英美法案例精选系列丛书（英文版）

美国知识产权法

Intellectual Property Law of the U.S.

陈剑玲　编著

对外经济贸易大学出版社

图书在版编目（CIP）数据

美国知识产权法：英文/陈剑玲编著. —北京：对外经济贸易大学出版社，2007
（英美法案例精选系列丛书）
ISBN 978-7-81078-851-9

Ⅰ. 美… Ⅱ. 陈… Ⅲ. 知识产权法－案例－美国－英文
Ⅳ. D971.23

中国版本图书馆CIP数据核字（2007）第054147号

ⓒ 2007年 对外经济贸易大学出版社出版发行

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北京市朝阳区惠新东街10号 邮政编码：100029
邮购电话：010－64492338 发行部电话：010－64492342
网址：http://www.uibep.com E-mail：uibep@126.com

北京市山华苑责任印刷有限公司印装 新华书店北京发行所发行
成品尺寸：140mm×203mm 14.625印张 366千字
2007年10月北京第1版 2007年10月第1次印刷

ISBN 978-7-81078-851-9
印数：0 001－3 000册 定价：24.00元

总　　序

自1984年设立国际法专业以来，对外经济贸易大学法学院（原国际经济法系）已经走过了20个年头。在20年的时间里，经过几代人的努力，在培养懂法律、懂经贸和熟练运用外语（英语）的综合型人才、满足国内市场和国际市场的人才需求的道路上，对外经济贸易大学法学院已成为国内外经贸法律教育中一个具有自己特色和风格的人才培养基地和输送站。

对外经济贸易大学法学院的教学特色体系是从“国际商法”开始的，为了适应国际经贸全球化的发展潮流，我们希望，从对外经济贸易大学法学院走出的人才能够从国际化的视角理解和把握我国的法律，并且客观地认识不同国家的法律、国际法律之间的相互作用和影响。为此目的，我院几代教师编辑的教材，包括案例教材，都在强调具有国际化视角的教学和比较研究的重要性。

对外经济贸易大学法学院以独特的教学方法——案例教学和双语教学为代表，旨在通过引导学生对“原汁原味”的英文案例的阅读和研讨，学习不同国家在国际商贸领域的法律原理和规则，也通过对经典案例事实和纠纷场景的分析，帮助学生认识现实生活中经贸活动的规律和特点。

我们多年的教学实践已经证明：案例教学对于培养学生发现和归纳问题、分析和处理问题的综合能力，对于培养学生在错综复杂的事实和现象中分清真伪和主次、结合事实和法律推理的能力有直接的促进作用。

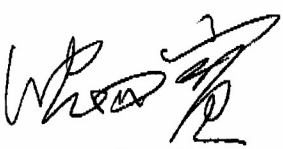
除了国际商法以外，对外经济贸易大学法学院国际法专业的

另一个教学和研究方向是以 WTO 法律为主的国际经济法（公法）。本套英文案例选编丛书包含了这样两个方面的内容。

我院鼓励教师在教学、科研和法律实践中全面拓展才能和发掘潜力，同时，我们强调：教师的工作应以教学为中心，科研和法律实践应为提升教师的专业素质、提高教学水平而服务。参与本套丛书编写的同志都是我院具有多年教学经验的中青年教师，本套丛书是他们在对自己的教学心得的积累和总结的基础上精心编辑而成的，是他们对多年摸索的教学方法的总结；本套丛书也是我院几代人的教学成果的延续，更是我院“211 工程”建设成果的组成部分。

20 年来，我们欣慰地看到：对外经济贸易大学法学院的教学风格和特色也得到国家和社会的认可，早在 20 世纪七、八十年代，我院就经批准设有可招收国际经济法专业方向的硕士点和博士点；我院的“国际商法”教材和案例教材也广为流传；2002 年我院的国际法专业被评为国家重点建设学科，现又增设了博士后流动站；学生和教师的规模日益扩大。我衷心希望：我院有更多的教师和学生加入案例教学和双语教学的尝试和探索中来，保持和发展特色，早日走上国际人才培养和学科全面发展的道路。

对外经济贸易大学
法学院　院长



2004 年 7 月

前　言

本书是对外经济贸易大学法学院国家重点学科建设项目英美法案例精选系列丛书（英文版）中的一辑，是以编者从美国知识产权法三大主要领域，即版权法、专利法和商标法中选择的经典案例为基础编录而成的。

美国是世界上施行知识产权制度最早的国家之一，其知识产权法体系的起源可以追溯到联邦政府成立的第一天。美国的奠基人早就已经认识到了知识产权法的重要性，并在美国联邦宪法第1条第8款中予以确定和保证："国会有权保障作者和发明人对各自的作品和发明在一定期限内的专有权利，以促进科学和实用艺术之进步。"美国的第一部专利法早在1790年就颁布实施，之后历经多次修订，对美国的经济发展和科技进步产生重大影响。迄今，美国已经基本建立起一套完整的知识产权法律体系，内容主要包括专利法、商标法、版权法等等。建国二百多年以来，美国经济科技等多方面走在世界前列，其重要原因也在于其经济制度适应生产力发展，其中知识产权制度的完善也是一大因素。例如，透过专利制度促进发明创造和技术进步，促进了企业在市场竞争中利用技术创新和知识产权获取最大经济效益和市场份额。除了以促进科学技术的发展为己任之外，美国的知识产权制度长期试图协调多种复杂的利益，例如由于美国法律体系的特殊性，即联邦和州法共同作用，知识产权法一直致力于保持联邦法和州法之间的平衡。又如在商标法的领域，法律在保护商标权利以创造公平竞争环境的同时，必须时刻意识到商标权的根本性目的在于帮助消费者辨认商品来源，因此对经营者商标权利的保护不能

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过于宽泛而变得不必要。

中国本身的知识产权体系目前尚处于逐渐完善的阶段。在入世的大背景下，如何运用知识产权制度来促进社会科学技术的进步，在与国际体系接轨的同时又最大程度地保护本国知识产权是一项刻不容缓的任务。美国知识产权制度发展到今天，已经相对比较成熟和完善。研究美国知识产权法律体系、管理机制、政策考虑和实施战略的主要经验，将对我国知识产权法律体系的建立和管理体制的改革有极大的启示和借鉴作用。

本书选录了美国版权法、专利法、商标法三个领域中的一些经典案例，旨在通过研究原汁原味的案例，介绍美国知识产权法框架体系中的一些基本原则。由于篇幅所限，本书难以对三大部门法中的相关经典案例作一个非常全面的介绍，因此，本书的重点主要是在版权法上。读者在阅读案例时，可以跟随美国法官的思路，理解其如何在综合考虑多方因素的基础上，尽量维护多种利益的平衡，并得出最终的判决。案例后面附有思考题，以帮助读者更快的理解每个案件的焦点问题。同时，本书最后还附上了美国版权法部分节选，方便读者参照和查找制定法的有关规则。

因编者本人的专业和英语能力所限，书中错误和疏漏在所难免，请读者拨冗指正。

编者：陈剑玲

2007 年 6 月于对外经济贸易大学

目　录

第一编　美国版权法

第二编 美国专利法

第三编 美国商标法

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第一编　美国版权法

第一章　版权保护的条件

第一节　表述和思想观念

思想/表述二分法（idea/expression dichotomy）是美国版权法中一个著名的原则。该原则基本的含义是指：思想观念本身不能得到版权保护，必须通过一定的表达形式表达出来，才能够得到版权法的保护。美国1976年《版权法》第102条明确地规定了这一原则。至目前为止，这一理论已经获得了世界范围内的承认，并成为美国版权法上最为重要的原则。

版权意义上的思想观念的含义要比通常说的思想观念宽泛得多，主要是指概念、术语、原则、客观事实、创意、发现等等。表述就是对上述思想观念的各种形式或方式的表达。

思想/表述二分法意味着作者不能将作品中所体现的思想观念据为己有；对于同样的思想观念，他人可以自由利用或者自由进行原创性的再表述；由此形成的表述或作品，同样可以得到版权法的保护。

思想/表述二分法这一原则通过案例法得到不断发展。最早确立这一原则的是Baker v. Selden案。最高法院在该案中的判

决对美国版权法的发展产生了深刻的影响。在该案中，法院裁定：原告可以禁止别人复印出版他的书，但不能禁止被告使用原告书中所描述的会计方法。

作品的“表达”是丰富多样的。对于小说、诗歌、散文等文学作品，可以文字或等同于文字的各种符号（如数字符号）作为其思想或情感的表达；绘画、书法等美术作品则以线条、色彩等作为其表达。如果在一部作品中其思想与表达清晰可辨，则对其表达的保护相对简便易行。但是，正如法院在 Nichols v. Universal Pictures Corporation 一案中所揭示的那样，“任何一部确定的作品都可以是许多思想和表达的混合”。在实践中，区分思想和表达并非一件易事。例如，对作品中牵涉到的创造的“素材”是更接近于思想还是更接近于表达，有时并不能很简单地判定。以文学作品的故事情节而论，基本的故事情节应当是创作的基本素材，属于思想与事实的范畴。普通的人物角色更趋向于被认定是“思想”；但一个卡通角色可能更容易被认定为“表达”。由此体现的是“情景”理论：相同主题里通用的情节、人物、场景不受到版权保护，任何人在同一主体的作品中都可以使用。

作为思想/表述二分法原则的例外，当某种思想观念只有一种或者几种有限表述的时候，以至于无法从表达中区分思想，则版权法不保护思想观念也不保护表述，因为对表述的保护会损害到他人对思想的自由获取。在极端的情况下，如果思想和表达混合在一起，授予版权相当于对于抽象的思想授予了版权。因此，为保护公共利益，不能因授予某一人版权而剥夺了公众在该领域的权利。Morrissey 一案即体现了这一原则。

二分法原则实质上属于确保版权利益平衡的基石性范畴。版权法确立思想与表达二分法原则的目标，是在通过提供向作者提供合理的利益，以实现促进创作和保障公众利益之间的

平衡。

案例 1

Baker v. Selden
101 U.S. 99 1879

MR. JUSTICE BRADLEY delivered the opinion of the court.

Charles Selden, the testator of the complainant in this case, in the year 1859 took the requisite steps for obtaining the copyright of a book, entitled "Selden's Condensed Ledger, or Book-keeping Simplified", the object of which was to exhibit and explain a peculiar system of book-keeping. In 1860 and 1861, he took the copyright of several other books, containing additions to and improvements upon the said system. The bill of complaint was filed against the defendant, Baker, for an alleged infringement of these copyrights. The latter, in his answer, denied that Selden was the author or designer of the books, and denied the infringement charged, and contends on the argument that the matter alleged to be infringed is not a lawful subject of copyright.

A decree was rendered for the complainant, and the defendant appealed.

The book or series of books of which the complainant claims the copyright consists of an introductory essay explaining the system of book-keeping referred to, to which are annexed certain forms or banks, consisting of ruled lines and headings, illustrating the system

and showing how it is to be used and carried out in practice. This system effects the same results as book-keeping by double entry; but, by a peculiar arrangement of columns and headings, presents the entire operation, of a day, a week, or a month, on a single page, or on two pages facing each other, in an account-book. The defendant uses a similar plan so far as results are concerned; but makes a different arrangement of the columns, and uses different headings. If the complainant's testator had the exclusive right to the use of the system explained in his book, it would be difficult to contend that the defendant does not infringe it, notwithstanding the difference in his form of arrangement; but if it be assumed that the system is open to public use, it seems to be equally difficult to contend that the books made and sold by the defendant are a violation of the copyright of the complainant's book considered merely as a book explanatory of the system. Where the truths of a science or the methods of an art are the common property of the whole world, any author has the right to express the one, or explain and use the other, in his own way. As an author, Selden explained the system in a particular way. It may be conceded that Baker makes and uses account-books arranged on substantially the same system; but the proof fails to show that he has violated the copyright of Selden's book, regarding the latter merely as an explanatory work; or that he has infringed Selden's right in any way, unless the latter became entitled to an exclusive right in the system.

The evidence of the complainant is principally directed to the object of showing that Baker uses the same system as that which is explained and illustrated in Selden's books. It becomes important, therefore, to determine whether, in obtaining the copyright of his

books, he secured the exclusive right to the use of the system or method of book-keeping which the said books are intended to illustrate and explain.

It is contended that he has secured such exclusive right, because no one can use the system without using substantially the same ruled lines and headings which he was appended to his books in illustration of it. In other words, it is contended that the ruled lines and headings, given to illustrate the system, are a part of the book, and, as such, are secured by the copyright; and that no one can make or use similar ruled lines and headings, or ruled lines and headings made and arranged on substantially the same system, without violating the copyright. And this is really the question to be decided in this case. Stated in another form, the question is, whether the exclusive property in a system of book-keeping can be claimed, under the law or copyright, by means of a book in which that system is explained? The complainant's bill, and the case made under it, are based on the hypothesis that it can be.

It cannot be pretended, and indeed it is not seriously urged, that the ruled lines of the complainant's account-book can be claimed under any special class of objects, other than books, named in the law of copyright existing in 1859. The law then in force was that of 1831, and specified only books, maps, charts, musical compositions, prints, and engravings. An account-book, consisting of ruled lines and blank columns, cannot be called by any of these names unless by that of a book.

There is no doubt that a work on the subject of book-keeping, though only explanatory of well-known systems, may be the subject of a copyright; but, then, it is claimed only as a book. Such a book

may be explanatory either of old systems, or of an entirely new system; and, considered as a book, as the work of an author, conveying information on the subject of book-keeping, and containing detailed explanations of the art, it may be a very valuable acquisition to the practical knowledge of the community. But there is a clear distinction between the book, as such, and the art which it is intended to illustrate. The mere statement of the proposition is so evident, that it requires hardly any argument to support it. The same distinction may be predicated of every other art as well as that of book-keeping. A treatise on the composition and use of medicines, be they old or new; on the construction and use of ploughs, or watches, or churns; or on the mixture and application of colors for painting or dyeing; or on the mode of drawing lines to produce the effect of perspective, would be the subject of copyright; but no one would contend that the copyright of the treatise would give the exclusive right to the art or manufacture described therein. The copyright of the book, if not pirated from other works, would be valid without regard to the novelty, or want of novelty, of its subject-matter. The novelty of the art or thing described or explained has nothing to do with the validity of the copyright. To give to the author of the book an exclusive property in the art described therein, when no examination of its novelty has ever been officially made, would be a surprise and a fraud upon the public. That is the province of letters-patent, not of copyright. The claim to an invention or discovery of an art or manufacture must be subjected to the examination of the Patent Office before an exclusive right therein can be obtained; and it can only be secured by a patent from the government.

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