

目 录

TABLE OF CONTENTS

第一部分 法律确定性	
A. 法律适用技术	(3)
I. 介绍性说明	(3)
II. 法律确定性	(3)
1. 什么是法律确定性	(3)
a. 定义	(3)
b. 法律确定性是法治的构成要素	(4)
c. 法律可预见性的含义是什么?	(4)
2. 法律确定性的功能	(4)
a. 为行为方向提供的保障	(4)
b. 为法律后果的实现提供保障	(4)
c. 维持法律制度的连续性	(4)
d. 法律确定性是私人自治的基础	(5)
3. 法律确定性为什么如此重要?	(5)
4. 那么, 有什么是实现法律确定性所必不可少的呢?	(5)
5. 法律确定性在中华人民共和国的情况	(5)
6. 法律确定性的局限	(5)
III. 制定法的实施	(6)
1. 制定法实施的含义是什么?	(6)
2. 法律适用上的法律确定性	(6)
3. 按照一定的方法适用法律意味着什么?	(7)
a. 什么是案例分析法?	(7)

b. 处理法律的形式方法	(7)
c. 排除个人意见	(7)
4. 依照一定的方法适用法律的优点	(8)
a. 法律确定性	(8)
b. 经济方面的优点	(8)
c. 更公正以及更高的接受度	(9)
IV. 法律适用技术——案例分析法介绍	(9)
1. 通用的方法	(9)
2. 案例分析背后的观念	(10)
3. 请求权法律基础的体系	(11)
4. “归入”的技术	(11)
5. 解释, 法律的发展, 裁决的范围, 自由裁量权	(14)
a. 解释标准	(14)
b. 法律的发展: 类比适用和目的性缩减法	(15)
c. 解释者不同带来的差别	(15)
d. 官方解释	(15)
e. 判断空间	(16)
6. 法律规定的结构和诉讼请求权基础	(16)
7. 准据法	(17)
a. 国际私法的含义是什么?	(17)
b. 是否存在国际性的统一法律?	(17)
8. 重要的实用提示	(18)
V. 如何确定案例的解决方案	(18)
1. 寻找请求权法律基础的步骤	(18)
a. 阅读并且梳理案件事实	(18)
b. 对诉讼请求加以区分	(19)
c. 找出法律基础	(19)
2. 异议	(19)
3. 最终结论	(20)
审查合同下请求权的方法概览	(21)

B. 中华人民共和国知识产权法	.....	(23)
I. 《民法通则》	.....	(24)
II. 《合同法》	.....	(25)
III. 《商标法》	.....	(25)
1. 相关的中国法律、法规和规章	.....	(26)
2. 商标在中华人民共和国获得注册	.....	(26)
a. 商标	.....	(26)
b. 姓氏	.....	(27)
c. 数字和字母	.....	(28)
d. 广告用语	.....	(28)
e. 禁用标记	.....	(28)
f. 集体商标和证明商标, 《商标法》第3条	.....	(29)
g. 服务商标和商品商标, 《商标法》第3条第1款第1句	.....	(30)
h. 驰名商标, 《商标法》第13、14条	.....	(30)
i. 汉字	.....	(31)
j. 商标注册	.....	(31)
3. 商标许可	.....	(36)
a. 许可合同	.....	(36)
b. 再许可合同	.....	(37)
c. 注册和备案	.....	(37)
d. 备案文件, 《商标许可合同备案程序》第7条	.....	(38)
e. 批准和备案	.....	(38)
f. 不遵守和执行	.....	(38)
g. 未注册的商标	.....	(39)
4. 商标转让, 《商标法》第39条, 《商标法实施条例》第25条	.....	(39)
5. 域名	.....	(39)
a. 概述	.....	(39)
b. 管理和立法	.....	(40)
c. 注册要求和申请程序	.....	(41)

d. 潜在的冲突和争端解决	(42)
6. 商标侵权	(44)
a. 何种行为构成侵权?	(44)
b. 保护商标权	(45)
7. 中国的海关保护	(49)
IV. 《专利法》	(50)
1. 相关的中国法律和法规	(50)
2. 概述	(51)
3. 专利	(51)
a. 授予专利的条件	(51)
b. 不授予专利的特殊情况	(52)
c. 申请程序	(52)
d. 无效程序, 《专利法》第45条及以下诸条, 《专利法实施细则》第63条及其以下诸条	(56)
e. 许可和转让	(57)
4. 实用新型	(57)
a. 定义	(57)
b. 获得专利权的条件	(57)
c. 申请程序	(58)
5. 外观设计	(60)
a. 定义	(60)
b. 获得专利权的条件	(60)
c. 申请程序	(60)
6. 药品的行政性保护	(61)
7. 侵权	(61)
a. 发明专利和实用新型	(61)
b. 外观设计	(62)
c. 辅助性侵权行为	(62)
d. 行政手段	(63)
e. 司法手段	(64)
f. 中国海关保护措施	(66)

V. 《著作权法》	(66)
1. 相关的中国法律、法规	(67)
2. 保护什么?	(67)
a. 作品的范围	(67)
b. 不受保护的作品	(68)
3. 保护谁?	(68)
a. 出版	(69)
b. 外国作品	(69)
4. 著作权作品的权利	(69)
a. 经济权利和人身权利	(70)
b. 表演权,《著作权法》第36条及以下	(70)
c. 录音、录像权,《著作权法》第39条及以下	(71)
d. 广播电台、电视台播放权,《著作权法》第42条及以下	(71)
5. 著作权的归属,《著作权法》第11条	(72)
a. 合作作者,《著作权法》第13条	(72)
b. 作品汇编者,《著作权法》第14条	(72)
c. 制片人,《著作权法》第15条	(72)
d. 雇员,《著作权法》第16条	(73)
e. 委托作品,《著作权法》第17条	(73)
6. 著作权保护期	(73)
a. 著作权人是雇主或作者的情况	(73)
b. 外国作品	(73)
c. 人身权利	(73)
7. 转让和许可	(73)
a. 转让	(73)
b. 许可	(74)
c. 转让和许可的一般性规定	(75)
8. 侵权	(75)
a. 构成侵权的行为	(75)
b. 合理使用	(76)
9. 保护和实施	(77)

a. 概述	(77)
b. 注册	(77)
c. 行政手段	(78)
d. 司法程序	(80)
10. 关于软件的特别立法	(81)
a. 定义	(82)
b. 例外情况	(82)
11. 关于国际互联网的特别立法	(83)
VI. 姓名权	(83)
1. 法律基础	(83)
2. 具体规定	(84)
VII. 反不正当竞争法	(84)
1. 法律基础	(84)
2. 一般规定	(84)
3. 保护商业秘密的法律体系	(85)
a. 案例分析	(85)
b. 法院赋予的补救措施	(86)
c. 行政手段	(87)
d. 对企业的实用性建议	(87)
VIII. 知识产权的质押	(87)
1. 法律基础	(87)
2. 介绍	(87)
C. 德国知识产权法简介	(89)
I. 民法概述	(89)
II. 商标法	(89)
1. 标记的客体	(89)
2. 标记的注册	(90)
3. 异议	(90)
4. 有效期、权利	(90)
5. 侵权	(90)

6. 欧洲法律概述	(91)
III. 专利法	(91)
1. 德国专利法概述	(91)
2. 获得专利权的要求	(92)
a. 一般规定	(92)
b. 新颖性	(92)
c. 创造性阶段	(93)
d. 工业适用性	(93)
3. 申请	(93)
a. 手续	(93)
b. 审查程序, 专利法第 42 条	(93)
c. 文件的审查和公告	(93)
d. 查询, 专利法第 43 条	(94)
e. 实质审查, 专利法第 44 条及以下	(94)
f. 异议, 专利法第 59 条	(94)
4. 专利权的期限、年费	(94)
IV. 著作权法	(95)
1. 一般规定	(95)
2. 有效期	(96)
3. 著作权的内容, 受保护的权利	(96)
a. 精神权利	(96)
b. 使用权	(96)
4. 著作权侵权和救济	(97)
V. 反不正当竞争法	(97)
D. 有关知识产权法的国际条约简介	(99)
I. 国际条约列表	(99)
1. 世界贸易组织 (WTO)	(99)
2. 商标	(99)
3. 专利	(99)
4. 著作权	(99)

II. 国内法律列表	(100)
III. 主要的国际条约简介	(100)
1. 《与贸易有关的知识产权协议》(TRIPS)	(100)
2. 专利合作条约	(101)
3. 巴黎公约	(101)
4. 马德里协议	(101)
5. 尼斯协议	(102)

第二部分 案例分析

案例缩略语	(105)
商标法案例 1: 商标的注册和保护	(109)
商标法案例 2: 域名注册及其争议	(155)
专利法案例 3: 专利许可和专利侵权	(211)
著作权法案例 4: 计算机软件侵权和预备措施	(232)
反不正当竞争法案例 5: 不正当竞争行为与侵犯商业秘密	(267)
反不正当竞争法案例 6: 违反《广告法》和歧视竞争对手	(297)

Table of Contents

Part I Basic System

A. The Technique of Law Application	(3)
I. Introduction Statement	(3)
II. Legal Certainty	(3)
1. What is Legal Certainty?	(3)
a. Definition	(3)
b. Legal Certainty is a component of the Rule of Law	(4)
c. What means predictability of the Law?	(4)
2. The Functions of Legal Certainty	(4)
a. Security of Orientation	(4)
b. Security of Realization	(4)
c. Continuity of legal system	(4)
d. Legal Certainty as basis for private autonomy	(5)
3. Why Legal Certainty is important?	(5)
4. What is therefore necessary to achieve Legal Certainty?	(5)
5. Legal Certainty in the PR of China	(5)
6. Limits of Legal Certainty	(5)

III. Implementation of statutory law	(6)
1. What does implementation of statutory law mean?	(6)
2. Legal Certainty in regard to the Application of Law	(6)
3. What does methodical application of law mean?	(7)
a. What is a case study method?	(7)
b. Formal approach to law	(7)
c. Exclusion of personal opinions	(7)
4. Advantages of methodical application of law	(8)
a. Legal Certainty	(8)
b. Economic Advantages	(8)
c. More justice and higher acceptance	(9)
IV. The Technique of Law Application-An Introduction to the Case Study Method	(9)
1. Universal Method	(9)
2. Idea behind a case study	(10)
3. System of Legal Basis for claims	(11)
4. Technique of Subsumption	(11)
5. Interpretation, development of the Law, scope for judgment, discretion	(14)
a. Interpretation criteria	(14)
b. Development of the law: analogy and teleological reduction	(15)
c. Distinction according to who interprets a law	(15)
d. Official interpretation	(15)

e. Scope for judgment	(16)
6. Structure of legal provisions and basis of claims	(16)
7. Applicable Law	(17)
a. What means private international law?	(17)
b. Is there an internationally unified law?	(17)
8. Important practical notice	(18)
V. How to find a solution to a case study	(18)
1. Steps to find the legal basis for a claim	(18)
a. Read and organize the facts of the case	(18)
b. Differentiate claims	(19)
c. Find the legal basis	(19)
2. Objections	(19)
3. Final result	(20)
Scheme for the examination of a claim for fulfillment of contractual obligations	(21)
B. Intellectual Property Law of the P. R. China	(23)
I. General Principles of Civil Law	(24)
II. Contract Law	(25)
III. Trademark Law	(25)
1. Relevant National Laws, Regulations, Circulars, etc.	(26)
2. Obtaining of a Trademark in the PRC	(26)
a. Trademark	(26)
b. Surnames	(27)
c. Numbers and Letters	(28)
d. Catchphrases	(28)
e. Prohibited Marks	(28)

f. Collective Marks and Certification Marks,	
art.3 TL	(29)
g. Service Marks and Goods Marks, art.3 par.1	
sent.1 TL	(30)
h. Well-Known-Marks, arts.13, 14 TL	(30)
i. Chinese Characters	(31)
j. Registration of a Trademark	(31)
3. Licensing of a Trademark	(36)
a. Licensing Contract	(36)
b. Sub-Licensing	(37)
c. Registration and Recording	(37)
d. Recordal Documents, art.7 Trademark Licensing Contract Recordal Procedures	(38)
e. Approval and Recordal	(38)
f. Non-Compliance and Enforcement	(38)
g. Non-registered Trademarks	(39)
4. Assignment of Trademark, art.39 TL, art.25 Implementing Rules TL	(39)
5. Domain Names	(39)
a. General	(39)
b. Administration and Legislation	(40)
c. Registration Requirements and Application Procedures	(41)
d. Potential Conflicts and Dispute Resolution	(42)
6. Infringement of a Trademark	(44)
a. What constitutes an Infringement?	(44)
b. Enforcing Trademark Rights	(45)

7. PRC Customs Protection	(49)
IV. Patent Law	(50)
1. Relevant National Laws and Regulations	(50)
2. General	(51)
3. Patents	(51)
a. Patentability	(51)
b. Specific Exclusions	(52)
c. Application Procedure	(52)
d. Invalidation Procedure, arts. 45 et seq. PL, arts.	
63 et seq. Implementing Regulations PL	(56)
e. Licensing and Assignments	(57)
4. Utility Models	(57)
a. Definition	(57)
b. Patentability	(57)
c. Application Procedure	(58)
5. Designs	(60)
a. Definition	(60)
b. Patentability	(60)
c. Application Procedure	(60)
6. Administrative Protection of Pharmaceuticals	(61)
7. Infringement	(61)
a. Patents and Utility Models	(61)
b. Design	(62)
c. Contributory Infringement	(62)
d. Administrative Method	(63)
e. Judicial Method	(64)
f. PRC Customs Protection	(66)

V. Copyright Law	(66)
1. Relevant National Laws and Regulations	(67)
2. What is protected?	(67)
a. Categories of Works	(67)
b. Works excluded from Protection	(68)
3. Who is protected?	(68)
a. Publication	(69)
b. Foreign Works	(69)
4. Rights in Copyright Works	(69)
a. Economic and Moral Rights	(70)
b. Rights of Performance, arts.36 et seq. CL	(70)
c. Audio-visual Recordings, arts.39 et seq. CL	(71)
d. Radio and Television Broadcasts, arts.42 et seq. CL	(71)
5. Ownership of Copyright, art.11 CL	(72)
a. Co-authors, art.13 CL	(72)
b. Compiler, art.14 CL	(72)
c. Producer of cinematographic works, art.15 CL	(72)
d. Employees, art.16 CL	(73)
e. Commissioned Works, art.17 CL	(73)
6. Term of Copyright	(73)
a. Employer or Author as Owner	(73)
b. Foreign Works	(73)
c. Moral Rights	(73)
7. Assignment and Licensing	(73)
a. Assignment	(73)
b. Licensing	(74)

c. General Provisions for Assignment and Licensing	(75)
8. Infringement	(75)
a. What constitutes an Infringement?	(75)
b. Fair Use	(76)
9. Protection and Enforcement	(77)
a. General	(77)
b. Registration	(77)
c. Administrative Action	(78)
d. Judicial Proceedings	(80)
10. Software - specific Legislation	(81)
a. Definition	(82)
b. Exclusion	(82)
11. Internet - specific legislation	(83)
VI. Right of Name	(83)
1. Legal Basis	(83)
2. Details	(84)
VII. Unfair Competition Law	(84)
1. Legal Basis	(84)
2. General	(84)
3. Legal Framework for Protection of Commercial Secrets	(85)
a. Analysis	(85)
b. Remedies Granted by the Courts	(86)
c. Administrative Enforcement	(87)
d. Practical Advice to Enterprises	(87)
VIII. Pledge of Intellectual Property Rights	(87)
1. Legal Basis	(87)

2. Introduction (87)

**C. Brief Introduction to Intellectual Property
Law in Germany (89)**

I. Civil Law in General (89)

II. Trademark Law (89)

1. Subject Matter of Marks (89)

2. Registration of Marks (90)

3. Opposition (90)

4. Term of Validity, Rights (90)

5. Infringements (90)

6. Aspects of European Law (91)

III. Patent Law (91)

1. Summary of German Patent Law (91)

2. Requirements for Patentability (92)

a. General (92)

b. Novelty (92)

c. Inventive Step (93)

d. Industrial Application (93)

3. The Application (93)

a. Formalities (93)

b. Examination Procedure, arts. 42 et seq.

 Patent Law (93)

 c. Inspection of the Files and Publication (93)

 d. Search, art. 43 Patent Law (94)

 e. Substantive examination, arts. 44 et seq.

 Patent Law (94)

f. Opposition, arts.59 et seq. Patent Law	(94)
4. Term of Patent and Annual Fees	(94)
IV. Copyright Law	(95)
1. General	(95)
2. Term of Validity	(96)
3. Content of Copyright; Protected Rights	(96)
a. Droit Moral	(96)
b. Right of Exploitation	(96)
4. Copyright Infringements and Remedies	(97)
V. Unfair Competition Law	(97)
D. Brief Introduction to International Treaties on Intellectual Property Law	(99)
I. List of International Treaties	(99)
1. WTO	(99)
2. Trademark	(99)
3. Patents	(99)
4. Copyright	(99)
II. List of National Laws	(100)
III. Introduction to Important Treaties	(100)
1. TRIPS Agreement	(100)
2. Patent Cooperation Treaty Applications	(101)
3. Paris Convention	(101)
4. Madrid Agreement	(101)
5. Nice Agreement	(102)

Part II Case Studies

Abbreviations for Cases	(105)
Case 1 Trademark Law: Registration and Protection of a Trademark	(109)
Case 2 Trademark Law: Domain Names Registration and Disputes (The Cartier case)	(155)
Case 3 Patent Law: Licensing of Patents and Patent Infringement	(211)
Case 4 Copyright Law: Infringement of Computer Software and Preliminary Measures	(232)
Case 5 Unfair Competition Law: Unfair Competition and Infringement of Business Secret	(267)
Case 6 Unfair Competition Law: Violation of Advertisement Law and Discrimination of Competitors	(297)