

# 知识产权冲突法论

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由厦门大学出版社和西藏民族学院联合推出的西藏自治区首部法学理论研究丛书——"西藏民族学院法学文库"即将问世,这是国家实施对口援藏战略以来,厦门大学支持西藏民族学院学科建设的又一重要成果,也是西藏民族学院法学研究的重大进展,值得热烈祝贺!

身处中国改革开放最前沿的厦门大学和地处祖国腹地的西藏民 族学院的合作,具有战略意义。自2002年开始,国家教育部确定国 内一流高校对口援助西藏民族学院。由著名爱国华侨领袖陈嘉庚先 生于1921年创建的厦门大学,是中国近代教育史上第一所华侨创办 的大学,也是中国唯一地处经济特区的国家"211工程"和"985工程" 重点建设的高水平研究型大学。秉承"自强不息,止于至善"的校训, 厦门大学的办学水平和科研实力享誉国内外。作为西藏高等教育的 开拓者,1958年创建于关中平原、古都咸阳的西藏民族学院,不仅光 荣地扮演着"西藏干部摇篮"和"西藏人才基地"的醒目角色,而且也 是中国藏学研究重镇,西藏在祖国内地的窗口。她以"爱国、兴藏、笃 学、敬业"为校训,坚持面向西藏、服务西藏的办学宗旨,肩负着为培 养西藏社会主义事业合格建设者和可靠接班人的历史使命,创造了 辉煌的办学业绩,全面而深刻地影响了西藏和平解放以来的历史进 程。2008年10月,中共中央总书记、国家主席胡锦涛致信祝贺西藏 民族学院建校50周年,对她的历史功绩给予高度评价。厦门大学和 西藏民族学院两校间构架起来的对口援藏和全面合作机制,不仅使 尚处发展阶段的西藏民族学院获得了积极推进学科建设、提升了教育教学质量的高端平台,而且对传承西藏民族文化,加快西藏跨越式发展,维护国家统一和民族团结,实现中华民族的伟大振兴具有伟大意义。

法学专业是西藏民族学院的特色专业和重点发展专业。创办于20世纪90年代初的西藏民族学院法学专业,虽专业历史不长,但成绩斐然,已经成为西藏法学专业人才的培养基地。1993年,根据时任西藏自治区党委书记的胡锦涛同志的指示,西藏民族学院正式开办法学专业,开创了西藏地方培养社会主义法律专业人才的先河。近20年来,西藏民族学院法学专业经历了由专科到本科,由单一方向到多方向培养,由传统综合法学到专业特色凸现的巨变,具备了较强的办学实力。2009年,法学专业被确定为西藏自治区特色专业。法学教学团队也在2010年被确定为自治区级教学团队。2010年5月,西藏民族学院法学院正式成立,标志着法学专业的发展已经跃升至新的历史起点上。

法律专业人才对西藏社会稳定和发展的意义不言而喻。自 1950年西藏和平解放到 1965年建立"西藏自治区",中国共产党在西藏的民族区域自治政策取得了历史性的胜利,成为新中国民族政策的成功范本。作为中国最大的民族区域自治地方之一,迫切需要一大批政治素质过硬、法律素养扎实、富于使命感的法学专门人才,致力于积极推进中国特色的民族自治政策的顺利实施,不断完善党的民族自治政策,传承和弘扬民族文化,促进各民族融合和共同发展,维护西藏的和谐稳定,捍卫国家安全。与此同时,西藏民族学院培养的法学专门人才,在西藏各级立法、执法部门,以自己良好的职业素养和责任感,为推进西藏地方法律体系建设,健全民族区域自治政策,保障西藏社会经济发展,做出了出色贡献。随着西部大开发和中央第五次西藏工作座谈会的召开,西藏又将迎来发展的伟大历史机遇,同时对法学人才的需求又将大大增加。法学人才在西藏当代社会发展和国家长治久安的历史进程中,必将扮演更加重要的角色。

我们必须从战略高度认识人才队伍建设,精心培养西藏自己的法学领域专家学者,不断形成面向西藏、服务西藏且具有相当影响的研究特色,全力打造西藏法学理论的研究基地。"西藏民族学院法学文库"丛书的出版,将有力助推西藏民族学院法学学科和专业发展,有利于更好地培养西藏法学专业人才,有利于西藏的发展稳定,共襄中华民族伟大复兴大业。

厦门大学出版社志存高远,无私援助,以西藏民族学院朱玉福博士的《中国民族区域自治法制化:回顾与前瞻》为开卷之作,隆重推出"西藏民族学院法学文库",并将陆续出版西藏民族学院学者的法学著作,对西藏民族学院法学学科建设和学科梯队的构建以最直接的扶植,其学术眼光和文化使命感令人钦佩。我期望西藏民族学院法学院不负厚望,制定规划,抓住契机,在未来可预期的时期内,以此为高端平台,推出系列化学术精品,提升法学研究的水准,构建富于特色的法学学科框架,把西藏民族学院的法学研究推向新的境界,为西藏的法制建设和社会文明作出历史性贡献。

西藏民族学院院长 刘洪顺 2010年7月16日

### 内容摘要

知识产权国际化为跨国知识产权民商事法律关系奠定了制度基础。但知识产权国际公约本身不可避免的缺陷性决定知识产权的跨国实施问题迭出。特别是由于现代资讯技术的不断发展,跨国知识产权案件的数量不断上升,给各国理论界与实务界提出挑战,呼唤人们寻找解决问题的制度方法。本书试从理论与实证的层面对知识产权冲突法若干问题进行研究,探讨作为调整国际民商事法律关系的冲突法制度如何在知识产权领域特别是在网络技术如此发达的国际环境下知识产权的国际实施中发挥作用。

全书由导论、总论、分论和尾论四大部分组成。其中正文共有四章。

第一章:知识产权冲突法基本理论。TRIPS协议以法律的形式规定了知识产权的"私权"性质,为知识产权冲突法提供了理论前提。冲突法所要解决的问题起因于法律制度的地域性,因此,知识产权地域性不能成为冲突法方法在知识产权国际保护领域发挥作用的根本性障碍。反而,一国承认和尊重作为立法管辖权表现形式的他国知识产权法在该他国域内的规范效力构成国际司法合作的主要前提。这是知识产权冲突法得以建立的理论基础。以《巴黎公约》为代表的知识产权的后文的体系所推动的知识产权的国际协调过程,为知识产权冲突法的产生提供了一个历史契机。然则,知识产权国际公约体系不但没有消除知识产权的地域性,反而肯定并在某种程度上强化了知识产权的地域性,知识产权冲突法从此便有了制度上的依据。全球化条件下知识产权的地域性从根本上讲取决于知识产权政策内国自治权,这是知识产权冲突法的制度保障。仅诉诸实体的国际公法手段保护知识产权,其结果必然导致国际参与者要么单纯获利要么单纯付出代价的结果。作为一种能容纳内国制度分歧的制度,冲突法可实现知识产权法律多

样化的目的。

第二章:知识产权冲突法制度的建构与发展。在发达且频繁的国 际经贸交往情形下,加强知识产权保护已成为国际社会关注的热点之 一。随着科学技术的迅速发展,世界已进入了高科技信息时代。与录 音技术开发而伴生的是越来越多的知识产权"海盗"行为,传统知识产 权跨国诉讼模式已经很难适应知识产权国际保护的新形势。变革传统 制度的要求集中到一点,就是扩大法院在涉外知识产权领域的管辖权。 这种变革的趋势首先体现在英、美、法、德、荷等国家晚近的一些典型判 例上。知识产权冲突法的实证还表现在一些内国法院纷纷适用外国的 知识产权法。以数字化网络技术为代表的现代资讯手段给知识产权跨 国保护带来真正的挑战。然而,新的语境下突破传统知识产权诉讼制 度带来了一系列新的问题。这些问题集中体现在法律适用上地域性原 则的异化与保护国法适用范围不确定性、平行诉讼所引发的当事人选 购法院以及过度管辖所带来的司法效率低下。新的问题挑战国际社会 的智慧。无论从欧洲布鲁塞尔公约体系到海牙《管辖权与外国判决公 约草案》的筹划,还是美国 ALI 原则的通过,国际社会应对知识产权冲 突法新问题的步伐从未停止过。

第三章:知识产权冲突法分论之法院管辖权。本章分节讨论知识产权产生与效力、知识产权所有权、知识产权侵权、知识产权合同的国际意义上的司法管辖权问题。由于授予知识产权被认为是一个国家行使主权的表现,因此,赋予需注册的权利的产生与效力问题以专属管辖权具有其合理性。对于版权等不需登记或存放的权利,国际实践一般将其排除在专属管辖范围之外。至于诉讼中作为抗辩或反诉提出的知识产权的有效性问题,将有效性问题与本诉合并且由受理本诉法院审理,是司法效率的内在要求。对于知识产权侵权、知识产权合同以及知识产权所有权纠纷,MPI建议案与 ALI 原则等国际立法纷纷突破专属管辖权而赋予不同种类知识产权纠纷以一般管辖权根据,反应了知识产权管辖问题上的国际趋势。

第四章:知识产权冲突法分论之法律适用。本章内容涉及知识产

权产生与效力、知识产权所有权、知识产权侵权、知识产权合同纠纷的法律适用问题。地域性原则决定保护国法应作为知识产权产生与效力、知识产权侵权以及须注册知识产权所有权问题的基本法律适用规则。然而,地域性方法由于有可能导致适用多个内国版权法的结果,因而不能成为全球化语境下知识产权初始所有权冲突规范的理想原则。ALI原则将起源国与作品创作时作者居所相连结具有启示意义。在雇佣关系存续期间产生权利的所有权适宜由调整雇佣关系的法律调整。另外,当知识产权侵权发生在全球性互联网环境下,严守保护国法原则已变得不可能且不实际的时候,有必要创制保护国法例外条款。最密切联系原则是一个适宜的选择。但地域性原则的重要性不应该被忘记或者低估,保护国法规则应作为例外规则的重要矫正或安全阀条款。至于国际知识产权合同,国际理论与实践都将其纳入一般民商事合同法律适用的范畴。然而,知识产权合同的特殊性质决定了它与一国的公共政策有关联。因此知识产权合同有效性的实质性要件与形式要件须接受有关国家在法律选择方面的适度限制。

关键词 知识产权 冲突法 管辖权 法律适用

#### **ABSTRACT**

The internationalization of intellectual property has ever established the institutional foundation for transnational intellectual property legal relationship. Yet, the inevitable defects of international conventions of intellectual property themselves resulted in the repeatedly revealing problems in the transnational enforcement of intellectual property. What's pressing is the arising amount of transnational intellectual property cases owing to the progressive development of modern information technology. This brought challenges to theorists and practitioners of all nations, and calls for solutions to these questions. This dissertation tries to investigate several questions of conflict laws of intellectual property from a stratification plane of theory and evidence, probing into how the conflict of laws as a system regulating the international civil and commercial legal relationship can play a role in the realm of intellectual property, especially in its international enforcement in so advanced an international environment of network technology.

The dissertation is composed of four parts which are Introduction, General Remarks, Subdivision Analysis and Closing Remarks, and among others the Text is composed of four chapters.

Chapter One discusses the elementary theory of the conflict laws of intellectual property. Taking the form of international legislation, the TRIPS has defined intellectual property "private right" in nature, so as to render theoretical precondition for the conflict laws of intellectual property. Conflict laws actually come of the territoriality of legal systems. Therefore, the territoriality of intellectual property cannot be

the ultimate obstacle in conflict laws playing their roles in the area of international intellectual property protection. On the contrary, a nation's recognition of and estimation to the validity of other nations' intellectual property laws within their own territory constitutes the key precondition for international judicial cooperations. This forms the theoretical basis for the conflict laws of intellectual property. The international intellectual property conventions of which Paris Convention is a representative impelled greatly the process of international coordination of intellectual property, and brought a historical chance for the conflict laws of intellectual property. But this is by no means to say that international conventions of intellectual property has eradicated the territoriality of intellectual property, but affirmed and intensified in a way the territoriality of intellectual property, therefrom conflict laws of intellectual property find their institutional basis. The territoriality of intellectual property under the condition of globalization basically rest with each nation's right of self determination on its own intellectual property policies. This forms the system foundation for the conflict laws of intellectual property. To merely resort to substantive public international law instruments to protect intellectual property is only to result in international participators' either profiting netly or to paying costs totally. Being a system which bears system divergences, conflict laws can realize or even encourage the diversity of intellectual property systems.

Chapter Two is on the construction and development of the conflict laws of intellectual property. Under the situation of so developed and so frequent international business and economics communication, strengthening of the protection of intellectual property became one of the concerns of world community. As technology has so developed, the world has now entered into a high-tech and information age. Along

with the development of recording technology are more and more "piracies" of intellectual property. Traditional mode of transnational intellectual property litigation became difficult to adapt to the new situation of international protection of intellectual property. The reform of traditional system focuses mainly on the expansion of national fora's jurisdiction over foreign-related intellectual property cases. Such a trend of change finds expression in some typical precedents lately taking place in some countries such as England, the USA, Germany and Holand. The real evidence also finds expression in some national fora's applying foreign intellectual property laws. Modern information instruments represented by digital network technology has brought genuine challenge to transnational intellectual property protection. However, in the new context, the breakthrough of traditional intellectual property litigation systems brought along a series of new problems, among which are the uncertainty of the scope of the application of laws of protecting states, parties' forum shopping initiated from parallel litigations, and the judicatory inefficiency brought by excess jurisdiction of national courts. All these problems challenge the wisdom of the world communities. Whatever Brussels Convention in Europe, or the Draft Hague Covention on Jurisdiction and Recogition of Foreign Judgments, or The Principles of Intellectual Property by the USA, show the great efforts of the world communities to conquer new problems in the conflict laws of intellectual property.

Chapter Three explores one of minute aspects of conflict laws of intellectual property—the jurisdiction. The chapter is divided into segments to discuss international jurisdiction problems such as the creation and validity of intellectual property, its ownership, the infringement and contracts in relation to the exploitation of intellectual property rights. As the award of intellectual property is generally considered

as a sovereignty behavior, vesting exclusive jurisdiction over the problem of creation and validity of registered rights therefore seems reasonable. As far as rights which are not needed to be registered or deposited are concerned, international practices commonly exclude them from exclusive jurisdiction. As for validity problems of intellectual property put forward as defences or counterclaims in litigations, the incorperation of validity problems into the action in chief reveals the intrinsic demands of judicatory efficiency. The MPI Proposal and the ALI Principles both broke through exclusive jurisdiction over cases of infringement and contracts of intellectual property, which react the international trend of intellectual property jurisdiction.

Chapter Four is on another aspect of the conflict laws of intellectual property—the application of laws. The content of this chapter covers law applying problems involving the creation and validity of intellectual property, the ownership of intellectual property, the infringement of and contracts concerning intellectual property. The territoriality principle determines that laws of the protecting states should be the fundamental laws applied to such questions as the creation and validity of intellectual property, the infringement as well as the ownership of those registered intellectual property. However, due to resulting in the application of numerous national copyright laws, the means of territoriality cannot be an ideal principle of the conflict rules governing the initial ownership of intellectual property in the context of globalization. That the ALI Principles attach the country of origin to the authors' residences while writing their works can be of enlightening significance. The ownership of rights created during the period of employment needs to be regulated by the laws regulating the employment relationship itself. Also, when infringement of intellectual property occurs in a global internet environment and it becomes unpractical to adhere to lex protectionis, it is necessary to develop exceptional clauses. Principle of the most significant relationship seems a feasible option. But what is to be highlighted is that the significance of the objective of territoriality principle ought not to be forgotten or underrated even in the age of cyberspace. Rules of the protecting states can be the correction or safeguard clause to the exception rules. As for international intellectual property contracts, international theories and practices include them into the category of ordinary civil and commercial contract. However, the distinctive feature of intellectual property contracts determines their linkage with a nation's public policy. Therefore, the substantial or formal requirements should accept the confinement of the countries concerned on choice of law.

**KeyWords:** Intellectual Property; Conflict of Laws; Jurisdiction; Law Application

## 缩略语表

AIPPI International Association For The Protection Of In-

tellectual Property: 国际保护知识产权协会

ALAI Association Litteraire et Artistique Internationale:

(法文)国际文学和艺术学会

ALI The American Law Institute:美国法学会

B2B business to business:企业之间

DHCC Draft Hague Convention on Choice of Court Agree-

ments:《选择法院协议公约草案》

DHJC Draft Hague Convention on Jurisdiction and Foreign

Judgments in Civil and Commercial Matters:《海牙

管辖权与外国判决公约草案》

E. C. European Community: 欧洲共同体

EFTA European Free Trade Association. 欧洲自由贸易联

盟

EPC European Patent Convention:《欧洲专利公约》

ICC The International Chamber of Commerce: 国际商会

ICI Imperial Chemical Industries:英国帝国化学工业公

司

INCOTERMS International Chamber of Commerce Terms:《国际

商会国际贸易术语解释通则》

IP Internet Protocol: 互联网络通信协议

ISP Internet Service Provider: 网络服务提供商

MPI Max Planck Institute: 马科斯普朗克研究所

NCCUSL National Conference of Commissioners on Uniform

State Laws: 统一国家法律委员会全国会议

OHIM Office for Harmonization in the Internal Market;欧

洲内部市场协调局

PCT Patent Cooperation Treaty:《专利合作条约》

SCT Standing Committee on the Law of Trade Marks, In-

dustrial Design and Geographical Indications: 商标、

工业设计与地理标识法常务委员会

TRIPS Agreement On Trade-related Aspects of Intellectual

Property Right:《与贸易有关的知识产权协议》

UDRP Uniform Domain Name Dispute Resolution Policy:

《统一域名争端解决政策》

UNIDROIT The International Institute for the Unification of

Private Law: 国际统一私法协会

VS versus:(拉丁文)对抗

WIPO The World Intellectual Property Organization:世界

知识产权组织

WTO The World Trade Organization:世界贸易组织

《巴黎公约》 1883 年巴黎《保护工业产权公约》

《伯尔尼公约》 1886 年伯尔尼《保护文学艺术作品公约》

《布鲁塞尔公约》 1968 年布鲁塞尔《民商事管辖权与判决执行公约》

《卢加诺公约》 1968 年卢加诺《民商事管辖权与判决执行公约》

《布鲁塞尔规则 I 》 2001 年《民商事管辖权与判决执行规则》

《海牙公约》 1999年《民商事管辖权与外国判决公约草案》

ALI 原则 《知识产权: 跨国纠纷管辖权、法律选择及法院判决

原则》

MPI 建议案 马科斯普朗克研究所知识产权诉讼特别条款建议案

《罗马公约 T》 1980 年《欧洲共同体合同义务法律适用公约》

《罗马公约Ⅱ》 2007年《欧洲共同体非合同义务的法律适用规则》

民诉法 2007 年 《中华人民共和国民事诉讼法》(修订)

合同法 1999 年 《中华人民共和国合同法》



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