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应用型系列法学教材

知识产权法

Intellectual Property Law

（汉英双语教程）

李正华　李珊　编著

微课版

WUHAN UNIVERSITY PRESS
武汉大学出版社

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前　言

知识产权制度最早出现在英国。英国于1623年就颁布了《垄断法规》。20世纪80年代以来我国开始制定知识产权法律、法规并根据需要进行了修改，还陆续加入了相应的知识产权国际公约及组织。

知识经济时代，知识产品已经成为了一种不可替代的生产要素。社会的法制化进程，也使得体现知识经济与法制结合的知识产权法在整个法学体系中更显出其重要的地位。

知识产权贸易与货物贸易、服务贸易成为了世界贸易的三大支柱。近年来，知识产权问题成为了对外贸易谈判的一个重要问题。“一带一路”①的建设，体现了“共商、共建、共享”，从而推动建立人类命运共同体，实现共同发展、共同安全和共同富裕。在“一带一路”建设中需要更多的懂外语、掌握专业技术的复合型人才。

根据教育部制定的《全国高等学校法学专业核心课程教学基本要求》，在法学专业的课程体系中，知识产权法成为16门核心课程之一。双语教学是适应我国高等教育国际化发展趋势，培养具有国际合作意识、国际交流与竞争能力的外向型和复合型人才的重要手段。因此，不少高校的法学院、知识产权学院开始为法学、知识产权专业的学生开设了一些全英文(如国际法等)或汉英双语的课程。知识产权法汉英双语教学的开展，使教科书的编写成为当务之急。

本教材已在中山大学新华学院使用6年，效果良好；其他兄弟院校使用后也给予了充分的肯定。我们在总结多年汉英双语教学经验和听取兄弟院校意见的基础上，经过修改和完善后付梓。

本教材为普通高等教育本科法学、知识产权专业学生而编写，也可作为大专和职业培训的教材或教学参考书。作者考虑到教学的需要，力图避免枯燥繁琐的理论演绎和纯粹的操作指南。因此，结合国内新的立法动态，关注社会现实中出现的新问题以及学科的发展趋势，由浅至深，既有中文的基本概念、基本原理、基本制度的阐述，也有英语课文和单词、基本句型，还有课外的英文阅读资料②，以便于拓展学生的视野。为配合教学，按每周3节课(共54课时)的教学时数安排，全书设18章，以便于教学活动之开展。

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① The Belt and Road，“丝绸之路经济带”和“21世纪海上丝绸之路”之简称。

② 限于教材篇幅的限制，每章的课外阅读资料、试卷样题的参考答案以二维码的方式嵌入书中，读者可以根据需要扫码。

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本教材所引用相关专家学者之观点、事例及课外读物，已在注释中列明出处，对相关的著作权人表示谢意！本教材的出版得到了武汉大学出版社的大力支持，胡荣编辑为此付出了辛勤的劳动，特表感谢。

受学识和视角之限制，书中存在疏漏和谬误，敬请各位不吝赐教。

编　者

2017 年 6 月

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第一编　导　　论

PART ONE　Basic Theories of Intellectual Property Law

第一章　知识产权法的基本理论
Chapter 1　Basic Theories of Intellectual Property Law

【引言】民事法律制度(civil law system)是以平等主体之间的人身关系(personal relations)和财产关系(property relations)为调整对象(object)的。知识产权作为无形的财产权(intangible property rights)，无论是主体、客体还是其保护，均与传统的有形物权(tangible property rights)有所区别。只有掌握了知识产权法的基本理论问题，才能更好地学习和掌握具体的知识产权制度和根据相关的规定解决实际问题。

【学习目的与要求】在学习具体的知识产权制度之前，必须对相应的知识产权法的基本理论问题有所了解。通过对本章的学习，应当了解知识产权制度的起源与发展，掌握知识产权的主体(subject)、客体(object)、权利内容(content of rights)以及保护方式(protection)。对知识产权法学的相关理论有所了解，理解我国知识产权战略对社会发展的促进作用。

第一节　知识产权及其特点
Ⅰ　The Definition and Features of Intellectual Property

一、有关知识产权的概念(The Definition of Intellectual Property)

知识产权，又称为智力成果权、无形财产权、无体财产权等，是人们对其智力成果所享有法律保护的专有权利之统称。Essentially, intellectual property rights mean civil rights enjoyed by people resulting from creative intellectual achievements.

In the 17th century, intellectual property is first put forward by French scholar Gapzov and later developed by Belgian scholar Picardie. Picardie identified intellectual property as a special kind of legal rights which is different from real rights(物权).

In 1967, the signing of *Convention Establishing the World Intellectual Property Organization* (《建立世界知识产权组织公约》) has gradually accelerated the recognition of intellectual property in many countries and by international organizations over the world.

The American famous scholar Richard Raysman narrates: "Intellectual Property is a term referring to a number of distinct types of creations of the mind for which a set of exclusive rights are recognized—and the corresponding fields of law."①

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① Richard Raysman. *Intellectual Property Licensing*: *Forms and Analysis* [M]. Law Journal Press, 1998-2008.

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Although many of the legal principles governing intellectual property have evolved over centuries, it was not until the 19th century that the term "intellectual property" began to be used, and not until the late 20th century that it became commonplace in the United States. ① *The British Statute of Anne 1709* and *the Statute of Monopolies 1623* are now seen as the origins of copyright and patent law respectively. ②

Law experts have tried to summarize intellectual property rights, and have formed a number of definitions. These definitions can be divided into three types. The first type is the definition of high degree of abstraction. For example, Wu Handong believed that intellectual property rights were exclusive rights enjoyed by persons resulting from creative intellectual achievements. ③The second type is generalized definition. For example, intellectual property rights are the exclusive rights based on creative intellectual achievements and industrial and commercial marks. ④ The third type is defined by samples, listing all the areas where intellectual property rights are protected.

二、知识产权之基本属性与特征(Basic Attributes and Features)

(一)知识产权的基本属性(Basic Attributes of Intellectual Property)

Intellectual property rights are civil rights. Intellectual property law has the nature of civil law.

1. 私权属性(Private Rights)

The private rights nature of intellectual property rights has been confirmed by legislation. In the preamble of *Agreement on Trade-Related Aspects of Intellectual Property Rights* (《知识产权协议》, 简称 TRIPS), there is one provision: "Recognizing the intellectual property rights are private rights"⑤ which sets the tone for the protection of the entire agreement. Private rights are generally understood as civil rights that person (including natural person, legal person and other social organizations) has. Private rights are opposed to public rights.

The main intention of TRIPS emphasizes that intellectual property rights are private rights which emphasizes the equality of subjects of intellectual property rights. The first Intellectual Property Code in the world, French Intellectual Property Code in 1992, provides for protection of literary and artistic property rights and industrial property rights from the perspective of private rights.

2. 人权属性(Human Rights)

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① Mark A. Lemley. *Property, Intellectual Property and Free Riding* [J]. Texas Law Review, 2005.

② Brad Sherman & Lionel Bently. *The Making of Modern Intellectual Property Law: The British Experience* [M]. 1760-1911. Cambridge University Press, p. 207.

③ 郑成思. 知识产权法教程[M]. 北京: 法律出版社, 1993: 1.

④ 刘春田. 知识产权法教程[M]. 北京: 中国人民大学出版社, 1995: 1.

⑤ Preamble of the *Agreement on Trade-Related Aspects of Intellectual Property Rights*.

Universal Declaration of Human Rights(《世界人权宣言》)is an important treaty on human rights. Human rights are regarded as eternal and inalienable rights beyond the times and nations. According to the theory of natural rights(天赋人权), intellectual property rights are innate gifts. It is universal and equal to every person.

In 1976, Article 15 of *International Covenant on Economic, Social and Cultural Rights*(《经济、社会和文化权利国际公约》) says: "The States Parties to the present Covenant recognize the rights of everyone:

(1)To take part in cultural life;

(2)To enjoy the benefits of scientific progress and its applications;

(3)To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author."①

知识产权具有人权属性，可以从三个方面来理解：第一，知识产权的客体为智力成果，是人们在参与社会文化生活过程中，依靠智力劳动所创造出来的，具有思想性和精神性的智力成果。对知识产权的承认和保护就是对思想自由的认可，是对人的尊严和价值的肯定。第二，知识产权制度必须保证创造者的知识产权得到保护。对智力劳动成果进行保护，有利于提高创造者的积极性，通过激励机制，促进越来越多的智力成果之诞生。第三，对智力成果保护的同时，也要保证这种激励机制能够促进而不是约束社会公众参与文化生活与分享科学进步的利益。因此，从人权属性的角度分析，知识产权制度的关键在于实现保护与限制之间的平衡。

私权与人权在本质上是统一的，理性地把握与处理两者的关系，有利于正确认知知识产权，有助于我们全面考察现代知识产权制度的价值理念和社会功能。②

(二)知识产权的基本特征(Basic Features of Intellectual Property)

As a civil right, intellectual property has the following characteristics in comparison with the real rights:

知识产权作为一种民事权利，其与物权相比较而言，具有下述特征：

1. 行政确认先定性(Administrative Affirmation Bring Ahead)

知识产权的客体具有无形性，而将某一无形客体之知识产权专门归属于某一特定主体行使权利，需要法律作出专门的规定(如著作权自作品创作完成之日起产生，无须履行任何手续)，或者通过行政审查而颁发权利证书(如商标权、专利权证书等)。

Although administrative affirmation is not absolute, it has previous effectiveness(先定力), which means obligee(权利人) has rights until meeting a veto by legal procedure.

Except for the convenience of management or the need for the third person to obtain rights, the formation of real rights usually does not require the administrative agencies to take the approval or certification to confirm the emergence and existence of rights.

2. 专有性(Exclusiveness)

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① Article 15 of *International Covenant on Economic, Social and Cultural Rights*.

② 吴汉东等. 知识产权基本问题研究[M]. 北京：中国人民大学出版社，2005：15.

The exclusive right to an intellectual achievement can only be granted once, and only one applicant (including co-ownership) is identified or granted with the exclusive right. The intellectual property rights owned by the obligee (权利人) are unique and the situation of intellectual property rights with different holders does not exist.

而有形的物权，则可以在相同种类的物品上，由不同的主体分别享有不同具体标的之物权，而且互不冲突，如基于同一物品而产生所有权、他物权。

3. 地域性(Territoriality)

Rights are generated based on corresponding laws, while laws depend on the regime. So there will be independent legislation to internal affairs if different countries exist. Therefore, there comes the problem of legal validity scope.

知识产权是依据一国的相关知识产权制度而确定的，当知识产权的拥有者在一国获得法律承认而享有知识产权，并不能理当得到他国知识产权法律制度的自动认可和保护。如果需要在其他的国家获得承认和保护，通常还需要该国家的法律明确规定甚至需要行政性认定。

Regional nature of intellectual property rights and that of tangible property rights are different. It is mainly reflected in applicable principles of international private law, that is, tangible property applies to lex rei sitae(物所在地法), while intellectual property applies to law of the place where right is registered or claimed.

4. 时间性(Timeliness)

Timeliness of intellectual property shows that the duration of the right is limited by law, although the duration of trademark can be renewed, each renewal is still finite. Therefore, intellectual property is timely. That means the obligee shall enjoy the exclusive rights in a legal period. After the legal period, these exclusive rights may be lost or taken from the owner and given to the public. For example, copyright protection has ended for Lu Xun and anyone is free to copy his books *Ah Q Zheng Zhuan* and *Na Han*.

知识应当为人类所共享，但是某些享有知识产权保护的特定知识，因其具有的专有性，就产生了排斥他人使用之功效。如这一功效是无限期的，则社会科技发展和文明进步就会受到影响；而对知识产权的保护时间过短，发明创造或者设计者则难以获得相应的经济回报。

Therefore, the time limit of intellectual property rights is boundary between private rights and social rights.

(三)知识产权体系(Intellectual Property System)

知识产权作为一种权利，而权利通常被理解为一种类型化的自由(typed freedom)，因此权利有其体系性。

According to the object of intellectual property rights, Chinese scholars have made some theoretical classifications of intellectual property rights. Some scholars divided intellectual property rights into copyright and industrial property. Some scholars divided intellectual property rights into copyright, patent and trademark. Some scholars divided intellectual property rights into

copyright, patent, trademark and others. However, the theoretical significance of the division should be more inclusive and in accordance with dynamic and open natures of intellectual property rights, which can be divided into rights of intellectual achievements and rights of industrial and commercial designation. ①

There are two typical international conventions providing for the system of intellectual property by complete enumeration(完全列举法):

Convention Establishing the World Intellectual Property Organization (《成立世界知识产权组织公约》), concluded in Stockholm(斯德哥尔摩) on July 14, 1967(Article 2) provides that "Intellectual property shall include the rights relating to:

(1) Literary, artistic and scientific works;

(2) Performances of performing artists, phonograms, and broadcasts;

(3) Inventions in all fields of human endeavor;

(4) Scientific discoveries;

(5) Industrial designs;

(6) Trademarks, service marks, and commercial names and designations;

(7) Protection against unfair competition;

(8) All other rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields". ②

The scope of intellectual property rights provided in the *Agreement on Trade-Related Aspects of Intellectual Property Rights*(《与贸易有关的知识产权协议》, 简称 TRIPS) includes:

"(1) Copyrights and related rights;

(2) Trademarks;

(3) Geographical indications;

(4) Industrial designs;

(5) Patents;

(6) Layout designs of integrated circuits;

(7) Protection of undisclosed information (trade secrets). "③

Comparing the provisions of two conventions, we can find that, since the purpose of TRIPS is to protect economic rights of trade, so scientific discoveries other designation except trade mark and geographical indications or other rights are not protected.

(四)知识产权与相关权利的关系(Relations Between Intellectual Property Rights and Relevant Rights)

1. 知识产权与无形财产权(intangible property rights)、信息产权(information property rights)

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① 刘春田. 知识产权法(第三版)[M]. 北京: 高等教育出版社, 北京大学出版社, 1995: 12-14.

② Article 2 of *the Convention Establishing the World Intellectual Property Organization*.

③ Article 2 of *the Agreement on Trade-Related Aspects of Intellectual Property Rights*.

Judging from the classification, civil rights can be divided into personal rights(人身权) and property rights (财产权). While property rights consists of tangible property rights (有形财产权) and intangible property rights(无形财产权). Intangible property rights include property rights of creative achievements, property rights of profit-making marks(经营性标记财产权) and commercial credit rights (经营性资信权).

Within the perspective of the theory of information property rights(信息产权理论), the products under protection of Intellectual Property Law can be viewed as types of information. Therefore, information property(信息产权), refers to the property rights people enjoy from information collection process.

2. 知识产权与发明权(Right of Invention)、发现权(Right of Discovery)

发明权，是指发明人依法以现有生产技术水平的变革活动的权利以及由此所取得的发明创造性成果取得的权利。它包括发明人对一项不能取得专利或者即便符合授予专利而不愿取得专利的发明所获得的权利。

The right of invention refers to the right of the inventor to make creative achievements in accordance with the existing technology according to the law.

Right of invention is not equal to invention patent. Invention patent is inventor's exclusive right to his invention which is protected by patent law. Some inventions cannot be patented based on the protection restrictions.

Right of discovery refers to the right of the recognition of phenomena, properties or laws of the material universe which hitherto has not been recognized and verified.

发明权和发现权着重于人身权方面，其并非知识产权意义上的"财产权"。因此，将发明权和发现权列入科技(政策)法的范畴似乎更合适些。

3. 知识产权与知识产权的许可使用权(Licensing)

Intellectual property rights are rights of ownership, while licensing of intellectual property rights are rights of use, which uses others' intellectual achievements by acquiring owner's permission or by compulsory licensing.

4. 知识产权与知识产权请求权(Claim for Intellectual Property Right)

知识产权请求权，是指知识产权人或知识产权许可使用人在知识产权受侵害或有受侵害之虞时，得向侵害人主张停止并消除已经存在的妨害或预防妨害发生的请求权。

知识产权是实体性权利(substantive rights)，知识产权请求权是行使实体性权利的程序性权利，二者缺一不可。

第二节 知识产权制度的起源及发展
Ⅱ The Origin and Development of Intellectual Property System

知识产权通常被认为是萌芽于封建社会的特权(privilege)。该特权或由君主个人、封建国家、代表君主的地方官授予。无论是体现"君主对思想的控制"，还是对经济利益的控制或国家以某种形式从事的垄断经营等，都与特定的历史条件有关。专利、商标、著作

权制度都有其自身的起源与发展的过程，而其产生又往往伴随着相关的立法进程。

一、专利制度的萌芽与产生(The Germination and Emergence of Patent System)

(一)专利制度的萌芽(The Germination of Patent System)

In 1331, King Edward Ⅲ of England had authorized craftsman John Kempe the right of sewing and dyeing process(缝纫与染织技术).

In 1421, architect Brunelleschi in Florence got three years' exclusive legal protection for inventing a barge with hoisting gear (带吊机的驳船)to transport marbles.

In 1474, Venice was the first city to issue legal document on patent. In 1602, the court of England was the first country which protected patent by Legal Precedent through the case of Darcy v. Allin.

In the 17th century, Queen Elizabeth I authorized invention patent rights for several times. During the period of Jame I, representative of the British bourgeoisie(英国资产阶级代表) tried to have legislation on the patent.

(二)专利制度的产生(The Emergence of Patent System)

After the 16th century, the early British bourgeoisie, in order to pursue wealth and maintain the prosperity of the national economy, encouraged invention. In 1623, the British Parliament(英国国会) passed and promulgated *the Statute of Monopolies* (《垄断法规》), which is the first modern patent law in the world.

At the beginning of the 18th century, in order to break the privilege of ranks and power, the United Kingdom proceeded to improve its patent system further by the rule of autonomy of the will (意思自治)and freedom of contract(合同自由)after the bourgeois revolution.

A patent is a limited property right that the government gives inventors in exchange for their agreement to share details of their inventions with the public.

Patent specification (专利说明书) is the milestone of the establishment of modern patent legal system. By the turn of the 19th century, patent system was carried out in European nations and the United States. So far, more than 170 countries and regions have established their patent system.

二、商标制度的萌芽与产生(The Germination and Emergence of Trademark)

(一)商标制度的萌芽(The Germination of Trademark System)

In English lexicon, the word *brand* originally meant anything hot or burning, such as a firebrand or a burning stick. Cattle brands play an important role in identifying an animal's owner in cattle ranching. The practice of branding is ancient. Some Egyptian tomb paintings at least 4,000 years old depict scenes of roundups and cattle branding, and biblical evidence suggests

that Jacob the herdsman branded his stock. ①

Burning an identifying mark into the hide of an animal was, until the invention of the tattoo, the only method of marking that lasted the life of the animal. The practice of branding became particularly widespread in nations with large cattle grazing regions, such as Spain.

(二)商标制度的产生(The Emergence of Trademark System)

In 1803, France first established the legal protection of trade mark. Under *Law on Factory, Manufacturing Field and Workshop* (《关于工厂、制造场和作坊的法律》), counterfeit trademark(假冒商标) was punished as counterfeit legal instrument(私造文书)。

In 1804, France first endowed trade mark the same protection with other property rights *in Codes Napoleon* (《法国民法典》).

In 1857, *Manufacturing Marker and Trademark Law on Use Principle and Non-censorship Principle*(《关于以使用原则和不审查原则为内容的制造标记和商标的法律》) is the first trademark law of French and the world, since then the legal protection of trademark is comprehensively established.

三、著作权制度的萌芽与产生(The Germination and Emergence of Copyright)

(一)著作权制度的萌芽(The Germination of Copyright System)

The history of copyright law starts with early privileges and monopolies granted to printers of books. The first copyright law was issued in England and was classified to Print Law, not copyright law. In 1662, *The Licensing Law* (《许可证法》) which is issued by England specified: 1. Whoever prints shall register with publishing company to get a printing permission; 2. Whoever obtains a permission has right to prohibit others re-print or import relevant books. ②

(二)著作权制度的产生(The Emergence of Copyright System)

The parliament(议会) of United Kingdom passed the first copyright law worldwide—*The Kingdom of Great Britain's Statute of Anne of* 1710 (《安妮女王法令》, *Anne Queen Acts*). *Anne Queen Acts* is the cornerstone of modern copyright theory system.

The Federal Copyright Law (《美国联邦版权法》), which promulgated in 1790, was greatly influenced by *Anne Queen Acts*. Thus America became the second country that possesses copyright law.

In 1834, Spain issued *Royal Law on Printing*(《皇家印刷法》).

In 1791, France promulgated *Performance Rights Law*(《表演权法》). In 1793 a new law was passed giving authors, composers, and artists the exclusive right to sell and distribute their works, and the right was extended to their heirs and assigns for 10 years after the author's death. The National Assembly placed this law firmly on a natural right footing, calling the law the

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① David Dary. *Cattle Brands*, *Handbook of Texas Online* [M]. Texas State Historical Association, 2011.

② Article 5 of *Licensing Law of* 1662.

"Declaration of the Rights of Genius" and so evoking the famous Declaration of the Rights of Man and of the Citizen.

四、知识产权制度产生的社会条件(Social Conditions of the Emergence of Intellectual Property System)

知识产权制度，仅有先进的科学技术并不能催生之，它还需要有一定的历史条件和环境以及相关制度之匹配。知识产权制度的建立能够促进科技的发展。没有知识产权制度，仅有的一点发明创造成果，也难以使社会得到整体的科技提升。这也就不难理解为什么中国古代就有四大发明，但科技在近代发展得却如此缓慢。因此，社会生产的科学技术化、科学技术成果的商品化、知识财产的法律制度化、知识产权制度的体系化，使知识产权制度得以逐渐的建立和完善。①

知识产权制度产生的社会历史条件可归纳为以下四点：

First, intellectual property appears with the development of new technology. Since the traditional craft is limited to craft workshop, a protection of privilege is enough. But when the developing technology may easily transcend the existing confidential technology, it is necessary to protect the monopoly before entering public domain.

Second, intellectual property develops with the cultural transmission and ideal updating. From the 14th century to the 16th century, Renaissance which highlighted humanism strengthened the protection of private rights and intellectual achievements.

Third, intellectual property is born with political reform. During the 17th century, many ideologists and politicians appeared in bourgeois revolution of Britain, such as Hobbes, Milton and Locke. The principles of sovereignty, equality freedom and private rights which shall not be infringed helped to promote the political reform and the construction of legal system.

Fourth, intellectual property accompany with the revival of the Roman law. The 15th to 16th century, people had a mental reflection of property protection on the Roman law, holding the idea that the intangible assets shall be protected by law. This understanding provided a solid legal foundation to perfect the intellectual property system.

五、知识产权制度的发展(Development of Intellectual Property System)

(一)传统知识产权的范围不断扩大(Expansion of Scope)

As the legal form to protect intellectual achievements, the scope of intellectual property rights expands with the scope of intellectual property constantly. It has grown from copyrights, patents, trademarks to the rights of trade secrets, domain names and so on. Intellectual property rights are not those of a single form, but a combination of a bundle of rights.

(二)知识产权法律体系不断完善(Improvement of Legal System)

著作权、专利权、商标权是传统的知识产权法的三大基本制度。集成电路布图设计

① 吴汉东等．知识产权基本问题研究[M]．北京：中国人民大学出版社，2005：65~68.

(layout-designs of integrated circuits)、计算机软件(computer software)、数据库(data base)、植物新品种(new varieties of plants)、基因(gene)等逐渐由专门的法律加以规范因而出现的相关知识产权立法，无一例外地说明了知识产权制度随着社会的发展而不断得以完善。

(三)知识产权的保护呈现国际化趋势(International Trend)

知识产权的地域性与国际化发展趋势互为存在条件并不断催生对立面。知识产权的国际条约与国内知识产权制度之间不断发生冲突，继而融合。知识产权保护标准的国际化以及协调保护已经成为知识产权的国际话题。

(四)知识产权与人权(Human Rights)、贸易(Trade)等相关联

在贸易国际化的发展态势下，知识产权已经不再是一个国家的内政问题，它不但涉及人权，还涉及贸易，因此也就不难理解在世界贸易组织下所确定了《与贸易有关的知识产权协议》(*Agreement on Trade-Related Aspects of Intellectual Property Rights*，简称 TRIPS)。

(五)知识产权的利益平衡(Balance of Interests)及处置(Management)

Intellectual property is monopolistic, but the development of society needs cultural communication and knowledge dissemination. The protection of intellectual property must be based on the balance of interests.

利益平衡则涉及利益的主体以及利益平衡的处理原则，这不但需要在发达国家与发展中国家、欠发达国家之间取得平衡，还需要在权利人与社会大众之间取得平衡。

第三节 知识产权制度的作用
Ⅲ The Influences of Intellectual Property System

一、鼓励创新(Encouraging Innovation)

Historically, science, technology and inventions certainly can promote the development of the society to some extent. But, if there is no institutional safeguard, even new technology would not create positive effect in long term. Only encouraging the innovation property system can possibly provide appropriate individual stimulation.

In 1624, England carried out *The Statute of Monopolies*. North Douglass (道格拉斯·诺斯) said in his speech: "If there is no guarantee of institutional factors of personal often stimulation and private industry and its income is no guarantee of modern industry, could not have developed."①It is not difficult to understand the famous remark that "the patent system adds fuel to the fire of genius".

二、保护专有权利(Protecting Proprietary Rights)

Inventions, as intellectual achievements, are not protected by law naturally; it must rely on

① 柳适，张家恕，郝明工等. 诺贝尔经济学奖得主讲演集[M]. 呼和浩特：内蒙古人民出版社，1998：534.

the construction of legal system. 人是理性的，对财产的“贪欲”和追求，从另一个侧面体现了文明的进程，“营利性”目标成为了对人具有极大支配作用、生机勃勃的力量，① 而“恒产恒心”则反映了人们对财产保护的渴望。

The monopoly rights of intellectual property rights themselves can repel other people's use in a certain period of time, thus guaranteeing the inventor's exclusive right to their intellectual achievements, in order to reclaim their scientific research investment and obtain corresponding profits, and then promote people's creative activities.

三、促进市场交易(Promoting Market Transactions)

作为无形财产权的知识产权，专有权人(patentee)可以通过自己实施来获得经济利益。

Under the doctrines of proprietary sanctions and autonomy of the will, patentee can assign or license his patent rights for benefit. Intangible assets promote the trade circulation of cultural, scientific and technological achievements, accelerating the civilization of material and spirit civilization.

四、维护社会公益(Safeguarding Social Commonweal)

From the aspect of human rights, every single person has the rights to enjoy the benefits of technology. Therefore, intellectual rights are not absolute, but have a certain range of limitations.

在社会利益、他人利益和知识产权人利益之间要实现平衡，仅靠权利人的思想道德制约是难以实现的，必须通过公开透明、可预期的制度加以安排。对知识产权既要保护权利人在一定地域、一定时间内的垄断权，又要打破其永久的垄断性占有，这就需要对知识产权人、社会公众之间有一个利益平衡的考量和安排。

Therefore, the appropriate restrictions on the copyright (such as fair use, legal permission), the trademark rights, and the patent rights become a certainty to safeguard the public interest.

第四节　知识产权的利用、保护与反垄断
Ⅳ　The Utilization, Protection and Anti-monopoly of Intellectual Property

一、知识产权的利用(The Utilization of Intellectual Property)

(一)知识产权利用的意义(The Significance of Utilization)

权利的静态支配之法律确认和动态的流转之法律保护，构成了财产权的两大部分并衍生出传统民法的物权法(property law)及合同法(contract law)。从某种意义上说，知识产权的利用是知识产权制度的必然要求。知识产权的利用，具有深刻的社会意义。

1. 实现知识财产的价值

① 刘春田．知识产权法(第三版)[M]．北京：高等教育出版社，北京大学出版社，2007：25.

Intellectual products(知识产品) cannot walk into economic market by themselves. Ownership(所有权) cannot realize its value just by itself, but by possession(占有), utilization(使用), seeking profits(收益) and disposition (处分) of the specific products.

充分利用知识产权，将知识产权之标的通过特定的形式传播开来，并得到相应的对价，不但满足了社会对知识产品的需求，也促使了知识产权向社会价值和经济价值的转换。

一个国家的知识产权授权量是衡量一个国家知识产权制度或者科技发达程度的标志，但却不是绝对唯一的标志，知识产权的运用(实施)率，则是深层次地反映知识产权制度对社会发展影响的一个量值标准。

2. 维系创造者、传播者与社会大众利益平衡的关系

The subjects of intellectual property rights are not only the owners of the products, but also the social public who is under lawful and reasonable utilization.

知识产品通过利用，创造者享有所有权，传播者享有传播劳动过程中应有的权利，社会大众享有因知识产品传播而得到的收益，各自从动态的角度来实现利益平衡。知识产品的利用表面上体现出权利人与知识产品之间的关系，而实质上则是反映出了权利人与社会大众之间的利益平衡。

3. 权利保护中排他性权力促使其价值的体现

The values that intellectual products provide lie in serving society(服务社会), benefiting mankind(造福人类), and paying corresponding consideration to creators and disseminators. To enjoy intellectual property rights, you must pay certain consideration, which is not only the original investment , but also the expenses in maintaining effectiveness of these rights(such as registration fee of trademark, maintenance fee of patent, etc.).

作为一种私权向社会公用领域转化的过程中，一定时间的垄断是以相应之对价为交换条件的。因此，在权利保护期限内，权利的排他性要求使用人向知识产权人交付一定的使用费用，来实现所有权的“收益”之权能，而不至于使知识产权成为权利人的“负资产”。权利—利用—效益—再拥有其他新的权利，这样的互动和进入良性循环，才是知识产权制度应有之义。

(二)知识产权利用的主体及方式(The Subjects and Methods of Utilization)

1. 知识产权人的利用(The Utilization of Intellectual Property Owner)

知识产权的权利人(intellectual property owner)对知识产品的利用，是通过实现知识产权的支配权来实现的。

(1)自我实施(Self-enforcement)

自己发表作品，把自己的专利技术运用到自己的产品生产中，将知识产品申请商标注册并在生产、服务中实际使用，等等，都是自我实施知识产权的表现。通过知识产权所有人实施，知识产品在社会中得以传播，社会大众也就获得了带有知识产权相应的商品或服务。

(2)转让(Assignment)

As a private right, intellectual property rights of owner can be partly or wholly assigned to the

assignee in a certain period.

由于著作权具有的人身、财产的双重属性，因此著作权的财产权是可以转让的，而著作权的人身权(如署名权等)则不能转让。

(3)授权使用(Authorization)

授权使用又称之为许可使用，国际上又称之为许可证贸易，是指知识产权所有人将其知识产权中的全部或者部分权能许可他人利用的法律行为。

The creative activities evolve to the exclusive activities of professionals gradually. Authorizers of the creative activities may not have corresponding industrial conditions to carry out. Therefore, authorizers obtain intellectual property through creative activities and acquire benefits through transfer or authorization.

(4)设定信托(Trust)

Trust is the property held by trustee for the benefit of the beneficiary. The value of intellectual property lies in its commercialization and not in its mere creation and development per se. Competitive advantage arises out of the way in which corporate organizes and performs activities and the activities are the means by which a firm creates value in its product for its buyers. The value and the value addition for the buyer is the end product for any organization.

专业化创作与职业化管理，凸显了社会分工不断细化的过程。在"凡事皆可信托"的普通法思想影响下，受托人接受委托人交付的知识产权，按照约定之目的进行管理和处分的知识产权信托现象也逐渐为人们所接受。在著作权领域，集体管理就可以理解为一种信托管理方式。

(5)设定质权(Mortgage)

将知识产权设定质权，当债务到期不能履行时，质押权人可要求将知识产权通过法定程序拍卖或者变卖，质押权人对其所得款项有优先的受偿权。知识产权可设定质权，体现了知识产权作为一种财产权应有的性质。

2. 社会大众的利用(The Utilization of Public)

(1)合理使用(Fair Use)

合理使用，是依据法律规定，他人不必征得知识产权人的同意，也无须向其支付报酬而自由使用知识产品的制度性安排。

The legal concept of "Test copyright" was first ratified by *Statute of Anne of* 1710(《安妮女王法令》). As room was not made for the authorized reproduction of copyrighted content within this newly formulated statutory right, the courts created a doctrine of "fair abridgment" in Gyles v. Wilcox, which eventually evolved into the modern concept of "fair use", that recognized the utility of such actions. The doctrine only existed in the U. S. as common law until it was incorporated into the Copyright Act of 1976, 17 U. S. C. § 107.

Fair use, a limitation and exception to the exclusive right granted by copyright law to the author of a creative work, is a doctrine in United States copyright law that allows limited use of copyrighted material without acquiring permission from the rights holders. Examples of fair use include commentary, criticism, news reporting, research, teaching, library archiving and

scholarship. It provides for the legal, non-licensed citation or incorporation of copyrighted material in another author's work under a four-factor balancing test.

尽管在著作权法中有专门的合理使用之规定，在专利法中也有相关的规定，而在商标法中往往没有明文的规定，但是对知识产权的限制，承认社会大众非商业性的合理使用权利，是知识产权制度实现利益平衡的应有之义。

(2)法定许可(Statutory Licensing)

法定许可，是指根据法律的直接规定，以特定方式使用已经公知的知识产品，可不经知识产权人同意但必须支付费用而使用的制度性安排。法定许可，在著作权领域出现。从作品已经向社会公开发表的事实，可以推定著作权人对其作品进入公用领域，允许他人使用，从而促进作品传播的本意。因此，任何人进一步传播作品的使用，是符合著作权人本意的，只是在商业性使用其作品时应当向著作权人付费，而费用标准和具体的支付方式可由双方当事人来意定。

(3)强制许可(Compulsory Licensing)

强制许可，是在特定的条件下，由知识产权主管机关应当事人的请求而强行许可他人使用，使用者向知识产权人支付费用的制度性安排。强制许可具有法定许可的替代功能,① 是在普适性法定许可制度之外的一种特殊性法定程序许可，也是对知识产权最底线的限制。

What happens if a patent owner refuses to license the use of the patented invention by demanding unreasonable terms? The law in many countries provides that where the patented product is not available or is available at exorbitant prices, the government may on grounds of public interest authorize an interested manufacturer to use the patent against payment to the patent holder of an adequate royalty. However, the agreement lays down strict conditions for such licensing to ensure that compulsory licenses are issued only in exceptional situations and on an objective basis. In particular, it provides that compulsory licenses may be granted only when the interested manufacturer has failed in his or her efforts to obtain the authorization on reasonable terms and conditions. Box 49 lists some of the other conditions which must be fulfilled before governments can intervene and license a manufacturer to use patented technology. ②

二、知识产权的保护(The Protection of Intellectual Property)

(一)知识产权的保护范围(The Scope of Protection)

Intellectual property rights are different with traditional real rights(物权) and obligatory rights(债权). The scope of legal protection is varied to different kind of intellectual products.

Copyright law protects works, not its ideological thoughts, but certain form of ideological thoughts. Virtually, technical features and technical scope are specific embodiments of creative thoughts that patent law protects.

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① 吴汉东等．知识产权基本问题研究[M]. 北京：中国人民大学出版社，2005：49.

② Article 31 of *Agreement on Trade-Related Aspects of Intellectual Property Rights*.

The exclusive right to registered trademark is not effective when operating beyond the registered conditions.

知识产权保护的不仅是一种专有权，权利人受到保护更多的是以一种禁止权被体现出来，即依法得以禁止他人非法使用知识产品的权利。

(二)知识产权损害赔偿的归责原则(Doctrine of Liability Fixation)

归责原则，是归咎责任的基本准则。

The core point of liability fixation is the causation between wrong action and its liability.

关于知识产权侵权赔偿的归责原则，法学界有不同的认识。有过错归责的“一元归责”学说，也有以过错归责为主、辅以其他归责(无过错、过错推定)原则的“二元归责”学说。①

凡是未经知识产权人同意又没有法定理由而使用享有知识产权的知识产品行为，主观上都是有过错的(明知不可而为之)。知识产权的侵权归责应当采用过错归责原则。理论上，任何的归责均应当基于主观上的过错。根据“谁主张谁举证”的证据规则，就算是无过错归责，也只是法定明确了某些客观情形，不问过错是否存在只要有损害，就要归咎责任；而绝对不是主观上无过错而强行归咎其责任。

尊重知识和尊重他人的知识产权，是社会上每一个人应有的义务；侵犯他人的知识产权在主观上是有过错的，只是在某些特定情形下行为造成的侵害结果并非是行为人的主观追求和放任，在一定程度上可以免除赔偿责任而已。例如，某商场尽到了合理的注意义务，进货后销售，之后发现了该批货物为假冒他人注册商标的，销售者能够提供货物之合法来源并立即停止销售的，可以免除赔偿责任(免除的仅仅是赔偿责任而非全部的侵权责任)。

(三)知识产权的保护方式(The Methods of Protection)

1. 民事保护(Civil Protection)

凡是不符合合理使用、法定许可条件，又没有强制许可的情形下，任何人未经知识产权权利人的许可，不得对知识产品加以利用。换而言之，知识产权人有依法禁止他人非法利用其知识产品的权利；当发生知识产权侵权行为时，知识产权人有权向公权力机关要求获得救济(要求行政查处或者寻求司法救济)。

Intellectual property rights, as private rights, has various relief for resolution when being infringed, including negotiation between the property owner and tort infringers, submitting to arbitration when there is an arbitration clause, or even a civil lawsuit when necessary.

2. 行政查处(Administrative Governance)

Intellectual property infringements not only violate private rights, but also disrupt the normal social order, even encroach on the common interests of the state and the public. Therefore, intellectual property infringements committed the administrative law, too.

知识产权的行政管理机关，可依职权对侵犯知识产权的行为予以查处，可没收侵权工具及设备、销毁侵权复制品，没收非法所得并可处以相应的行政处罚，以打击侵权活动。

① 吴汉东等. 知识产权基本问题研究[M]. 北京：中国人民大学出版社，2005：56.

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3. 刑事打击(Criminal Protection)

The article 61 of the *TRIPS* further appeals countries to see that, where there is "willful trademark counterfeiting or copyright piracy on a commercial scale", the infringer is prosecuted under criminal law and imprisoned or fined to an extent sufficient to provide a deterrent. ①

我国的刑法规定了"侵犯知识产权罪",明确了侵犯著作权罪、假冒注册商标罪、假冒专利罪、侵犯商业秘密罪、侵犯商誉权罪等各项罪名,在刑罚上规定了有期徒刑、拘役、管制、罚金等。

三、知识产权的反垄断(Anti-monopoly of Intellectual Property)

知识产权是一种专有性权利(exclusive rights),具有垄断性(monopoly)。《反垄断法》(*Antitrust Law*)所规制的是经济性垄断行为,包括了经营者达成垄断协议;经营者滥用市场支配地位;具有或者可能具有排除、限制竞争效果的经营者集中等。

就著作权、商标权和制止不正当竞争的权利而言,基本上不存在滥用的可能性,只有涉及专利权时,才可能发生滥用的问题。"DVD 专利池"和"华为诉思科"等知识产权案件引起了社会各界的强烈反应和广泛关注。对于专利技术控制所产生的垄断问题,在专利法的强制许可制度中能够加以解决:具备实施条件的单位以合理的条件请求发明或者实用新型专利权人许可实施其专利,而未能在合理长的时间内获得这种许可时,国务院专利行政部门根据该单位的申请,可以给予实施该项发明或者实用新型的强制许可。

第五节 知识产权法学
V The Education of Intellectual Property Law

一、知识产权法学及学科定位(Intellectual Property Law and Its Academic Position)

(一)知识产权法(Intellectual Property Law)

1. 知识产权立法(Legislation)

知识产权法,是调整因知识产品而产生的各种社会关系的法律规范之总称。具体而言,就是调整因知识产权确权、知识产权运用、知识产权保护和知识产权管理所产生的社会关系的法律规范之总称。

The objects of intellectual property are creations of the human mind. Under Intellectual property law, owners are granted certain exclusive rights to a variety of intangible assets, such as musical, literary, and artistic works; discoveries and inventions; and words, phrases, symbols, and designs. Common types of intellectual property include copyrights, trademarks, patents, industrial design rights and trade secrets in some jurisdictions.

Since the 1980s, the state has promulgated and enforced many laws and regulations which

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① Article 61 of *the agreement on Trade-Related Aspects of Intellectual Property Rights*.

cover the main content of intellectual property protection, including *Trademark Law of the People's Republic of China*(promulgated in 1982, revised in 1993 , 2001 and 2013), *Patent Law of the People's Republic of China*(promulgated in 1984, revised in 1993 , 2000 and 2008), *Copyright Law of the People's Republic of China* (promulgated in 1990, revised in 2000 and 2010), *Regulations on Computers Software Protection* (promulgated in 2001), *Regulations on the Protection of Layout-designs of Integrated Circuits* (promulgated in 2001), *Regulations on Collective Management of Copyright*(promulgated in 2004), *Regulations on the Protection of New Varieties of Plants* (promulgated in 1997), *Regulations on Customs Protection of Intellectual Property Rights* (promulgated in 1995, revised in 2003 and 2010), *Regulations on the Administration of Special Sign*(promulgated in 2003), etc.

China actively accedes to major conventions and treaties for international intellectual property rights protection. 1980 年 6 月 3 日，中国成为世界知识产权组织成员国。2001 年 12 月 11 日，中国加入世界贸易组织，开始履行《与贸易有关的知识产权协议》(*Agreement on Trade-Related Aspects of Intellectual Property Rights*，简称 TRIPS)项下的义务。多年来，中国还相继加入了《保护工业产权巴黎条约》(*Paris Convention for the Protection of Industrial Property*)、《专利合作条约》(*Patent Cooperation Treaty*，简称 PCT)、《商标国际注册马德里协定》(*Madrid Agreement Concerning the International Registration of Trademarks*)、《国际植物新品种保护公约》(*International Convention for the Protection of New Varieties of Plants*)、《保护文学和艺术作品伯尔尼公约》(*Berne Convention for the Protection of Literary and Artistic Works*)、《世界版权公约》(*Universal Copyright Convention*)等 10 多个国际公约、条约、协定或议定书。

2. 知识产权法的地位(The Status of Intellectual Property Law)

知识产权法的地位，是指知识产权法在整个法律部门体系中所处的位置与作用。知识产权法，是相对于有形财产法而言的。从知识产权的私权性质以及法律调整的范围以及遵从的原则来分析，知识产权法调整的是平等主体之间因创造或使用智力成果而产生的财产关系和人身关系，因此仍然属于民法的范畴。知识产权法在目前不可能脱离民法而成为一个独立的法律部门。

Intellectual property law regulates property relations and personal relations of intellectual achievements between equal subjects, so it belongs to the category of civil law.

为了加强对知识产权的保护，促进科技创新，建设创新型国家，2017 年 3 月 15 日全国人大审议并通过的《中华人民共和国民法总则》(简称《民法总则》)第 123 条规定，民事主体对作品、发明、实用新型、外观设计、商标、地理标志、商业秘密、集成电路布图设计、植物新品种及法律规定的其他客体依法享有知识产权。对比《民法通则》的规定，《民法总则》中规定的商业秘密、集成电路布图设计、植物新品种等均为新增内容。

(二)知识产权法学学科定位(The Discipline Status)

1. 知识产权法学(Intellectual Property Law)

知识产权法学，是指以知识产权法律规范和知识产权社会现象为研究对象的科学。它是以知识产权法律规范和知识产权社会现象作为主要研究对象的一门新兴的法律科学。