新世纪商务英语专业本科系列教材（第二版）/ 总主编 王立非

国际知识产权简明教程

A SHORT COURSE IN INTERNATIONAL INTELLECTUAL PROPERTY RIGHTS

编者 Karla C. Shippey / 张小号

上海外语教育出版社
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总序

进入“十三五”，我国高等英语教育迎来深化改革和创新发展的关键期，商务英语专业也随之从规模发展进入内涵发展和质量提升的新常态。截至2016年，全国已有293所高校开办了商务英语本科专业，有近500所高校的英语类专业开设了商务方向或课程。2017年，教育部制订的《高等学校商务英语专业本科教学质量国家标准》（以下简称《国家标准》）也将颁布，《国家标准》对商务英语人才培养提出了明确要求，以满足对外开放的国家战略和需求。

为了认真贯彻落实《国家标准》，全国高等学校商务英语专业教学协作组与上海外语教育出版社密切合作，对入选“十二五”普通高等教育本科国家级规划教材的“新世纪商务英语专业本科系列教材”进行全面修订。修订后的“新世纪商务英语专业本科系列教材（第二版）”体系更加完整，涵盖英语知识与技能和商务知识与技能两个模块，很好地体现出《国家标准》对商务英语专业学生知识和能力的要求。

本系列教材中，英语知识与技能模块包含《商务英语综合教程》、《商务英语视听说教程》、《商务英语阅读教程》、《商务英语写作教程》、《商务英语论文写作》、《商务英语口译教程》、《商务英汉翻译教程》等。

商务知识与技能模块包含《国际贸易实务与操作》和《国际商业伦理》、《国际商务合同》、《国际经济学》、《国际知识产权》、《国际营销》、《国际支付》、《国际贸易单证》等简明教程。

本系列教材具有以下四个鲜明的特色：

第一，完全对接《国家标准》规定的培养目标和课程体系，突出打牢英语基本功，拓宽国际视野，提升人文素养，培养商务意识和素养，着重提高英语应用能力、商务实践能力、跨文化交流能力、思辨与创新能力、自主学习能力。

第二，编写理念先进，选材新颖，充满时代感，坚持语言、文化、商务三者有机结合，充分体现国际化、人文性、复合型、应用性的特点和全人教育的理念。

第三，体系完整，覆盖商务英语专业核心课程，英语知识与技能教材突出听、说、读、写、译、跨文化交际等技能训练导向；商务知识与技能教材理论体系完整，知识讲解简明扼要，语言原汁原味，配套练习实用性和可操作性强，注重中外真实案例分析，培养思辨和创新能力。

第四，课堂任务设计多样化和立体化的特色鲜明，突出网络多媒体技术的应用，提供丰富的视频材料和教学资源，加大了英语学习的趣味性和输入的有效性。

本系列教材是全国高等学校商务英语专业教学协作组重点推荐教材，由国内商务英语教学专家编写，可供一、二年级商务英语专业本科生、英语专业商贸方向学生、财经类院校本科生以及各类经管专业本科生使用，同时也可作为大学英语ESP课程模块的商务英语教材，以及各类企业培训和社会商务英语学习者的参考书。本套教材的修订得到上海外语教育出版社领导和编辑的大力支持，在此表示衷心感谢。

王立非

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前言

“知识产权”这个曾经非常陌生的概念，现在已然成为人们争相议论且无法回避的话题。现如今，许多贸易活动，特别是跨国贸易活动，直接以知识产权为标的。还有很多贸易活动虽并非以知识产权为标的，但也往往涉及较为复杂的知识产权问题。我国已于2001年12月正式加入世界贸易组织，严格执行《与贸易有关的知识产权协定》(TRIPS)成为必须履行的国际义务。在此背景下，学习和利用知识产权知识具有重要意义。包括商务英语专业在内的学习者，应将知识产权纳入到他们的知识体系中。

与物权等传统权利类型相比，知识产权具有显著特殊性，知识产权法由此形成了相对独立的理论体系。同时，法学是一门实践性学科，与贸易活动密切相关的知识产权法更是如此，故而学习知识产权不能脱离实践。此外，尽管知识产权具有地域性特征，但知识产权学习者绝不能将思维禁锢在特定地域范围内，而是应当放眼世界，具备国际视野。

这些因素均凸显出《国际知识产权简明教程》的重要性。本教程旨在帮助学习者了解知识产权基础理论知识和实务操作技能，主要内容包括：知识产权基础理论知识、知识产权的获得、知识产权的保护和知识产权的利用等。

为便于阅读，本教程用中文编写章节提要和背景知识，帮助读者深入理解。

案例是本教程的特色之一。为了便于学习者进一步了解知识产权法并做到学以致用，本教程的每一章都附有案例。案例选择奉行以下原则：一、尽量选用涉及我国的知识产权纠纷；二、紧扣章节主题；三、时效性，部分案例刚有或尚未有最终裁决。这些案例将有助于深刻了解我国企业目前普遍面临的知识产权困境，并启发(他们)思考可行的出路。

受时间和个人能力所限，本书在编写过程中难免会出现错误或疏漏，敬请广大读者谅解并批评指正！

张小号

西安外国语大学经济金融学院

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 there-fore 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

Irvine, California 2001

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Intellectual Property (IP) Basics

知识产权基础知识

CHAPTER 1

本章概要

知识产权是一类新型权利，除了专利、商标和著作权这三种传统形式外，新形式的知识产权不断涌现。

学习目标

基本目标（Text-based）

- 熟知知识产权法保护的传统客体形式。

拓展目标（Text-related）

- 知识产权法保护的智力成果范围是动态发展的，在熟悉知识产权法保护的传统客体的基础上，了解知识产权客体的新类型。

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

知识产权是一种无形财产权，因它与土地、房屋、汽车等可感知的有形财产形态有较大差异，故导致智力成果在很长一段时间里不受法律的保护。

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

Word Study

Intangible Property — **无形财产**：个人或企业拥有的可转让但不具有实体形式的财产，一般指依法取得的著作权、商标和专利等形式的智力成果，不包括土地、建筑物和附着物等不动产和轮船、汽车、工具等动产。

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?

知识产权是一种垄断性权利，未经许可的使用行为可能构成侵权。不过，出于对社会公共利益的保护，知识产权的垄断是有限度的垄断。

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

专利、商标和著作权是知识产权法的传统保护客体。专利权保护的对象是具有新颖性、实用性和创造性的发明；商标权保护的是文字、图形或其组合所构成的具有识别特定商品或服务功能的显著标记；著作权保护的对象是具有独创性且固定在有形介质上的表达。

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 rights are quite distinct, and yet they have several aspects in common. Each of these rights is defined here in very broad terms because the definitions will vary from country to country. It is essential to check the specific definition applicable within the country where you are seeking IP protection.

PATENT

- DEFINITION A "patent" may be defined as (1) the exclusive right granted by statute (2) to a party (the inventor) who conceives or discovers (3) a nonobvious and novel invention (4) to use and develop the invention, and (5) to prevent others from manufacturing, selling, or using the invention. The patent right is granted for a limited time, which varies depending on such factors as type of invention and jurisdiction of registration. Patent terms are typically from 14 to 20 years and usually the term cannot be extended.
- STATUTORY RIGHT Patent rights must be granted pursuant to a statute. If a country has no Patent Law, a patent right will not be granted there. Unlike trademarks and copyrights, which may be able to derive some protection from court-made doctrine, patent rights and protection are totally dependent on statute. As a result, the type of invention that may be registered as a patent depends on the law of the country. Be certain to verify with local counsel whether a type of patent is available in the jurisdiction where you seek to patent your invention.

The following types of patents are commonly found in countries where patent law is most highly developed:

- UTILITY PATENT is for an invention that can be characterized in one or more of the following categories: a process, machine, manufacture,