

知识产权与竞争法研究

(第二卷)



同济大学法学文丛

张伟君 张韬略 主编



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知识产权出版社
全国最佳图书出版单位

图书在版编目 (CIP) 数据

知识产权与竞争法研究: 第2卷 / 张伟君, 张韬略主编. —北京: 知识产权出版社, 2014. 9

ISBN 978 - 7 - 5130 - 2959 - 9

I. ①知… II. ①张…②张… III. ①知识产权法 - 研究 - 中国②反垄断法 - 研究 - 中国 IV. ①D923. 404②D922. 294. 4

中国版本图书馆 CIP 数据核字 (2014) 第 205467 号

责任编辑: 刘 睿 罗 慧
特约编辑: 王晓琳

责任校对: 韩秀天
责任出版: 刘译文

知识产权与竞争法研究 (第二卷)

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出版发行: 知识产权出版社 有限责任公司

社 址: 北京市海淀区马甸南村1号

责编电话: 010 - 82000860 转 8113

发行电话: 010 - 82000860 转 8101/8102

印 刷: 三河市国英印务有限公司

开 本: 880mm × 1230mm 1/32

版 次: 2014 年 9 月第一次

字 数: 418 千字

ISBN 978 - 7 - 5130 - 2959 - 9

网 址: <http://www.ipph.cn>

邮 编: 100088

责编邮箱: liurui@cnipr.com

发行传真: 010 - 82000893/82005070/82000270

经 销: 各大网上书店、新华书店及相关专业书店

印 张: 17.5

印 次: 2014 年 9 月第一次印刷

定 价: 50.00 元

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卷首语一

约瑟夫·斯特劳斯博士教授*

中国经济发展的强劲动力，反映在知识产权上，是史无前例的：中国在1982年8月通过首部《商标法》；2010年，中国商标局受理了超过百万件的商标申请。1984年3月通过了首部《专利法》；2010年，中国专利局受理了391 177件发明专利申请；同样受《专利法》保护的工业外观设计的申请数量超过了421 000件。设想一下，只是一年就出现了这么多申请，那么人们大概产生一个粗略的概念：得有多少的排他权即所谓的垄断权会出现在中国市场上，以及这些权利在可能被滥用时对整个经济的影响。

在接受了知识产权法后，中国立法者花了将近20年的时间，才在2007年8月通过了《反垄断法》。根据《反垄断法》第1条，其目的是预防和制止垄断行为，保护市场公平竞争，提高经济运行效率，维护消费者利益和社会公共利益，促进社会主义市场经济健康发展。同时，《反垄断法》在第55条指出，其不适用于经营者依照有关知识产权法律、行政法规规定行使知识产权的行为；但适用于经营者滥用知识产权，排除、限制竞争的行为。

* 慕尼黑马克斯·普兰克知识产权与竞争法研究所前所长；比勒陀利亚南非大学NIPMO-UNISA知识产权教席负责人；华盛顿特区佐治亚华盛顿法学院马歇尔·B. 科宁国际和比较法客座教授。

熟悉欧洲和美国有关反垄断法与知识产权滥用问题相关判例法的人，或许已经预见到中国《反垄断法》第55条在未来实践中所要扮演的角色。该条相对模糊的措辞，给法律解释留下了充分的空间，中国反垄断法执行机构和法院将会（至少人们希望如此）采用适当的方式来平衡所涉各方的利益，最终有效地激励和保护市场中的真正创新性的竞争。

同样显露出现代中国之动力并应予以庆贺的是，在《反垄断法》通过之后仅5年，同济大学两位年轻的教师张伟君博士和张韬略博士就倡导并决定推出《知识产权与竞争法研究》，志在立足于中国视角，推进知识产权与竞争法交叉领域的研究，并与同行分享美国、欧洲、日本以及中国在这一领域的最新进展。这一及时、重要和有责任心之努力付出值得祝贺。在此我祝愿他们及“评论”的成功，祝福他们达成所愿，为知识产权和竞争法的平衡、互补和共存作出重要的贡献。

PREFACE by Prof. Dr. Dres. h. c.

Joseph Straus^{*}

A Word of Welcome

The dynamics of the economic development of the People's Republic of China as reflected in the figures related to intellectual property rights seems unprecedented: The first Chinese Trademark Law was adopted in August 1982 and in 2010 the Chinese Trademark Office received more than one million trademark applications; the first Patent Act in China was adopted in March 1984, and the State Intellectual Property Office received in 2010 391.177 patent applications; finally, the number of applications for industrial design, protected under the Patent Act, amounted in 2010 to more than 421.000. Bearing these figures generated just in one year, in mind, one gets a rough idea of how many exclusive rights, so-called monopolies, have to be respec-

* Director Emeritus, Max-Planck-Institute for Intellectual Property and Competition Law, Munich; NIPMO-UNISA Chair for Intellectual Property, University of South Africa (UNISA), Pretoria; Marshall B. Coyne Visiting Professor of International and Comparative Law, George Washington University Law School, Washington D. C.

ted in the Chinese market and also of the overall economic impact of potential abuses of such rights.

It took the Chinese legislator more than 20 years before the intellectual property laws were followed by the adoption of the Anti-Monopoly Law in August of 2007. According to its Article 1 the Anti-Monopoly Law is aimed at preventing and restraining of monopolistic conducts, protecting fair competition in the market, enhancing economic efficiency, safeguarding the interests of consumers and social public interests, as well as promoting the healthy development of the socialist market economy. In its Article 55 the Anti-Monopoly Law clarifies at the same time that it does not govern the conduct of business operators to exercise their intellectual property rights under laws and relevant administrative regulations on intellectual property rights, but, that business operator's conduct to eliminate or restrict market competition by abusing intellectual property rights is governed by that law.

Those familiar with the European and US-case law and regulations dealing with the problem of abuse of intellectual property rights in terms of antitrust law may already foresee the role of Article 55 of the Chinese Anti-Monopoly Law will play in practice in the years to come. Its relatively vague wording leaves ample space for interpretation, which the Chinese administrative authorities and courts will, hopefully, use in a way to properly balance all the interests involved so that they, eventually will effectively incentives and protect truly innovative competition in the market.

It is to be welcomed, and again a clear demonstration of modern Chinese dynamism, that two young Professors of the Tongji University, namely Dr. Zhang Weijun and Dr. Zhang Taolue, only five years after the adoption of the Anti-Monopoly Law, took the initiative and decided to establish the Journal “IP and Competition Law Review” aimed at further research in the overlapped field of intellectual property and competition law, especially from China’s perspective and to inform the Chinese professional community on the latest developments in this area in the US, EU and Japan, as well as in China itself. The editors are to be congratulated to this very timely, important and responsible endeavour. I wish them and the Journal great success, may they achieve the envisaged goals, i. e. significantly contribute to a balanced and complementary co-existence of intellectual property and competition law.

卷首语二

安·巴托尔教授*

对中国知识产权法有着浓烈兴趣的我，很高兴能在这本《知识产权与竞争法研究》首次出版的时刻表达我的祝贺之情。由我的两个好朋友、任职于同济大学法学院和知识产权学院的张伟君博士和张韬略博士所编辑的这份“评论”，将有助于传播国际社会高度关注的主题的优秀学术作品。

中国的法律体系包罗万象且非常复杂。任何促进学术文章的产生、出版和发行的学术期刊，若能解释、梳理清楚这个有着举足轻重的国家的法治运作规则，其重要性都不可估量。在同济大学法学院和知识产权学院的支持下，张伟君和张韬略为知识产权法之学术对话，作出了非常及时的贡献，执业律师、优秀学生以及学术圈都能从中获益。

法律学术能够促进许多有价值的目标。它教导人们何谓法律历史，借此我们得以理解法律如何演进至今。它告知读者法律的现状，借此我们得以成为优秀的律师和评论者。它还提供了一个平台，让我们得以摆脱个别客户以及判例之束缚，对未来法律应演进之方向进行理论探索。从这个角度来看，法律学术帮助国家

* 美国纽约佩斯大学法学院法学教授。

规划更加公平和公正的明天。30 多年之前，在享有盛誉的《耶鲁法律评论》上，安东尼·陶琛德·克伦曼写下了这样的一段话：

学术之明确特征，在于关注真理的发现。学术之归宿即真理之发现与知识之增进。有时候人们会说，即便学者获得的知识可能有助于其他目标，学者们探求知识是出于自身利益而非更深远之目的，这种说法实际殊途同归。学术之唯一目的，就是真实地理解这个世界本身，除此之外学术别无他求。^①

《知识产权与竞争法研究》的首发已经激发了人们对中国经济持续发展和拓展其全球影响重要法律问题的睿智之辩论。对任何参与这一充满希望的事业的人们，在此我致以最诚挚和衷心之祝福！

① 安东尼·陶琛德·克伦曼：“前言：法律学术与道德教育”，载《耶鲁法学评论》1980 年第 90 卷，第 96～97 页，http://digitalcommons.law.yale.edu/fss_papers/1068。

PREFACE by Prof. Ann Bartow*

A Warm Welcome to New and Important Chinese Law Journal

As a law professor with an ardent interest in Chinese Intellectual Property Law, I am very pleased to welcome the arrival of this premier issue of the Intellectual Property and Competition Law Review. Edited by my good and brilliant friends Zhang Weijun and Zhang Taolue of the Tongji University Law School and Tongji Intellectual Property Institute, it will facilitate publication of outstanding scholarship on topics of significant international interest.

The Chinese legal system is enormous, and extremely complicated. Scholarly journals which enable the production, publication and distribution of articles that explain and contextualize the operation of the rule of law in one of the most consequential nations in the world are of immeasurable importance. With the instrumental support of Tongji University's Law School and Intellectual Property Institute, Zhang Weijun and Zhang Taolue are bringing forth a very timely contribution to

* Professor of Law, Pace Law School, Pace University, White Plains, New York, USA.

the academic dialogue about intellectual property law that will benefit practicing lawyers and precocious students in addition to the academic community.

Legal scholarship can promote many worthy objectives. It instructs people about legal history, so that we can understand how laws have evolved over time. It informs readers about the current state of the law, so that we can be optimally knowledgeable lawyers and commentators. And it provides platforms for theorizing about the future directions laws should take, unbound from concerns about individual clients and cases. In this way legal scholarship helps nations plan fairer and more just tomorrows. Over three decades ago Anthony Townsend Kronman wrote in the pages of the prestigious Yale Law Review:

The defining characteristic of scholarship is its preoccupation with the discovery of truth. The end of scholarship is the discovery of truth and the promotion of knowledge. The same point is sometimes made by saying that the scholar seeks knowledge for its own sake, not for some further purpose, although the knowledge he acquires may be instrumentally useful for other ends. To understand the world as it truly is—this, and nothing else, is the goal of scholarship. ^①

This wonderful inaugural issue of the Intellectual Property and Competition Law Review is already sparking erudite debates about legal

^① Anthony Townsend Kronman, “Foreword: Legal Scholarship and Moral Education,” 90 Yale L. J. 96 ~ 67 (1980), available at http://digitalcommons.law.yale.edu/fss_papers/1068.

topics relating to subjects crucial to China's continued economic growth and the expansion of its already profound global influence. I offer congratulations and my warmest heartfelt wishes for success to everyone involved with this auspicious undertaking.

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