

PART II. SUBSTANTIVE RULES OF INTERNATIONAL INTELLECTUAL PROPERTY LAW

CHAPTER 4: COPYRIGHT AND RELATED RIGHTS

Introduction

Origins and definition

4.1 The origin of copyright can be traced back to the licence issued by the British Crown and Star Chamber in the sixteenth century to keep the printers of seditious material in check. The first copyright act was the Statute of Anne 1709 which gave authors of books fourteen years of monopoly in printing their books.

According to WIPO, 'copyright is a legal term describing rights given to creators for their literary and artistic works.'¹ The works of artistic and literary expression include books, poems, pamphlets and other writings, musical compositions, cinematographic works, drawings, paintings, sculpture, photographic works, illustrations, maps and dramatic works.

In summary, the rights of a copyright owner include the exclusive right to reproduce the work, to disseminate it to the public, and to adapt and/or translate it. Exceptions to this exclusive right include compulsory licences and 'fair use' for the purposes of criticism, news reporting and education. Copyright is usually attached upon the creation of a work, and formalities such as registration are not required under the Berne Convention and the TRIPs. The term of protection in most countries is generally the life of the author plus fifty years.

Internationalisation of copyright law

4.2 Despite some common elements shared in national copyright laws, countries differ greatly in the following aspects in respect to copyright protection: (a) the categories of works to be protected; (b) the need for fixation of works in a tangible medium; and (c) the degree of creativity or originality required for protection to attach.

There has been an ongoing trend of internationalisation of copyright protection through bilateral, multilateral and regional arrangements. Through

¹ <http://www.wipo.org/about-ip/en/copyright.html>. A copyright is defined by the US International Trade Commission as '... a form of protection provided by a national government to authors of original works of authorship including literary, dramatic, musical, artistic and certain other intellectual works.'

bilateral negotiations, countries have reached certain common grounds on copyright protection. For example, with s 301, the US has forced other countries to adopt higher levels of protection. In the case of the EU, national laws of European countries have been gradually harmonised by the regional Copyright Directives and the EC Software Directive. NAFTA, a regional trade agreement of 1994, also includes copyright issues on its trade agenda. Several other Free Trade Agreements signed between the US and countries such as Australia, Singapore and North American countries addressed copyright issues as well.

In the meantime, international treaties and conventions have also played an instrumental role in harmonising the national copyright system. They are:

- (1) The Berne Convention for the Protection of Literary and Artistic Works (Berne Convention)
- (2) The Universal Copyright Convention (UCC)
- (3) The International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (Rome Convention)
- (4) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs)
- (5) The WIPO Copyright Treaty (WCT)
- (6) The WIPO Performances and Phonograms Treaty (WPPT)

Author's Right or Copyright?

Author's right system

4.3 The author's right system has its root in the civil law systems of the countries of the European Continent and their former colonies in Latin America, Africa and Asia. In France, protection of authors is traditionally known, instead of copyright, as *droit d'auteur*; in Germany, *Urheberrecht*; and in Italy, *diritto d'autore*.² Civil law countries tend to protect subject matter lacking a real human author, such as sound recordings and television broadcasts, using neighbouring rights rather than author's right (see below for details on neighbouring rights).

The early statutes protecting author's rights include the 1791 and 1793 French laws, giving authors an exclusive right against unauthorised reproduction of their works. In Germany, the 1837 German law (Prussian statute) grants the same kind of right to authors.

Copyright system

4.4 The copyright system is associated with the common law system of England, its former colonies and the countries of the British Commonwealth. This system traces to the Statute of Anne, 8 Anne c 19 of 1710, entitled 'An Act for the Encouragement of Learning, by vesting the Copies of Printed Books in the Authors or Purchasers of such copies, during the Times therein mentioned.'³

² Paul Goldstein, *International Intellectual Property Law: Cases and Materials* (Foundation Press, New York, 2001) p 142.

³ Paul Goldstein, *International Intellectual Property Law: Cases and Materials* (Foundation Press, New York, 2001) p 142.

The US passed its first copyright statute, modelled on the Statute of Anne, on 31 May 1790, giving a fourteen-year copyright in books, maps and charts. Given the relatively lower technological level in the 1700s, the rights protected under this US statute were limited to unauthorised printing, reprinting, publishing or vending.⁴

4.5 It was suggested that the major difference between the author's right system and copyright system is that the former emphasizes the author's natural rights, attaching his literary creation to his personality and giving him control over every aspect of his work's exploitation.⁵ On the other hand, the copyright system has its 'utilitarian' thread that is needed 'as an encouragement to the labours of learned men.'⁶ Other scholars have, however, asserted that the difference was theoretical and philosophical rather than real, because one can easily observe a natural rights element in the common law materials, and a utilitarian theme in the author's rights law.⁷

Subsistence of Copyright

Copyrightable subject matter

4.6 The copyrightable subject matter under the Berne Convention are the production in the literary, scientific and artistic works which include 'books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatico-musical works; choreographic works and entertainments in dumb show; musical compositions with or without words; cinematographic works to which are assimilated works expressed by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works to which are assimilated works expressed by a process analogous to photography; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science.'⁸

The subject matter above have been incorporated by reference into the TRIPs.⁹ Article 9(2) of the TRIPs further clarifies that 'copyright protection shall extend to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such.' In addition, the TRIPs also inserted a special provision governing computer programs,¹⁰ which was not addressed by the Berne Convention.

4 Paul Goldstein, *International Intellectual Property Law: Cases and Materials* (Foundation Press, New York, 2001) p 142.

5 The rationale can be traced to Otto von Gierke and Immanuel Kant's theories. Paul Goldstein, *International Intellectual Property Law: Cases and Materials* (Foundation Press, New York, 2001) p 142.

6 Adam Smith, 'Lectures on Jurisprudence' 83 (1762), cited from Paul Goldstein, *International Intellectual Property Law: Cases and Materials* (Foundation Press, New York, 2001) p 142.

7 Jane C Ginsburg, 'A Tale of Two Copyrights: Literary Property in Revolutionary France and America', 64 *Tulane Law Review* 991 (1990) p 1014, cited from Paul Goldstein, *International Intellectual Property Law: Cases and Materials* (Foundation Press, New York, 2001) p 143.

8 Article 2(1) of the Berne Convention.

9 Article 9(1) of the TRIPs.

10 Article 10 of the TRIPs; see detailed discussion in paras 5.7 and 5.10.

'Literary and artistic works'

4.7 All the leading copyright conventions require that protection should be given to 'literary and artistic works'.¹¹ However, what 'literary and artistic works' actually means is not clear. According to art 2(1) of the Berne Convention, they must include all works capable of being protected. Essentially, the term is to be defined by individual countries.

Different countries interpret the term differently. For instance, the US Copyright Act includes sound recordings, broadcasts and other fixed performances as copyrightable subject matter, but many other countries, including France, Germany and the PRC, protect them under a bundle of neighbouring rights. Copyright protection is normally more comprehensive than neighbouring right protection, eg, protection term is life plus fifty years for copyright, but only fifty years for most neighbouring rights. This creates serious problems when the national treatment principle is applied to dispute resolution. Assuming Country A protects sound recording under copyright while Country B protects it as neighbouring right, and both A and B are signatories of an international treaty and are bound to observe the national treatment principle, the question to be answered is: is Country A required to give copyright protection to sound recordings originating in Country B while Country B simply needs to give neighbouring right protection to Country A's sound recording works? If so, Country A's sound recording work will receive less protection than Country B's sound recording work.

Computer programs

4.8 Software technology has been protected as new and useful inventions under patent law. However, algorithms and other abstract ideas were excluded from such protection.¹² Copyright was, therefore, needed to fill the gap.

Article 10(1) of the TRIPs required that 'computer programs, whether in source or object code, shall be protected as literary works under the Berne Convention.' Article 4 of the WIPO Copyright Treaty contains a similar provision.¹³ Therefore, it is an obligation for member states of the Berne Union, WTO and WIPO Copyright Treaty to treat computer programs as 'literary works' in their national copyright laws.

The US was the first country to protect computer programs as copyrightable 'literary works' and lead international campaigns to treat computer programs as copyrightable literary works.¹⁴ The main reason for the US to push for a higher level of copyright protection rather than a lower level *sui generis* protection for computer software, is that the US has become a leading exporter of computer programs and has thus a high stake in preventing worldwide software piracy.

11 See arts 2 and 2bis of the Berne Convention; and arts 1 and 3 of the Rome Convention.

12 See *Parker v Flook* 437 US 584 (1978) and *Gitschalk v Benson* 409 US 63 (1972).

13 'Computer programs are protected as literary works within the meaning of Article 2 of the Berne Convention.'

14 The US Copyright Office registered the first computer program in 1964. See Goldstein, *International Intellectual Property Law: Cases and Materials* (Foundation Press, New York, 2001) p 152.

The EC Software Directive clearly requires its member states to 'protect computer programs, by copyright, as literary works.'¹⁵ In contrast, China's position on this issue is uncertain. On the one hand, 'computer software' was separately listed and not included in the category of 'literary work' in the PRC Copyright Law while on the other hand, the administrative rules encourage but not require mandatory registration of computer software.¹⁶

It remains controversial as to whether copyright, which originally protected the print medium, is an appropriate method to protect works of technology such as computer software. It has been argued that it is not fair and reasonable to grant such lengthy protection to computer programs whose life cycle is usually not more than five years.¹⁷

Database and compilation of data

4.9 In the era of information, collection of facts such as telephone directories, catalogues and price lists are of paramount importance in daily living and business operation. The work is often tedious but requires a low level of creativity. It is therefore unsettled which form of IP laws would be most appropriate to protect such databases.¹⁸ No international treaty has been formed so far; national laws differ greatly in this area. The debates are focused on whether the data or the compilation of the data, or both, should be copyrightable.

Under the Berne Convention, copyright protection only extends to the 'collections' of works such as encyclopedias and anthologies 'as such.'¹⁹ The TRIPs extends the scope to 'compilations of data or other material, whether in machine readable or other form,'²⁰ meaning that the compilations of computer database, not only those in traditional forms, are subject to protection. It is also clear that under the TRIPs, that copyright protection does not extend to the data contained in the compilation.²¹ The EU passed a Database Directive in 1996 requiring member states to provide two levels of protection: (1) copyright protection for selection and arrangement; and (2) *sui generis* protection for

15 Council Directive (EEC) No 91/250 of 14 May 1991 on the legal protection of computer program, art 1(1).

16 Article 3(9) of the PRC Copyright Law lists 'computer software' which is separated from 'literary work' listed under art 3(1). A literary work is not required to be registered to receive copyright protection. However, under the PRC Regulations for the Protection of Computer Software (1991), registration is mandatory for computer software. Although the PRC Regulations have been replaced by new Regulations on January 2002, which is more in line with the TRIPs and does not require mandatory registration of computer software, the registration is still encouraged. Pursuant to the Measures on Registration of Computer Software issued by the National Copyright Administration (NCA) on 20 February 2002, registration is highly recommended for computer software because the registration certificate of copyright is deemed to be prima facie evidence of copyright ownership in administrative or court proceeding.

17 Doris Estelle Long, Anthony D'Amato, *A Coursebook in International Intellectual Property* (2000).

18 WIPO proposed to have a treaty for *sui generis* protection for database, but it failed to be passed.

19 Article 2(5) of the Berne Convention.

20 Article 10(2) of the TRIPs.

21 Article 10(2) of the TRIPs.

database contents.²² Under the *sui generis* system, there is no requirement of creativity or novel contribution.²³ Protection term lasts fifteen years 'from the first of January of the year following the date of completion.'²⁴

The US Congress has drafted two Bills on database protection, but failed to pass them. In judicial practice, the US Supreme Court held in *Feist Publications Inc v Rural Telephone Service Co* that the telephone directory in question was not copyrightable since it failed to meet the creativity criterion in the selection, arrangement and coordination of facts.²⁵ This is contrary to the position in Europe under which a higher degree of creativity is required, but works such as telephone directories and catalogues are nevertheless often granted copyright protection.

Official texts

4.10 The Berne Convention leaves the issue of whether official texts are copyrightable largely in the hands of national legislatures of the Union members.²⁶ The US, Germany, Japan and PRC have allowed official texts such as laws, ordinances, official decrees and notices, to be placed in public domain. By contrast the British Commonwealth countries use Crown and Parliamentary copyright to protect official texts that are nonetheless subject to generous provisions for free use.²⁷

Applied arts and industrial designs

4.11 Under Article 2(7) of the Berne Convention, member states are free to decide whether applied arts and industrial designs and models are protected by copyright and if so, to what extent. If the applied arts and industrial designs and models are protected under the *sui generis* system or by other IP laws, eg patent protection for utility models and designs in China, then other member states must also grant the same protection to these subject matter in their countries. On the other hand, if they are not protected by any special legislation, they shall be treated as artistic works and be protected by copyright.²⁸

22 Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases. Article 3(1) provides that 'database which, by reason of the selection or arrangement of their contents, constitute the author's own intellectual creation shall be protected as such by copyright.' Article 3(2) provides that copyright protection of database 'shall not extend to their contents.' Article 7(1) under Chapter III, entitled *Sui Generis Right*, requires member states to 'provide for a right for the maker of a database which shows that there has been qualitatively and/or quantitatively a substantial investment in either the obtaining, verification or presentation of the contents to prevent extraction and/or re-utilization of the whole or of a substantial part, evaluated qualitatively and/or quantitatively, or the contents of that database.'

23 Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, art 7(4).

24 Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, art 10(1).

25 499 US 340, 345, 18 USPQ2d 1275.

26 Article 2(4) of Berne Convention provided that 'it shall be a matter for legislation in the countries of the Union to determine the protection to be granted to official texts of a legislative, administrative and legal nature, and to official translations of such texts.'

27 Goldstein, *International Intellectual Property Law: Cases and Materials* (Foundation Press, New York, 2001) p 153.

28 Article 2(7) of the Berne Convention.

The power of dispute body

15.10 In Ruth Okediji's words, 'the power of a dispute body to determine the precise meaning and scope of the legal text is, in the enforcement stage, nothing less than the delegation of law-making authority to an international body'.²⁸ It is believed that, from the cases shown above, the dispute panel and appellate body have been in favor of the private right holders, by trying to restrictively interpret or construct the substantive provisions in the TRIPs while 'ducking' the issues involving general welfare and public interests under arts 7 and 8 of the TRIPs, as the case of *Canadian—Patent Protection of Pharmaceutical Products* indicates.²⁹ This approach, in Okediji's view, may be consistent with the free trade model of the global trade system, but it 'obscures the importance of national conditions and the priority of domestic welfare goals even where these may be inconsistent with globalization'.³⁰

Enforcement of dispute settlement rulings

15.11 The dispute settlement under s 110(5) of the US Copyright Act indicates the difficulties in enforcing the decisions under the TRIPs dispute settlement. Countries may use resources constraint in carrying out the decision as an excuse to delay or to refuse implementation, ie the legislature is not in session, or the country lacks the financial and technical resources. However, to set up a 'reasonable period' and impose retaliation measures, necessary financial and technical resources can be made available to assist implementation pursuant to art 67 of the TRIPs:

In order to facilitate the implementation of this Agreement, developed country members shall provide, on request and on mutually agreed terms and conditions, technical and financial cooperation in favor of developing and least-developed country members. Such cooperation shall include assistance in the preparation of laws and regulations on the protection and enforcement of intellectual property rights as well as on the prevention of their abuse, and shall include support regarding the establishment or reinforcement of domestic offices and agencies relevant to these matters, including the training of personnel.

28 Ruth Okediji, 'Public Welfare and the Role of the WTO: Reconsidering the TRIPs Agreement', 17 *Emory International Law Review*, 819, pp 914–915.

29 Ruth Okediji, 'Public Welfare and the Role of the WTO: Reconsidering the TRIPs Agreement', 17 *Emory International Law Review*, 819, p 915.

30 Ruth Okediji, 'Public Welfare and the Role of the WTO: Reconsidering the TRIPs Agreement', 17 *Emory International Law Review*, 819, p 917.

PART V. POLICY DEBATES AND FUTURE DIRECTION

CHAPTER 16: SOUTH-NORTH CONFLICTS OVER INTERNATIONAL
INTELLECTUAL PROPERTY PROTECTION

Debates Concerning the Value of Intellectual Property Protection

For more than a century, debates on the value and need for the internationalisation of intellectual property protection have been ongoing between developed and developing countries. The continuing expansion of information technology has further intensified the conflict and widened the gap between developed and developing countries on IPRs protection. This is due to the unique nature of information technology: it is not bound by any physical national borders and is hence not easily controlled by governmental institutions.

16.1 On one hand, the producing and exporting nations of new information, such as the United States, have lost billions of dollars each year to piracy and counterfeits occurring in the developing countries. Developed countries argue that intellectual property protection is economically sound and necessary in order to alleviate distortion in international trade. They believe that the protection of IPRs will enhance economic growth and reduce poverty. Innovation and creative ideas are crucial in certain types of industries such as the pharmaceutical industry. These industries will only survive and prosper if intellectual property rights are adequately protected.¹

16.2 On the other hand, developing countries urgently need access to information technology for their economic development. Developing countries consider free flow of technology an essential element for their social and economic development. 'Many poor people in developing countries have only been able to access certain works through use of unauthorized copies available at a fraction of the price of the original.'² Developing countries argue that strengthening the IPRs protection will deprive such access. They also believe that IPRs can do little to stimulate economic growth and promote innovation in their home countries since the required human and technical resources are

1 See Report of the Commission on Intellectual Property Right, 'Integrating Intellectual Property Rights and Development Policy' (London, September 2002), <http://www.iprcommission.org/papers/text/final-report/execsumwebfinal.htm>.

2 Report of the Commission on Intellectual Property Right, 'Integrating Intellectual Property Rights and Development Policy' (London, September 2002), <http://www.iprcommission.org/papers/text/final-report/execsumwebfinal.htm>.

absent. On the contrary, IPRs may in fact increase the costs for essential medicines and agricultural inputs, resulting in severely negative impacts on the developing countries.³

16.3 As mentioned in the executive summary of the report of the British Commission on Intellectual Property Rights, 2002, 'the crucial issue in respect of IP is perhaps not whether it promotes trade or foreign investment, but how it helps or hinders developing countries to gain access to technologies that are required for their development'.⁴ While the developed countries have used IPRs extensively in some new and high technologies such as the internet and biotechnology, some developing countries have only started to learn the concept of IPRs. For them, knowledge and technology are 'the common heritage of mankind' and should be freely shared by all.⁵ Therefore, finding the right balance between the views of developed and developing countries on IPRs protection will not be easy, especially in this competitive global economy. In-depth economic analyses of costs and benefits will be required.

The Benefits and Costs of Free-Riding

There are certain benefits for developing countries to adopt a rather weak IP system and allow their domestic industries to free-ride the innovations and technologies of the developed countries, but the costs resulting from such approach will also be significant.

16.4 First of all, there are certain benefits justifying the immediate need for development, which outweigh the costs involved in writing and enforcing IP laws.⁶

- (1) By copying rather than developing their own products, the developing countries enjoy lower production costs and pay no royalties to the intellectual property owner or creator.
- (2) Low production costs result in lower prices in the consumer market.
- (3) By copying only successful products, the developing countries avoid the risk of market failure.
- (4) Industries engaged in producing counterfeit goods employ thousands of workers and help their governments to solve employment problems.
- (5) Paying for imports or making royalty payments imposes economic burdens and fosters a negative balance of trade.

3 Report of the Commission on Intellectual Property Right, 'Integrating Intellectual Property Rights and Development Policy' (London, September 2002), <http://www.iprcommission.org/papers/text/final-report/execsumwebfinal.htm>.

4 Report of the Commission on Intellectual Property Right, 'Integrating Intellectual Property Rights and Development Policy' (London, September 2002), <http://www.iprcommission.org/papers/text/final-report/execsumwebfinal.htm>.

5 Anthony D'Amato and Doris Estelle Long (eds), *International Intellectual Property Law* (Kluwer Law International, London, the Hague, Boston, 1997) p 445.

6 Anthony D'Amato and Doris Estelle Long (eds), *International Intellectual Property Law* (Kluwer Law International, London, the Hague, Boston, 1997) pp 449-450.

16.5 Secondly, there are also certain costs associated with the weak intellectual property protection and free-riding in developing countries:⁷

- (1) Short-term gains will be outweighed by long-term losses.
- (2) Developing countries will lose access to technical expertise due to the decreasing transfer of new technology from developed countries.
- (3) Without the transfer of 'state of art' technology from foreign countries, local research and development will be impeded.
- (4) Indigenous innovations also suffer from piracy, which in turn affect local research and development capability.
- (5) Inferior or dangerous counterfeit goods threaten public health and local consumers' welfare.

In conclusion, without an effective IP system, it will be difficult for developing countries to acquire such information because 'without intellectual property protection for a new process or product, the creator could lose its investment when another party appropriates the item and reproduces or distributes it at a lower cost'.⁸

16.6 It should be noted that there exists a difference between developing countries with strong technological capacities, eg, China and India, and those with weak capacities. Innovation would have a stronger impact on the former and thus the balance between costs and benefits would have been better achieved. Developing countries with a weak technological capacity, on the other hand, may often experience a situation where the costs of IPRs outweigh the perceived benefits.⁹

Problems of IPR Protection in Developing Countries

Patents

16.7 According to some scholars, the following problems have been prevalent in developing countries in terms of patent protection:¹⁰

- (1) Counterfeiting leads to inferior quality pharmaceutical products.
- (2) Lack of substantive protection, eg, some countries do not protect chemicals or pharmaceuticals. Some countries deny protection to processes.
- (3) Inadequate infrastructure to administer the patent system, eg, some countries only have 'a handful of examiners to handle thousands of applications'.

7 Anthony D'Amato and Doris Estelle Long (eds), *International Intellectual Property Law* (Kluwer Law International, London, the Hague, Boston, 1997) pp 449-450.

8 Anthony D'Amato and Doris Estelle Long (eds), *International Intellectual Property Law* (Kluwer Law International, London, the Hague, Boston, 1997) p 447.

9 Report of the Commission on Intellectual Property Right, 'Integrating Intellectual Property Rights and Development Policy' (London, September 2002), <http://www.iprcommission.org/papers/text/final-report/execsumwebfinal.htm>.

10 See generally Anthony D'Amato and Doris Estelle Long (eds), *International Intellectual Property Law* (Kluwer Law International, London, the Hague, Boston, 1997) pp 450-451.

- (4) Short protection term, eg, before 1991, India had a protection term of five years from the filing date or five years from the patent grant, while Costa Rica has a one year term for food, agricultural products and drugs.
- (5) Working requirement, eg, some countries require that the patentee 'work' (use) the patented invention after a certain time of exclusive use.
- (6) Liberal use of compulsory licencing.

Copyright

16.8 The major problems in copyright protection in some developing countries include the lack of protection for new forms of expression such as computer software and semiconductor chips, and weak enforcement of copyright.

Trademarks

16.9 Trademarks are seen in some developing countries as 'symbols of the foreign business influence in the development process of the less advanced countries of the world',¹¹ because: (1) the consumption patterns and tastes of developing countries are shaped by the persuasive advertising efforts of the developed countries; (2) the costs of advertising are generally shifted onto the consumers of developing countries; (3) the poor in developing countries are spending money on goods which do not satisfy their basic needs; (4) production of these goods (brand names) would either require inputs not available in the local country or would create less employment than traditional indigenous activities; and (5) public dependence on foreign famous marks impedes the production of their own local marks.¹² Therefore, there is insufficient protection for trademarks, particularly famous marks, in developing countries.

16.10 However, all of the above problems also existed in developed countries when they first introduced the IP system into their own legal regimes. For example, it was common for developed countries during their early years to discriminate against foreigners by refusing them IP protection, as well as exclude food and pharmaceuticals from patentability. More analysis would need to be conducted on how these problems have arisen and on the appropriate IP policies for coping with them.

Points to Consider in Analysing South-North Conflicts

Mutual dependency

16.11 In a global economy, developed and developing countries are mutually dependent and affected in their development. One cannot be completely independent from the other. For example, 'restrictions on access to materials and

11 Anthony D'Amato and Doris Estelle Long (eds), *International Intellectual Property Law* (Kluwer Law International, London, the Hague, Boston, 1997) p 455.

12 Anthony D'Amato and Doris Estelle Long (eds), *International Intellectual Property Law* (Kluwer Law International, London, the Hague, Boston, 1997).

data on the internet can affect everyone. IP rules and regulations may be hampering research on important diseases or new crops that affect developing countries but that is actually carried out in developed countries. Developing countries may not be sharing appropriately in the benefits from commercialisation of their knowledge or genetic resources when they are patented in developed countries.¹³ International IP policies must take into consideration this mutual dependency.

Gap between developed and developing countries

16.12 An international IP policy also must consider the significant gap between developed countries and developing countries in technological, social and economic condition. 'The balance of costs and benefits will vary according to how the rights are applied and according to economic and social circumstances of the country where they are being applied. Standards of IP protection that may be suitable for developed countries may produce more costs than benefits when applied in developing countries.'¹⁴

In addition, evidence shows that the patent system plays little role in promoting research on diseases particularly prevalent in developing countries unless there is a substantial market, and the patent protection can in fact raise the price for medicines to a level that poor people cannot afford. It is therefore important to decide how the benefits to society can outweigh the costs to society. Should protection of the right of IPR owners be pursued 'at the expense of the necessities of life for poor people'?¹⁵

The report of the British Commission on Intellectual Property Rights suggested that the developing countries should adopt an IP system which suit their own economic, social, and technological conditions, as developed countries did in the past. Higher IP standards should not be arbitrarily imposed on developing countries. 'Serious and objective assessment of their impact on development and poor people' should be conducted.¹⁶

Sources of IPRs

16.13 In designing global IP systems, consideration must be given to the fact that developed and developing countries have different sources of IPRs that deserve equal or similar protection. For example, most developing countries, although lacking in strong technological bases, have genetic resources and traditional knowledge.¹⁷ Any international IP policy should consider how such resources can be protected.

13 See Report of the Commission on Intellectual Property Right, 'Integrating Intellectual Property Rights and Development Policy' (London, September 2002).

14 See Report of the Commission on Intellectual Property Right, 'Integrating Intellectual Property Rights and Development Policy' (London, September 2002).

15 See Report of the Commission on Intellectual Property Right, 'Integrating Intellectual Property Rights and Development Policy' (London, September 2002).

16 See Report of the Commission on Intellectual Property Right, 'Integrating Intellectual Property Rights and Development Policy' (London, September 2002).

17 See Report of the Commission on Intellectual Property Right, 'Integrating Intellectual Property Rights and Development Policy' (London, September 2002).

第一部分 基本概念、原则和理论

第一章：全球经济下的知识产权

知识产权的定义与特征

1.1 知识产权一词由约瑟夫·寇乐 (Josef Kohler) 和爱德蒙德·卡得 (Edmond Picard) 在19世纪晚期率先使用。他们意识到与其它物权的法律形式相比, 版权、商标和专利方面的法律与古罗马法典有更多共同之处。¹ 二十世纪五十年代, 依据《保护工业产权的巴黎公约》(“巴黎公约”) 和《保护文学和艺术作品的伯尔尼公约》(“伯尔尼公约”), 知识产权一词正式被两个国际局采用。² 知识产权最初仅包括版权、商标权和专利权。以后则扩展至反不正当竞争(仍处于争论中)、外观设计和实用新型、商号、邻接权、植物新品种、拓扑图、半导体产品、数据库等。

1.2 那么, 这些不同的权利何以被统称为知识产权? 它们又有哪些共同的特征呢? 根据世界知识产权组织 (“WIPO”) 的定义, 这些权利之所以被统称为知识产权是因为它们都是“智力活动的结果, 即应用在商业活动中的发明、文学和艺术性的创作、标志、名字、图像和设计。”³ 世界贸易组织 (“WTO”) 的定义为“知识产权是赋予人们对他们的脑力创作所拥有的权利”, 因而“创作人享有阻止其他人使用其发明、设计或其它创作的权利。”⁴

1.3 知识产权的特征包括:⁵

- (1) 无形性: 著作权是艺术或科学方面的智力创作; 商标是文字或图形和与其标识的产品与服务之间的联系; 专利是发明。这是知识产权和其它物权的最重要的区别。但是, 值得注意的是, 这些无形的权利通常以具体的形式表现出来。

1 参见 Jerome H Reichman 著: “概述专利-商标两分法的崩溃: 重建国际知识产权体系的前提” 13 《Cardozo 艺术与娱乐法律期刊》1993 年第 475 期, 引用自 Anthony D'Amato 及 Doris Estelle Long 著: 《国际知识产权法》(Kluwer Law International 出版社, 伦敦, 海牙, 波士顿 1997 年) 第 246 页。

2 这两个局后合并为世界知识产权组织或者 WIPO。

3 参见 Jennifer Davis 著: 《知识产权法》(Butterworths 出版社, 2001 年), 第 1 页。

4 参见 Jennifer Davis 著: 《知识产权法》(Butterworths 出版社, 2001 年), 第 1 页。

5 参见 Georges Koumantos 著: “知识产权概念的反映”, 载于 Graeme Dinwoodie 编辑: 《世界知识产权法与政策》(LexisNexis 出版社, 2001 年), 第 3 至 7 页。

- (2) 保护创造性和创作的作品：著作权保护文学、艺术和科学作品；专利权保护技术创新，而商标权则关系到商业企业；
- (3) 权利人的独占权：一般来说，著作权的期限为作者的有生之年加上其死后 50 年；专利权为 20 年；商标权的期限可以是无限的，只要商标合法存在并被使用。⁶但是，此独占权受“强制许可”和“合理使用”等权利例外的制约和限制。实践中，因为许可可以带来巨大的收益，知识产权的持有人更倾向于许可他人使用其产品和技术，而不是千方百计地保障其独占权。
- (4) 地域性：物权可以从一个国家转移到另一个而不会影响到它的所有权。知识产权则不同，它是由国家政府授予的只在一个特定的国家领土内有效的权利。例如，美国专利只在美国领土内合法有效，其有效性不会被其它国家认可。

知识产权的论证

自然权利理论

1.4 就知识产权的属性问题存在着两种学术争论，即功利主义和自然权利。该争论源于公元前四世纪亚里士多德 (Aristotle) 反对海普得木斯 (Hippodamus) 奖励发明者和创造者的提案。该提案基于一个假设，即更多有用的发明创造源于更多的奖励。⁷通常，功利主义与劳动理论紧密结合。劳动理论认定，财产权应当作为奖励授予付出努力创造值得受保护的财产所有人。自然权利理论则相反，它相信，创造者对创造性的工作始终享有一种人身权利。这种理论由约翰·洛克 (John Locke) 在其著作《政府论下篇》中得到进一步的发展。他主张，如果人们的劳动增加了源于“公共财”的产品价值，而其他的人也因此享受到“公共财”的价值，他们就有权利因他们的劳动而收取报酬。⁸正如弗里茨·马克鲁普 (Fritz Machlup) 所指出的：

“自然法”论认为人对其想法拥有自然财产权。擅用他人的想法，即未被授权的使用，必须被谴责为偷盗行为。一个社会有道德义务认可和保护这种财产权。财产实质上是专属的。因此，强化使用专利发明的排他性是唯一的使社会认可这种财产权的适当方式。⁹

1.5 在知识产权范畴内，“公共财”是流入公共领域的智慧产品。根据洛克理论，对智慧产品的利用只会增加，而不会减少这些智慧产品的价

6 每 10 年可以进行续展，例如在中国。

7 参见 Paul Durdik 著：“远古时代的争论，新技术：欧共体开始保护计算机数据库” 12 波士顿大学国际法期刊第 153 期 (1994 年)。引用自 Anthony D'Amato 及 Doris Estelle Long 编辑：《国际知识产权法》(Kluwer Law International 出版社，伦敦，海牙，波士顿 1997 年) 第 27 页。

8 参见 Jennifer Davis 著：《知识产权法》(Butterworths, 2001 年) 第 7 页；也可以参见 Lawrence Lessig 著：《思想的未来，互联世界中公共财的命运》(Random House 出版社，纽约，2001 年)。

9 参见 Fritz Machlup 著，引用自 Anthony D'Amato 及 Doris Estelle Long 编辑：《国际知识产权法》(Kluwer Law International 出版社，伦敦，海牙，波士顿 1997 年) 第 39 页。

值。因为知识产权鼓励人们将其创作公开，从而鼓励进一步的创造性。其结果是，当智慧产品的保护期限届满时，这些智慧产品就会回到公共领域。¹⁰

法律和经济分析

1.6 运用“法律和经济”方法来分析法律主要是研究法律如何帮助高效率地分配经济资源。将这种方法运用到知识产权领域，我们可以看到，如果没有知识产权保护，创作人的富有创造性的无形资产将被其他人轻易利用，从而减弱创作和投资的积极性。创造性活动和投资的短缺最终将减少公共领域价值的存储。¹¹然而，国际间却存在一种强烈的反对加强知识产权保护倾向。其根据在于，知识产权可能妨碍竞争，从而阻碍创新和创造性。有人得出结论，“加强知识产权保护并不一定对社会公众有利…强化的专属性并不能促进更多发明的产生。即便能，为该发明投入的成本也将十分巨大。”¹²

知识产权法国际化论证

成本和效益分析

1.7 以上的知识产权的法律和经济分析非常适用于纯国内经济体制，也就是说，在纯国内经济体制下，知识产权的成本与利益之间存在相对密切的联系。以专利为例，该制度最高的成本是强加给专利技术消费者的高昂价格。高成本转变为生产者的利润并由生产者最终转移给国家的工业基础。¹³总之，国内的专利所有人通常会将全部或部分的赢利再投资给本地的经济，从而在某种程度上减轻专利成本。

但是，在国际经济下，知识产权的成本与效益联系并不那么紧密。假设，发明者在外国获得一个专利，他本国的产业就会因此而获得专利所带来的利益，消费者也无需支付因专利而增加了的价格。相反，高昂的价格却由外国消费者承担。结果，财富就从授予专利者专利的外国转移到专利所有人的国家。¹⁴

10 参见 Hughes 著：“知识产权哲学” (1998 年)《Georgetown 法律期刊》第 287 期。

11 参见 van den Bergh 著：“版权的角色和社会论证：一种法律与经济途径” (1996 年) IPO 17, 引用自 Jennifer Davis 著：《知识产权法》(Butterworths 出版社，2001 年) 第 5 页。

12 引用自 Peter Newman 中的 Stanley M. Besen 《最新帕尔格雷夫 (Palgrave) 经济和法律词典》第 348 页。

13 “高价格将消费者为专利技术而支付的额外的费用转移到生产者那里，明白了这一点，发明者将对发明专利技术更有热情…则国家工业的混合以这种增长作为基础，并且消费者可以得到更新的技术。”参见 R Carl Moy 著：“专利协调条约的历史：作为一种影响利益的经济自利” 引用自 26《John Marshall 法律评论》457 期 (1993 年) Anthony D'Amato 及 Doris Estelle Long 著：《国际知识产权法》(Kluwer Law International 出版社，伦敦，海牙，波士顿 1997 年) 第 248 页。

14 参见 R Carl Moy 著：“专利协调条约的历史：作为一种影响利益的经济自利”，引用自 26《John Marshall 法律评论》457 期 (1993 年) Anthony D'Amato 及 Doris Estelle Long 著：《国际知识产权法》(Kluwer Law International 出版社，伦敦，海牙，波士顿 1997 年) 第 248 页。

1.8 知识产权强加给社会的另一社会成本是：它对某一技术的独占可能会妨碍科研的进步。例如，专利赋予所有人专有权。其他研究人员可能会因此而减少进一步研究该专利技术的动力。这在纯国内经济秩序下尤其如此。

然而，当面对国际专利时情况则有所不同。在某个国家获得专利的技术可能被其他国家的研究人员学会。在没有专利法保护该项技术的国家，研究人员可以自由使用和进一步探索这样的技术而不需要支付任何专利许可使用费。结果，随着时间的推移，该技术可能得到开发，相关的产业也会因此而蓬勃发展起来。¹⁵

保护主义及其后果

1.9 因为先前讨论的种种原因，许多国家采取了保护主义的措施以防止国内财富流向国外。这些保护主义措施包括强制许可和国家工作要求。根据后者的情况，专利所有者被要求通过国内生产来满足国内对专利技术的需求。否则，这个专利会被视为无效或不可实施。中国在2000年修改专利法之前采取了这样的措施。

其它许多国家采取的措施包括拒绝保护外国人的专利；制定专利法使国内专利随着相应的外国专利的到期失效而失效。有些国家为某些技术制定较低的保护标准，例如，中国不像美国一样保护转基因动物。这样，他们国内的研究人员在进行本国的研究时就不受限制。有些国家甚至根本没有专利法。例如，直到德国以报复关税的行动相威胁之前，瑞士一直没有专利法，它的消费者不需要支付额外的价格购买新技术，它的产业也可以自由采用其他国家开发的新技术，而且政府不需要负担管理专利系统的社会费用。与此同时，瑞士的产业却在海外获得专利，如此从出口赢得专利的利益。实际上，瑞士的研究人员以此获取进一步发明的动力。¹⁶ 瑞士战略成功的原因是因为她是一个小国而且主要是一出口国。原有的《巴黎公约》没有要求成员国对有专利权者提供任何最低限度的权利。

1.10 不同的利益方看待国际知识产权保护有什么差别呢？在国内经济下，国家政府考虑的是社会成本和消费者的利益，而专利所有者则只关心他们自己的利益。比如，面对猖獗的盗版，中国的软件企业已日益强化对知识产权保护的支持，尽管中国政府对软件的专利保护还相对落后于其他发达国家。¹⁷

但是在全球性经济环境下，政府、企业以及专利所有者都以同样的动机尽可能去获取更多的外国专利，因为专利人个人的收益会转化成所属国的社会利益，而专利的社会成本则被转嫁到其他国家。¹⁸ 政府一般比较支持，

15 参见 R. Carl Moy 著：“专利协调条约的历史：作为一种影响利益的经济自利”引用自 26 《John Marshall 法律评论》457 期（1993 年）Anthony D'Amato 及 Doris Estelle Long 著：《国际知识产权法》（Kluwer Law International 出版社，伦敦，海牙，波士顿 1997 年）第 249 页。

16 进一步的讨论，参见 Anthony D'Amato 及 Doris Estelle Long 著：《国际知识产权法》（Kluwer Law International 出版社，伦敦，海牙，波士顿 1997 年）第 253 页。

17 参见李亚红著：“对更有力的保护的推动：中国软件工业中推动更有力的知识产权保护的趋势以及对法治的暗示”《Pennsylvania 大学国际经济法期刊》第 23 卷，2002 年冬，第 4 期。

18 参见 Anthony D'Amato 及 Doris Estelle Long 著：《国际知识产权法》（Kluwer Law International 出版社，伦敦，海牙，波士顿 1997 年）第 250 页。

采取保护主义措施，而企业和专利人则持反对态度，因为它会削弱企业的外国专利的市场竞争力。¹⁹

知识产权商品和技术的国际贸易动态

1.11 发达的电讯技术以及公司希望寻求超国界利益资源的愿望推动了始于 20 世纪 70 年代的市场全球化。²⁰ 而市场的力量又推动了知识产权的国际化，比如，AT&T 等公司开始了他们的国际性思维，并将知识产权作为主要条款写入合资协议当中。

数字化革命（或网际网络的出现）；科学和技术前所未有的发展（如生物工程学）；无形资产如知识、信息和创新作为经济发展的主要驱动力；因商务国际化而产生的国家间日益增长的相互依赖；这些是触发知识产权法律发展和变动的四个主要因素。²¹ 如一学者指出，

“网络世界的无边界性…正在推动国家着手解决可适用于跨边界知识产权交易的法律，多媒体作品的所有权，数字化权利管理系统的互动性以及技术保护措施等问题。”²²

1.12 综上所述，诸多国家知识产权法中的保护主义条款，发达与不发达国家在保护标准上的差距，商务的全球化走势以及数字化革命这些因素触发了知识产权的国际化过程。而这一过程导致了国际协议如《巴黎公约》，《伯尔尼公约》，《罗马公约》和《与贸易有关的知识产权协议》(TRIPs)，以及国际机构如世界知识产权组织(WIPO)和世界贸易组织(WTO)的建立和发展。其它区域性或多边协议如欧共体和北美自由贸易协议(NAFTA)，也发挥了非常重要作用。以下是部分在知识产权国际化过程中制定的重要法律：

- 保护工业产权巴黎公约（1883 年，斯德哥尔摩 1967 年）
- 保护文学和艺术作品伯尔尼公约（1886 年，巴黎 1971 年）
- 工业品外观设计国际保存海牙协定（1925 年，1934 年和 1960 年修改）
- “罗马公约”（保护表演者、音像制品制作者和广播组织罗马公约 1961 年）
- “国际版权公约”（巴黎 1971 年）
- 专利合作条约（华盛顿 1970 年）
- 国际专利分类史特拉斯堡协议（1970 年）
- 以商标注册为目的的商品和服务国际分类尼斯协定（1957 年，1967 年）
- 建立商标图形要素国际分类维也纳协定（1973 年）
- “卫星公约”关于播送由人造卫星传播载有节目信号的公约（1974 年）
- 欧共体商标指令（1989）

19 参见 Anthony D'Amato 及 Doris Estelle Long 著：《国际知识产权法》（Kluwer Law International 出版社，伦敦，海牙，波士顿 1997 年）第 251 页。

20 参见 Willam L. Keefauver 著：“知识产权法中国际思考的需要” 37IEDA 181 (1996)，引用自 Graeme B. Dinwoodie, William O. Hennessey 以及 Shira Perlmutter 著：《世界知识产权法与政策》（LexisNexis 出版社，2001 年），第 21 页。

21 参见 Kamil Idris 著：“国际知识产权法：介绍”，26 《Fordham 国际法期刊》第 209 期。

22 参见 Kamil Idris 著：“国际知识产权法：介绍”，26 《Fordham 国际法期刊》第 209 期。第 4 页。

第四部分 国际知识产权的执法和争端的解决

第十四章：国际知识产权执法

知识产权的保护

条约义务

14.1 无论知识产权制度有多么复杂和完善，如果缺乏行之有效的知识产权执法体制，都会毫无意义。

据统计，在欧盟国家，盗版和假冒的光盘和音乐磁盘占销售量的 10%，仿冒和假冒的录像带和数码播放机占销售量的 16%，服装占 22%。¹ 因此，根据 TRIPs 协议第 41 条第 1 款，WTO 各成员国应确保在其国内法中建立执法程序“以有效打击侵犯知识产权的行为。”

一般原则

14.2 在知识产权的执法和促进技术传播与社会福利之间建立平衡也是 TRIPs 协议的目标。TRIPs 协议第 7 条指出：

知识产权的保护和执法应有助于促进技术革新和技术转让与传播，使技术知识的创造者和使用者互相受益并有助于社会和经济福利的增长及权利和义务的平衡。

14.3 另外，世界贸易组织 (WTO) 也在 TRIPs 协议中对其成员国规定了观察知识产权执法的几项基本原则：

- (1) 执行程序应包括可及时阻止侵权的救济措施和遏制进一步侵权的救济措施。实施这些程序时，应避免对合法贸易造成障碍并防止其被滥用而规定保障措施。²
- (2) 有关知识产权的执法程序应公平和公正。它们不应不必要地繁琐或昂贵，也不应规定不合理的时限或导致无端的迟延。³

1 参见 Michael Knapper 著：“欧洲严惩盗版”，《知识产权管理》，2004 年 5 月第 139 期，第 44 页。

2 参见 TRIPs 协议第 41 条第 1 款。

3 参见 TRIPs 协议第 41 条第 2 款。

- (3) 对案件的裁决应基于证据，采取书面形式并陈述理由，并应在合理的时间内告知诉讼当事方。⁴
- (4) 对最终的行政决定应提供司法审查的机会。在刑事案件中的无罪判决除外。⁵

其他国际方面的努力

14.4 20 世纪 80 年代初期，WIPO 就已经非常重视知识产权执法的问题。WIPO 分别于 1981 年和 1983 年就盗版问题组织了两次论坛。1986 年至 1988 年期间，WIPO 制定了详细的打击视听作品、唱片和印刷品盗版的建议性措施。1988 年，专家委员会制定的打击盗版和假冒的措施纳入了 WIPO 版权示范法的草案之中。1992 年，关于权利执法的章节被收录于 WIPO 关于音乐录制者的权利保护的模范法草案之中，内容包括对滥用技术方法保护版权的制裁。

14.5 2003 年 1 月，欧洲委员会提出一项在协调欧盟知识产权执法的规章和行政规定，并建立在有关的成员国政府之间交换信息的基本框架的建议。

该计划中的指令提供措施反对以商业目的或对权利人造成显著危害的所有知识产权的侵权行为。具体措施包括：

- 颁发禁令以制止销售假冒或仿冒产品；
- 建立权利管理或专业防御机构以启动法律程序；
- 临时措施如对涉嫌侵权人的银行、金融或商业文件银行账户、侵权产品，以及动产或不动产采取预先扣押的措施，包括冻结银行账户和其他资产；
- 提供适当的法律保护以对抗非法的技术装置的生产、进口、销售和使用，装置例如安全性激光全息，光学设备，智能卡，磁系统，特殊墨水，和显微标签。
- 侵权人须支付从市场上撤回侵权产品的费用，权利人应当得到两倍于正常版税或许可使用费的损害赔偿或相当于利润损失的赔偿；
- 相关规定允许权力机构迫使侵权人支付权利人损失费以补偿其失去的收入，并且提供侵权产品来源的信息，涉及生产的人员和销售渠道；
- 将严重的侵犯知识产权的行为作为刑事犯罪。

2004 年 4 月 24 日，欧洲部长级委员会接受了该指令中除在争论中的刑事制裁条款外的全部其他内容。

4 TRIPs 协议第 41 条第 3 款。

5 TRIPs 协议第 41 条第 4 款。

权利意识

14.6 根据 WIPO 知识产权手册，竞争者在开发技术或产品时应该意识到在先知识产权持有者的权利。一种避免可能存在的诉讼或纠纷的办法就是仅以合法的形式竞争。例如，在发明的保护范围外进行新的发明创造或寻求许可或者以友好的方式谈判达成协议。竞争者也应该了解他的权力范围，如认真了解专利权利请求书中所确定的发明主题的保护范围，并决定是否进一步开发现有技术或者产品。⁶

为了维护知识产权，知识产权的权利人必须做自己的警察，包括进行市场监督。如果发现侵权行为，应该联系侵权人，基于合理的理由向对方递交通知书或警告信并通过中间人或仲裁的方式与侵权人谈判。⁷

行政措施

14.7 即使是最严格的审查体制也不能保证授予的权利是有效的，因为总有可能一项在先权利在审查中被忽略了或者误解了说明书，更何况很多国家的知识产权审查体制并不很严格。因此，建立允许第三方在某种阶段介入和反对知识产权授权的措施就显得尤为重要。⁸ 这种措施叫做“异议程序”，它可以适用于授权之前或之后，尤其是在有关专利或商标的注册方面。⁹

很多国家，如英国、中国和德国，允许商标注册前的异议。异议可以在商标公告后，获准注册前提出。¹⁰ 实践中，因为涉及在先权利检索的审查相当严格，因此英国没有太多的商标异议案。¹¹ 德国则相反，由于在先权利检索系统较弱的原因产生了大量的异议案。

专利授权前的异议程序带来很多问题，因为允许第三方加入到程序中，将极大地拖长专利审查的进度。英国仅允许第三方以“观察”的形式来质疑专利性。¹² 观察并不允许第三方以当事人的身份介入专利审查程序。¹³

一些国家，如美国和法国，出于种种原因并没有建立异议程序。在这种情况下，美国允许第三方请求专利局对专利进行复审。最近，美国正在考虑引入授权后异议程序。¹⁴ 法国缺乏对专利的实质审查，向法院申请撤销专利是唯一保证取消或修改专利的方法。

建议知识产权所有人应该时刻注意竞争者的活动从而可以及时地提出异议。理想的异议应在专利申请案件优先权日后的 18 个月内提出。可以使用浏览专利局期刊与公告，检索在先权利的报告并向竞争者发出警告。¹⁵

6 参见从《WIPO 知识产权手册：政策、法律和运用》第 4 章，第 207 页摘录的“工业产权、版权及相关权利的执法”。

7 参见从《WIPO 知识产权手册：政策、法律和运用》第 4 章，第 208 页摘录的“工业产权、版权及相关权利的执法”。

8 参见从《WIPO 知识产权手册：政策、法律和运用》第 4 章，第 208 页摘录的“工业产权、版权及相关权利的执法”。

9 该程序在版权案件中很少运用，因为在大多数国家版权和相关权利在作品创作后自动产生。

10 例如，英国 1984 年商标法案第 38 条第 2 款，以及中国商标法第 33 条。

11 WIPO 知识产权手册第 209 页。

12 英国 1977 年专利法案第 21 条第 1 款。

13 英国 1977 年专利法案第 21 条第 2 款。

14 参见第 9 章，第 9.2 节。

15 WIPO 知识产权手册第 208-209 页。

民事程序

公平和公正的程序

14.8 TRIPs 协议第 42 条要求各成员国应向权利持有人提供公平和公正的保障知识产权的民事司法程序。“公平和公正的程序”包括被告应有权获得及时和充分详细的书面通知；允许当事方由独立的法律辩护人代表出庭，不应强制本人出庭；有权出示证据与身份以及保护机密信息。

为保证民事程序的“公平和公正”，TRIPs 协议第 43 条规定了证据规则，在其要求下，法院可以要求异议方提供对案件具有关键作用的证据，除非该证据属于秘密。如果一方拒绝提供必要的资料，或不在合理的期限内提供，或提供的信息严重影响执行程序，法院还可以在缺乏足够证据的情形下，作出初步的或终局的决定。¹⁶

临时措施：禁令

14.9 在以下情形下，成员国法院可以发布临时措施，如禁令：¹⁷

- (1) 阻止任何侵犯知识产权行为发生；
- (2) 阻止有关货物包括刚结关的进口货物进入商业渠道，虽然成员国没有义务运用此权利针对善意的货物购买人；¹⁸
- (3) 有证据被毁灭的明显风险；或
- (4) 任何迟延很可能对权利持有人造成难以弥补的损害。

这些措施应受到审查。受影响的各方应有权对这些措施进行听证。如果临时措施被撤销，被告有权对其遭受的伤害或损失获得适当的补偿。申请临时措施的期限为 20 个工作日或 31 个公历日。¹⁹

损害赔偿及其他救济

14.10 根据 TRIPs 协议，法院可以裁定三种损害赔偿方式：(1) 如果侵权人故意或有合理的依据知道他正在从事侵权活动侵犯了权利持有人的知识产权，侵权人应向权利持有人支付足以补偿他因侵权所受实际损害的损害赔偿金。²⁰ (2) 权利人所支出的费用，包括律师费；(3) 退还利润或法定赔偿金，即使侵权人不是故意地或没有合理的依据知道他正在从事侵权活动。²¹ 该损害赔偿的措施是可供成员国选择的。第 46 条规定侵权的货物应被清除出商业渠道或销毁。

16 TRIPs 协议第 43 条。

17 TRIPs 协议第 44 条和第 50 条。

18 善意购买人是指获得或定购要求保护的标的物的人“在先得知或者有合理的依据知道处置所述标的物将会带来侵犯知识产权的后果”。

19 TRIPs 协议第 50 条第 4、6、7 款。

20 TRIPs 协议第 45 条第 1 款。

21 TRIPs 协议第 45 条第 2 款。

公开道歉

14.11 “公开道歉”是中国法律特有的救济方式。几乎所有的知识产权法律都设定了此项除罚金之外的救济方式。²²最近的涉及到公开道歉的法院判决是 *Lacoste 诉 Singapore Crocodile International* 一案。法院判决服装公司 Lacoste 著作权侵权成立并向 Singapore Crocodile International 公开道歉且赔偿美金 1 元。²³

边境措施

14.12 TRIPs 第 4 部分规定了一系列的边境措施：如根据海关的职权暂停放行货物或者根据第 52 到 60 条规定的详细步骤销毁或处理侵权货物。这些步骤包括申请，保证金或其他等效保证，暂停放行通知，暂停放行时限，对进口商和货物所有人的补偿，检验和知情权，职权内行动，救济，和少量进口。

14.13 由于假冒产品生产在粤港之间十分猖獗，香港海关和广东公安局负责打击假冒产品的部门已经建立了正式合作渠道共同处理假冒问题。

刑事程序

14.14 刑事程序通常适用于具有商业规模的故意假冒商标或版权盗版案件。根据 TRIPs 协议第 61 条，对这些犯罪行为的制裁手段包括足以起威慑作用的监禁、罚金、扣押、没收和销毁侵权货物。

《巴黎公约》第 10 条第 1 款规定对“直接或间接使用虚假的商品原产地的标识”的商品在进口时予以扣押。第 10 条第 2 款将“利害关系人”定义为“生产者、制造商或商人，其营业所设在被虚假地称为商品原产的地方、地区或国家，或者在使用该虚伪原产地标记的国家。”

《制止商品产地虚假或欺骗性标记马德里协定》第 1 条和第 2 条规定了許多制止标有虚假或欺骗性标记的产品的扣押措施。第 3 条第 2 款要求成员国承诺“在销售、陈列和推销商品时，禁止在招牌、广告、发票、葡萄酒单、商业信函或票据以及其他任何商业信息传递中使用具有广告性质并且可能使公众误认商品来源的任何标志。”

代替性的纠纷解决方式 (ADR)

14.15 面对知识产权纠纷，考虑到诉讼的费用、危险、复杂及拖沓，人们开始采取代替性的纠纷解决方式如调解和仲裁。调解在商标案件中比例上升并且成为受鼓励的方式。²⁴ 美国大量适用调解来解决纠纷。英国的民事

22 中国版权法第 46 条和第 47 条。

23 中国版权法第 46 条和第 47 条。

24 参见 Michael Leathes 著“为什么在商标案件运用调解”，《知识产权管理》，2004 年 6 月第 24 页。

诉讼程序规则也鼓励使用调解的方式。2004 年初，英国政府通过了一项使用非约束力仲裁的专利议案。中国也是一个被认为是倾向于调解多于诉讼的国家，而且在其知识产权法律中常常在规规定仲裁和诉讼的同时，要求调解。²⁵

14.16 接受知识产权纠纷的 ADR 机构主要是国际商标协会 (INTA) 国际中立委员会 (IPON) 和 WIPO 仲裁和调解中心。那里有 1000 多个知识产权和 ADR 专家的名单。至 2004 年 4 月，WIPO 中心接受了 20 个请求调解的申请，其中 5 项关于专利，3 项关于信息科技，3 项关于版权，7 项关于域名，1 项涉及与知识产权有关的雇佣纠纷。²⁶ 国际中立委员会可以提供对商标纠纷的调解服务。

技术措施

14.17 网络的无国界性质显著地增加了调查和阻止知识产权侵权的困难，尤其是在版权方面。同时，技术措施如加密技术大量产生以抑制网上的非法复制行为。这些技术措施通过“1996 WIPO 网络协议”，即《WIPO 版权条约》(WCT) 和《WIPO 表演者组织和音像制品条约》(WPPT) 最终被赋予了合法的地位。²⁷ 尤其是 WCT 第 11 条要求缔约各方：

“应规定适当的法律保护和有效的法律补救办法，制止规避由作者为行使本条约或《伯尔尼公约》所规定的权利而使用的、对其作品进行未经该有关作者许可或未由法律准许的行为加以约束的有效技术措施。”

美国《数字千年版权法案》(DMCA) 贯彻了 WCT 的第 11 条。DMCA 规定禁止制造、销售和运输含有规避用以保护版权作品或保护版权所有者的权利的技术措施的商品或服务。违法的装置必须是以规避为其主要功能的；除了规避功能外，它必须仅含有极少的其他商业价值，或者，它必须以规避为卖点。²⁸

2004 年 3 月 31 日，美国参议院“法院、网络和知识产权附属委员会”通过了三项议案：2004 年盗版遏制与教育法；2003 年反假冒修正案；和惩罚虚假网络身份法案。期望通过三项法案加强打击网络侵权的执法力度。

美国还实施了一系列打击网上侵权的突袭行动。比如 2004 年初，联邦调查局 (FBI) 和美国司法部对在线盗版广泛传播的国家实施了 120 次所谓“快速连接行动”的联合突袭。

25 例如，根据中国版权法第 54 条，调解不是强制性的方式但是推荐的方式，一方当事人可以直接到法院起诉。但是中国商标法第 53 条规定调解为强制性的方式。只有在调解失败或当事人不愿解决时，可以启动法院的法律程序。中国专利法第 57 条也在诉讼程序前推荐调解方式。

26 <http://arbiter.wipo.int/center>

27 参见 Goldstein 著：《国际知识产权法：案例及资料》(Foundation 出版社，纽约，2001 年) 第 236 页。

28 17 U.S.C., 第 1201 条 (1998 年)。