

Judicial Methodology

Methods for Case Studies in Intellectual Property Law

法律适用方法

知识产权法案例分析方法

国家法官学院 著
德国国际合作机构



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自1996年以来，我们一直在中华人民共和国卓有成效的司法改革中为最高人民法院和国家法官学院提供支持。为确保法治原则在法律适用过程中得到更好的实施和遵循，我们已为5000多名法官提供了法律适用方法的培训。

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序言一

美国法学家德沃金将没有清晰的法律规范加以确定指导的案件定义为“疑难案件”，认为对于“疑难案件”，法官需要通过运用正确的法律解释方法以及价值判断，发现案件的唯一正解。法律适用的结果是否存在唯一正解尚存争议，但是法律适用方法的客观化和统一却并非不可能：法官通过运用统一的、能为客观标准所衡量的法律适用方法，作出契合法律规范和承载法律基本价值内涵的裁判结论，在某种程度上也是回应了统一适用法律的司法本质要求。从方法论的意义上讲，素以完备和严谨著称的德国法律适用方法无疑对我国法律适用技术的完善和发展具有很强的借鉴意义和参考价值。

国家法官学院作为最高人民法院下属的全国法院法官培训机构，多年来一直致力于与各国保持着友好交流合作关系，并学习与借鉴他国有益的经验。自1998年至今，国家法官学院与德国国际合作机构联合举办三十多期法律适用方法培训班，内容涉及刑法、民法、行政法等多个领域，选取中国的案例，运用中国的法律，采用德国的案例分析方法（归入法、关系分析法）分析案件，得出结论。在举办培训班的过程中，参加培训的法官纷纷表示，此两种案例分析方法逻辑严密，推理缜密，对中国法官分析案情、运用法律具有很大的启发和借鉴作用。在每期培训班上，法官们都对本套书所选的案例进行了讨论。通过这三十多期培训班的举办，这些案例被打磨得愈加精辟而具有指导意义。此次，我们将这些精选

的案例结集出版，既是作为中德双方在法官培训领域的合作成果展示，也希望这些凝结了中德法官的智慧和心血的作品能帮助更多的法律实务工作者。

本书的核心思想，即是以法院教育培训工作方针为指导，运用案例教学的手段，以法官亲历式的教学方式，将法律适用方法融入个案的分析过程中，以期提升法官的法律逻辑思维能力、驾驭法律信息资源的能力以及将理论知识运用于司法实践解决实际问题的能力。

黄永维

国家法官学院院长

Preface 1

American Jurist Dworkin defines “hard case” as the one without positive guidance by clear legal norms. When dealing with such “hard case”, a judge needs to find the only right decision by making use of proper legal interpretation methods and value judgment. Though it is still controversial to say whether law application brings the only right decision, it is possible to make law application methods objective and unified; the utilization of unified law application methods measurable with objective criterion by judges to make decisions consistent with legal norms and bearing the basic value connotation of laws is a kind of response to the essential judicial requirements of unified application of law to some extent. Methodologically speaking, it is doubtless that complete and rigorous law application methods of Germany provide good examples and references for China’s improvement and development of law application techniques.

As a national judge training institution under the Supreme People’s Court, National Judges College has always been committed to maintaining friendly exchange and cooperation with as well as learning good experience from other countries for years. From 1998 to date, National Judges College has jointly organized over 30 training sessions concerning law application methods with GIZ, covering criminal law, civil law and administrative law, etc. By setting Chinese cases as examples, judges are trained to analyze cases and make judgments through applying Chinese laws and adopting German case analysis methods (subsumtions method and relation analysis method). Many judges participating in the training thought that the afore-

said two case analysis methods are rigorous in logic and reasoning, and they can draw inspiration and experience from them when analyzing cases and applying laws. Cases discussed in over 30 training sessions are now selected and published to exhibit cooperation achievements between China and Germany in judge training and show the wisdom and efforts of judges in both countries.

Guided by court education and training guidelines, this book uses cases to provide personal experience for judges, and integrates law application methods with case analysis, so as to improve judges' ability of logical thinking in legal issues, ability to utilize legal information resources and ability to solve practical legal issues with theoretical knowledge.

Huang Yongwei

President of National Judges College of China

序言二

2000年以来，德国国际合作机构（GIZ）中德法律合作项目与国家法官学院紧密合作，在民法、行政法和刑法领域，共同举办了长、短期的法律适用方法培训班。2012年我们开始将培训材料整理出版，这是双方长期以来卓有成效合作的又一重要里程碑。自2014年起，我们也相继推出了法律适用方法丛书的电子版和英文版。

我们的培训教材以及培训课程旨在支持和帮助中国政府在依法治国的背景下实现审判专业化和标准化的目标。从长远来看，只有当司法裁判和行政决定能清晰地在法律中找到依据时，法律的实施才是成功的。我们相信，除了渊博的法律知识之外，统一的法律适用方法亦能为实现司法裁判和行政决定的确定性和周全性发挥至关重要的作用。

秉持上述信念，我们很荣幸地向读者奉上新一册图书《法律适用方法——知识产权法案例分析方法》。对知识产权的保护，是知识创新型社会的基石。本书中，我们将讨论知识产权法领域中中国法官所遇到过的典型案例。因此，本书的重点在于介绍适用方法，实现并巩固统一解决模式的运用。

本书中介绍的德国方法论由“归入法”（Subsumtionstechnik）以及“关系分析法”（Relationstechnik）构成。前者是在事实清楚的情况下解决案例的方法，后者则是在事实不清楚的情况下解决案例的方法。该方法论在德国是历史悠久且根深蒂固的法律传统。它在法学教育中的普及以及在法律实践中的广泛应用，确保了所有法律专业人士都运用同样的方法解决法律问题。

归入法对于所适用的法律具有完全的独立性。因此它能够适用德国法、中国

法或者其他任何国家的法律来解决案件。相对而言，关系分析法反映了德国民事诉讼法的基本原则，这些原则与中国民事诉讼法有一定的区别。然而，即使各程序法基于不同的原则，关系分析法也可以通过将其结构适用于既定程序体系的方式，应用于中国的法律。

我们在本书中编写了一些适用中国法的案例作为介绍德国法律适用方法的素材。需要强调的是，我们仅仅是法律方法论的专家而不是中国法方面的专家。我们尽可能准确地适用德国方法论解决中国的法律问题。尽管如此，对于在适用中国法过程中可能出现的错误还希望读者予以包容。

我们衷心地希望，本书中的法律适用方法对来自中国各级法院的法官同仁的工作能有所裨益——这样我们编写本书的目的也就达到了。

我代表德国国际合作机构（GIZ）中德法律合作项目对组织和支持本次出版的人员和机构表示感谢。特别要感谢我们的合作伙伴国家法官学院的黄永维院长、冯文利副院长以及国际合作处处长王晓芳女士对我们一如既往的支持和信任。

德国法律顾问白蕊女士（Britta Beylage-Haarmann）为编写及改进培训材料做出了巨大的贡献。中德法律合作项目的德国法官杨翰博士（Dr. Johannes Schlichte）负责法官培训和交流活动以及团队协调工作。胡兰女士、万迪女士、赵晓兰女士和路易斯先生（Lutz Grzonka）也为本书的出版做出了很多努力。我对他们表示衷心的感谢。



雅克博士（Jörg Binding）

项目主任

德国国际合作机构

中德法律、消费者个人信息保护、金融及质量基础设施合作项目

Preface 2

Since 2000 the Sino-German Legal Cooperation Programme of the Deutsche Gesellschaft für Internationale Zusammenarbeit GmbH (GIZ) and the National Judges College of China have been closely working together in conceiving and carrying out long-term and short-term training courses on judicial methodology in civil, administrative and criminal law. In 2012, we began to publish the training material used in those courses, which marked another significant milestone in our longstanding and successful cooperation. Since 2014 we also publish electronic and English versions of our books.

Both our training material and our training courses aim at supporting the efforts of the P. R. China's authorities to professionalize and standardize jurisprudence based on the rule of law. In the long run, the implementation of law will only be successful if judgments and administrative decisions clearly find their basis in the law. We are convinced that, besides a profound knowledge of the law, a uniform method of the application of law is essential for reaching predictable and comprehensive judgments and decisions.

Following this conviction, we are proud to present the new volume "Judicial Methodology: Methods for Case Studies in Intellectual Property Law". The protection of intellectual property rights is, among other things, the basis for a knowledge-based and innovative society. In this book we aim to discuss typical cases Chinese judges are confronted with in the field of intellectual property law. Thereby the main focus lies on the introduction of techniques that enable and enhance a uniform approach to solving these cases.

The German methodological approach presented in this book is characterized by the "subsumption technique" (Subsumtionstechnik), a method used for solving cases in which the facts are already clear, and the "relation technique" (Relationstechnik), a method used for solving cases where the facts are unclear. This methodology has a long and deep-rooted tradition in the German legal system. The fact that these techniques are taught in the legal education and applied in the legal practice ensures that all legal pro-

fessionals have the same approach to solving legal cases.

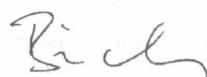
The subsumption technique is completely independent from the content of the jurisdiction where it is applied. Thus, it can be used for solving cases under German law, under Chinese law or under any other law. The relation technique, on the other hand, reflects basic principles of the German civil procedure law which in parts are different from those of the Chinese civil procedure law. However, the relation technique can be adapted to the Chinese procedural rules—even if they rely on different principles—by taking these principles of the procedural system as a basis.

Accordingly, the case studies presented in this book serve as examples of how the German methodology can be applied to cases under Chinese law. We should stress that we are experts only in legal methodology and not in Chinese law itself. Nevertheless we have done our best to adapt the German methodology to reflect the specific characteristics of Chinese law as accurately as possible. Nevertheless, we kindly ask for indulgence for any errors made as regards the application of Chinese law.

We hope that our Chinese colleagues, judges from Chinese courts at all levels, from all regions and provinces of the P. R. China, will find the case study methodology helpful to their work—then the aim of this book is achieved.

On behalf of GIZ's Sino-German Legal Cooperation Programme, I would like to thank all the organizers and supporters of this publication. I am particularly grateful to the National Judges College of China, notably President Huang Yongwei, Vice President Feng Wenli and Ms. Wang Xiaofang, head of the International Department, for their continuous support and long-lasting trustful cooperation.

The development of this training material is mainly owed to the efforts of Legal Advisor Britta Beylage-Haarmann. German judge Dr. Johannes Schlichte, who is in charge of the judicial training and exchange activities of the Sino-German Legal Cooperation Programme, was responsible for the coordination of our team. Ms. Hu Lan, Ms. Wan Di and Ms. Zhao Xiaolan and Mr. Lutz Grzonka have also put a lot of effort into this book. I would like to thank all of them very cordially.



Programme Director

GIZ Sino-German Legal Cooperation Programme

目 录

Contents

第一部分 法律适用方法导论

导 论	3
结 构	5
一、理论背景	8
I. 法律、法规与规章的目的	8
II. 人们遵守或违反法律规则的理由	11
III. 法律之外可以作为社会组织原则的选择	12
IV. 采用一定方法适用法律的理由	14
二、归入法	22
I. 归入法简单介绍	22
II. 解决民事案件	41
III. 整体结构	47
三、关系分析法	50
I. 关系分析法简单介绍	50
II. 民事案件中的关系分析法	51

第二部分 知识产权法简介

结 构	77
一、简介	81
二、《商标法》	82
I. 法律框架	82

II. 保护的目标	83
III. 有权限的机关	84
IV. 商标注册的申请程序	84
V. 保护的范围	88
VI. 宣布无效	90
VII. 撤销	92
VIII. 法律保护	94
三、《著作权法》	101
I. 法律框架	101
II. 保护的目标	101
III. 著作权人	103
IV. 著作权作品中的权利	105
V. 保护期	109
VI. 转让、许可与出质	109
VII. 侵权与保护	111
VIII. 关于计算机软件的特别立法	115
IX. 关于互联网的特别立法	117
四、《专利法》	119
I. 法律框架	119
II. 一般规定	120
III. 可专利性	120
IV. 专利的申请程序	121
V. 无效程序	124
VI. 许可使用和转让	124
VII. 专利侵权	124
五、《反不正当竞争法》	128
I. 法律框架	128
II. 一般规定	128
III. 侵权	129

第三部分 归入法案例分析方法 (S)

一、商标法案例 S1	133
二、商标法案例 S2	145
三、商标法案例 S3	164
四、商标法案例 S4	187
五、著作权法案例 S1	197
六、著作权法案例 S2	206
七、著作权法案例 S3	220
八、专利法案例 S1	228

第四部分 关系分析法案例分析方法 (R)

一、商标法案例 R1	237
二、商标法案例 R2	258
三、著作权法案例 R1	278
四、著作权法案例 R2	299
五、专利法案例 R1	325

Judicial Methodology

Methods for Case Studies in Intellectual Property Law

第一部分

法律适用方法导论

