find sidebars that emphasize and highlight the issues, checklists for ready access and use in decision-making and record-keeping, a special section on what you can expect in different legal systems and countries, and a glossary defining the technical legal meaning of common IP terms.

WHY WORRY ABOUT THE INTANGIBLE?

You are in business with the intent to make money. Your goods, equipment, building, and other property are assets of your business. Your time and labor are spent in ensuring the best quality and highest quantity of production at competitive prices within a fast changing market. You have a plan, and your plan is bringing (or will soon bring) you a profit. Your services are provided with a smile, and the client is always right. What have you forgotten?

The value of your intellectual property. What's in a name? What's in a new method or procedure? What's in an invention? What's in a web page or software presentation? Your ideas, once presented and distributed, will be the backbone of your business, because it is the presentation of your ideas that will grab your share of the market and keep customers coming back for more and more and more. There is value in the eye-catching design of a new dress, the unusual shape of a bottle containing a new perfume, the formula for the perfume itself, the lyrics and musical score you just wrote, and the logo and name you invented and printed on your stationery. If you cannot protect your rights in your creation, other traders can copy your creation, cause consumer confusion about who is providing the goods or services, and ultimately hurt your sales and market share.

WHAT IS THIS "IP" TERMINOLOGY?

In common US and Western European legal parlance, the term "IP" is taken to mean "Intellectual Property." As a US attorney, the author has adopted this term to refer to all types of creations that anyone can possibly create using his or her intellect, provided the creation has commercial value. The author is using the term "IP" in its broadest interpretation to include not only the traditional concepts of trademarks, copyrights, and patents, but also what some refer to as Industrial Property (intangible creations specifically related to commercial

ventures, such as trade names, trade secrets, trade designs, trade dress, industrial drawings and designs, geographical indications, and company manuals and methodologies). Moreover, the author would intend the term "IP" to refer to creations to which legal protection is being extended as this area of law develops, such as ethnobiological IP rights, Internet and software IP design rights, and IP rights in smells, sounds, and three-dimensional shapes.

WHO IN THE WORLD KNOWS ABOUT IP RIGHTS?

As a US attorney, the author admits to some bias toward the highly developed IP laws in the US and other common-law based countries (e.g., Canada, England, Singapore, South Africa, Australia). However, the author is well aware that the cultures and countries of this world have developed a variety of legal systems, and therefore IP rights are treated differently from nation to nation. In some places, the concept of intangible property does not exist, and therefore rights in IP are not recognized. Where political and legal systems have removed or limited private ownership rights in favor of state and public ownership, rights in IP are considered to be public. In many countries, IP laws have been in force for decades but have not been updated for current commercial practice, and even if laws have been revised, nontraditional IP rights remain beyond their scope. A plethora of international activity is also affecting national IP laws and practices as diverse economic and political interests come together in bilateral, regional, and multi-national trade summits and pacts.

As a trader, you need to be aware of the issues internationally and nationally that will affect your IP rights. Decisions you make today about your IP rights will ultimately affect your future profits in international markets both directly in terms of the labor and cost you spend in establishing and protecting your IP rights, and indirectly in terms of the development of IP that has commercial value and therefore contributes significantly to the international success of your venture. Accordingly, the author has tried to write about IP rights from an internationally generic viewpoint, and therefore she cautions that some of the points may not apply in a particular nation. You should always seek legal counsel to ensure that you understand your IP rights within any particular situation.

DOES THIS "SHORT COURSE" TELL ME EVERYTHING I NEED TO KNOW?

The author does not claim to tell you everything about IP, and quite certainly, you will need to seek other resources, including attorneys, to answer questions about your specific situation. The IP field is extremely diverse and complex, and also very legalistic. Volumes and volumes have been written about each one of the various IP rights, and IP laws vary significantly from country to country. Therefore, this skinny guide cannot do complete justice to every nuance of IP law and practice around the world.

Instead, the author has made a well-considered effort to bring to your attention the issues that you need to know so that you will become aware of your IP interests and can then ask the right questions to get the right answers. The author has also concentrated on giving you a practical how-to guideline from start to finish. Be certain to obtain authoritative legal advice. As the title says, this book is a Short Course.

JUST SAY IT

Forms, forms, forms. Lawyers love written agreements, and you will find many in this book. As the scope of this text is IP rights and the space is limited, the author has provided forms specifically related to IP rights, even if in some instances the forms would typically be included as clauses or sections within more comprehensive agreements, such as a distribution contract or an agreement to sell an entire business. In selecting forms, the author has concentrated on forms that the commercial trader would be most likely to use or review. Forms that are usually completed or prepared by legal counsel, such as applications for registration of IP rights have not been included. You will find sources for obtaining such forms listed at the end of this book.

The author has made a supreme effort to avoid "legalese", but unfortunately some conventions are necessary in the sample forms to indicate alternative phrasing. The conventions are not part of the forms. Alternative phrasing is enclosed within brackets, and inside the brackets additional alternatives are shown within parentheses. The brackets contain italicized instructions for completion; text of the form is always in roman typeface. A slash between two or more words indicates that you should choose one of the words depending on your particular situation.

Karla C. Shippey, J.D.
Irvine, California 2001

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CHAPTER 1

Intellectual Property (IP) Basics

Understanding IP Rights

Intellectual property is a product of the mind, and as such, it is distinct from the usual notions of "property." Land, buildings, vehicles, clothing, even your hat, are all tangible property. You can see and feel them. You can own them, lend them, and pass your ownership temporarily or forever to another person. You can judge their commercial value by looking at them, measuring them, poking about in their dirt mounds, timbers, axles and engines, and fibers. You can do price comparisons with other similar tangible properties.

INTANGIBLE PROPERTY RIGHTS

An intellectual creation, until it is presented in a tangible form, cannot be sensed by someone other than the creator, and it has value only to the creator. It is intangible property, present only in the creator's mind. For many centuries, intangible property rights in creations were not recognized or protected by law. There was an impasse among lawmakers and courts alike over whether and how to protect and value the rights associated with ideas and the presentation of ideas.

With the dawning of the Era of Enlightenment, the economies of the Americas and Europe began overflowing with inventors, authors, composers, publishers, and entertainers, and the political and economic worlds in the West realized that intangible rights in creations needed to be reviewed and come under the protection of the law and the courts. Property rights — such as the right to own, publish, distribute, sell, exchange, or lend — in intangibles had to be recognized if such property was to have marketable value for the creator. Put another way, an idea has marketable value only if you alone, and no one else, can use your manifestation of the idea. Or, marketable value comes from monopoly.

The willingness to recognize property rights in creations is a fairly new concept in relative terms to tangible property rights, which have been long recognized and well developed in the law. Moreover, this concept was first recognized in European and North American countries and in the countries touched by those political powers. In much of the rest of the world, intangible property rights in creations went unrecognized. What is viewed by Western powers as infringement of these rights is in fact not a crime in countries where creations are considered to be the right of the people as a whole. Legislation has been passed in many of these countries, but enforcement of IP rights remains a very difficult problem because of the popular view against recognition of intangible property rights.

Wherever you do business in the world today, be aware that legislative and judicial interpretations, protections, and constraints on the intangible property rights in creations are in a constant state of development and flex. Further, you must keep in mind the public view of IP rights, which can affect where you market and how you choose to enforce your IP rights.

IS MONOPOLY A "BAD" WORD?

A "monopoly" simply means exclusive ownership, possession, or control. Thus, if you own all property rights in an acre of land, you have exclusive rights — or a monopoly — to determine who can enter and cross the land, who can use the land, and how it can be used. This concept is not "bad" in and of itself.

In the context of IP rights, a monopoly is quite favorable, particularly if you are the creator, that is, the holder of the monopoly. If a creator has no monopoly in the creation, there is little or no commercial value in it. If you have designed and built a golf course, you have a monopoly over that design. Until you give up your monopoly, no other person should be allowed to recreate your design at another course or to photograph it for commercial distribution. If you have meticulously splashed color on canvas in your own creative patterns, you have a monopoly over where that canvas may be displayed and who may photograph it until you give up your IP rights. As the creator, you benefit from the monopolistic rights granted by law. Assuming you intend to profit from your creation, be certain that your IP rights — your exclusive property rights — are protected.

The reverse side of monopolistic rights — including rights in property — is that they can be abused to the harm of private parties or the public at large. A monopoly can result in one person controlling a market to the exclusion of all competition. If you want to profit from someone else's creation, the fact that the monopoly rights exist in that creation can hamper your intentions. You may need to purchase those IP rights or obtain a license or other authority to use them. Otherwise, the creator may sue you on grounds that your usage is an infringement of the IP rights.

Whether or not to allow monopolies has always been a conundrum. In many cultures and countries, monopolies go unregulated. Where laws have been enacted to control monopolies, monopolistic rights have merely been limited, not eliminated. For example, a landowner has exclusive rights to use the property, but those rights may be limited if the use causes an attractive nuisance or hazardous condition. Similarly, a creator may be permitted monopolistic rights in the creation, but if the creator stops using the IP or fails to protect the IP rights, the creator may not be able to stop another person's use of the creation.

Because of the view that monopolies are adverse to the interest of the public at large in free competition, IP rights are not considered natural, basic human rights. Such rights are therefore primarily established by statute. The extent to which courts will protect IP rights without statutory requirement or compliance is very limited. Moreover, statutory rights to IP are also limited. Laws regulating IP usually fix a term of years during which monopolistic rights in the IP may exist. In some instances, the term may be extended, typically on a showing that the IP is still used within the jurisdiction. The law also limits monopolistic IP rights by refusing to recognize exclusivity over IP that is merely generic, descriptive, or otherwise not invented or new.

Defining Traditional Forms of IP

Patents, copyrights, and trademarks were the first intellectual property rights to be recognized in law. Because these rights have a longer tradition, most people think of them first when considering IP issues. These three intangible property

Traditional Forms of IP: A Quick Comparison

Although it is difficult to generalize the law of various countries, the following points should provide a framework for understanding the similarities and differences between patents, copyrights, and trademarks.

A PATENT PROTECTS:

1. Inventions (any thing, process or idea), that are
2. not already known generally and currently (novel), that are
3. reducible to tangible form or used in tangible form without too much skill or ingenuity, that are
4. valuable or useful to society, and that are
5. conceived or discovered by the inventor;
6. for a finite term.

A COPYRIGHT PROTECTS:

1. Original (not copied) expressions of ideas, that are
2. creatively produced, and that are
3. fixed in tangible medium (such as paper, tape, disk, canvas, wood, metal, clay);
4. for a finite term (typically life of creator plus 50 to 70 years).

EXTREMELY IMPORTANT CONCEPT: Expression versus Idea. A copyright will not protect the idea, only the expression.

A TRADEMARK PROTECTS:

1. A word, phrase, sign, symbol, shape, or label, that is
2. a distinctive identifier of the goods or services of the creator when placed in commerce, that is
3. used to distinguish goods or services from those of any other person or business;
4. for an indefinite term (provided renewal is made before the term expires).

EXTREMELY IMPORTANT CONCEPT: Classification of Goods and Services. Unlike a copyright or patent, a trademark right is granted only with respect to the specific goods or services claimed by the trademark owner. An exception may be made for famous trademarks, but only if the exception is recognized in the particular country at issue. Thus, the trademark adidas® as used for shoes would not be infringed against by a company that uses the same trademark in connection with tobacco, unless the jurisdiction will recognize the trademark as famous and will accord it protection regardless of the goods or services.