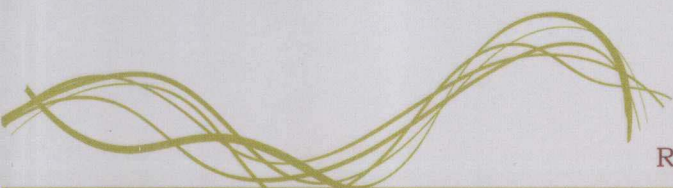


现代知识产权与 人权冲突问题研究

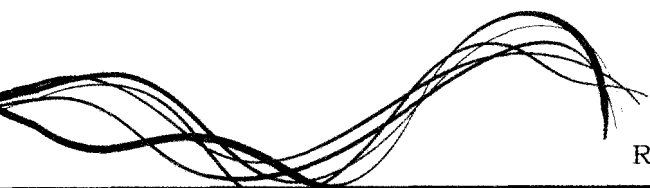


XIANDAI ZHISHI CHANQUAN YU
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王 渊 著

中国社会科学出版社

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摘 要

知识产权制度自产生以来，对科技发展、人权实现以及社会进步起到了极大的促进作用。但是，随着经济全球化进程的加快，现代知识产权的不断扩张带来了许多负面影响，突出表现为与生存权、受教育权、发展权等人权发生冲突，造成了富国越富、穷国越穷的局面。由此，知识产权制度遭到了质疑。国内外学者对这个问题比较重视，从理论上研究知识产权并试图改善其与人权的关系，但是，效果不是很理想，冲突仍在不同程度地发生着，有的领域甚至较为严重。这就需要对知识产权与人权冲突进行深入研究，创新知识产权中与人权冲突的基本理论，使知识产权与人权平衡协调发展。

本书以语境论为研究进路，以权利冲突理论为主线，以人权为视角，全面研究了知识产权与人权冲突问题。知识产权与人权的冲突属于权利冲突，多数学者认为权利冲突主要是正当的合法的权利之间的冲突。知识产权与人权都是合法的权利，但是由于现代知识产权法出现了合法性危机，知识产权的正当性出现了瑕疵，所以知识产权与人权的冲突是欠缺正当性的法定权利与正当的法定权利的不能同时实现。知识产权与人权冲突的产生有其特定的经济、政治、法律制度和文化背景。冲突在制度上表现为知识产权主体扩展、知识产权客体扩张、知识产权内容增多、创造性与实用性标准降低和保护期限的延长等方面与社会公众的人权相冲突，在实践中表现为知识产权与生存权、发展权和集体人权等不断发生冲突。冲突的发生是由于知识产权与人权追求的价值目标不同、新自由主义思潮、新经济增长理论以及产业政策理论对知识产权的影响、知识产权制度的扩张等导致的，但更为重

要的是冲突的发生是因跨国公司为首的知识产权人及发达国家片面地追逐利益、无视人权造成的。知识产权与人权冲突是个人主义与集体主义的冲突，是发达国家以知识产权为手段进行经济扩张，谋求发达国家利益的结果。

知识产权与人权能否协调发展？通过研究历史上知识产权与人权的联系发现，可能性是存在的。为解决知识产权与人权冲突，学者们提出了利益平衡、利益分享、知识公共领域及人权框架下的知识产权等理论，这些理论对冲突的解决有一定效果，但是实践中知识产权与人权冲突越来越广泛激烈，说明这些理论有一定的局限性。我们应取其精华，同时进行创新。以现代人权理论为知识产权制度发展的理论基础，在确定以国际民主的社会为背景、各国根据本国经济条件进行知识产权立法的基础上，调整知识产权的人性基础，以平等为知识产权的价值目标，明确创造者的知识产权具有人权属性，确立知识产权的私权性质及公权化，赋予社会公众获得知识产品权以及完善知识产权基本理论的其他方面。通过以上创新，使知识产权在促使人权逐步实现的同时得到发展，使知识产权与人权平衡和谐地发展。

本书得出的结论能从一定程度上解决知识产权与人权冲突的现实问题，为未来知识产权制度的发展尤其是发展中国家知识产权立法提供理论指导，从而具有重要的价值和意义。

ABSTRACT

The intellectual property system has been playing a vital role in promoting the development of science and technology, realization of human rights and social progress ever since its establishment. However, with the speeding up of economic globalization, the modern intellectual property system is constantly expanding, leading to negative impacts on and conflicts with such human rights as survival, education, development etc, and meanwhile widening the gap between rich and poor countries. Thus the intellectual property system is now being questioned. This has drawn close attention from both home and abroad, and theoretical research efforts have been made on how to improve the relations between intellectual property rights and human rights, but mostly in vain. Conflicts on various levels are still found and in some fields they are even very serious. Therefore, it is necessary to further the study on the conflicts between intellectual property rights and human rights, to innovate the basic theory on intellectual property rights which conflict with human rights and to harmonize the development of intellectual property rights with that of human rights.

This dissertation, approaching issues in discussion with the help of contextualism and from the angle of human rights, shall focus on the theory of the conflict of rights and study the conflicts between intellectual property rights and human rights in a comprehensive manner. The conflicts between intellectual property rights and human rights are in essence conflicts of rights, which, according to many scholars, are in turn conflicts mainly be-

tween just and legitimate rights. Intellectual property rights and human rights are all legitimate rights, but the legitimacy crisis of modern intellectual property law comes onto the stage and the legitimacy of intellectual property rights becomes flawed. The conflicts between intellectual property rights and human rights have particular economic, political and cultural backgrounds. In terms of intellectual property system, the conflicts are manifested by conflicts between the human rights of the social public with the extension of the subject, the object and the contents of intellectual property rights, the lowered criteria for innovativeness and practicality, and the prolonged protection period. In practice, the conflicts are mainly between intellectual property rights and rights of survival, rights of development and collective human rights. Conflicts occur mainly due to the following reasons: differences in respective value objectives, the impact of the theory of new liberalism and the theory of new economic growth plus the theory of industrial policy on intellectual property system, and the expansion of intellectual property system. But more importantly, it results from the fact that intellectual property right holders such as transnational corporations and developed countries are solely pursuing economic interest, with little attention spared for human rights. The essence of the conflicts between intellectual property rights and human rights is one between individualism and collectivism. Developed countries often take advantage of their intellectual property power to seek economic benefits.

Is it possible for intellectual property rights to coexist with human rights harmoniously? A study of the relations between intellectual property rights and human rights in history has proved it possible. In order to resolve the conflicts, theories such as balance of interests, benefit-sharing, public domain knowledge, intellectual property within the framework of the human rights and so on have been put forward. All the theories are helpful to resolve the conflicts to certain extent. However, in reality, the conflicts are becoming more and more intensified, indicating that all the above theories have

limitations. Therefore, theoretical innovations based on them should be made. Modern human rights theory should serve as the theoretical basis for intellectual property rights and the construction of democratic society as the background. All countries should establish an intellectual property system in accordance with their economic conditions, adjust the humane base of intellectual property rights, take equality as the value objective, recognize the intellectual property rights of the creator as human rights, define the private and public attributes of intellectual property rights, endow the public with the rights to have access to knowledge products and perfect other aspects of the theories of intellectual property. All the above innovations aim at the development of intellectual property together with the gradual realization of human rights and the balance and harmony between the two.

The conclusion drawn from this research will hopefully be able to settle practical issues concerning the conflicts between the two and provide theoretical guidance for the future development of intellectual property rights, especially the establishment of intellectual property system in developing countries. Therefore this study bears great value and significance.

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第一章

绪 论

第一节 研究背景与研究目的

一 研究背景

知识产权已成为西方世界的主流话语之一，成为现代社会的主要资源。21 世纪初，世界各技术先进国家将其设为立国之本，尤其是《与贸易有关的知识产权协议》（以下简称 TRIPS 协议）制定之后，知识产权在世界上受到了前所未有的重视。知识产权制度作为一项鼓励创新、保护创造者权益、促进人类社会共同进步的重要法律制度，从创设发展到现在不过几百年的历史，对人类社会的发展进步起到了重要的促进作用。同时，由于人们权利意识的不断增长，越来越多的国家批准了《世界人权宣言》及《经济、社会和文化权利国际公约》，生存权、健康权、信息自由和知情权等都已经成为具有普适价值的基本人权。

当今社会进入全球化时代，在此条件下，知识产权和人权的保护都跨越了国界，已经不再仅仅局限于由国内法调整。一个国家的知识产权在其他国家也可能会得到承认和保护。由于国际经济、政治、文化交往变得逐渐频繁，任何国家的公民其生命权、健康权、信息自由等人权，无论是在本国还是在国际上都受到了尊重。

但是，近年来知识产权制度不断地扩张，尤其是 TRIPS 协议的制定，在一定程度上侵占了公共领域，影响了人们的生存权、健康权、发展权等人权的实现。发达国家主导的 TRIPS 协议将知识产权与贸易紧密联系起来，使发展中国家迫于贸易或经济制裁的压力，不得不作