Tongji IP Series
同济大学法学院/知识产权学院
知识产权丛书

EU-CHINA 中国
IPR2 欧盟
知识产权项目二期

欧洲知识产权典型案例

LEADING COURT CASES ON EUROPEAN INTELLECTUAL PROPERTY

（汉英双语）

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内容提要

本书共选取了21个欧洲知识产权领域的典型案例，第一编11个案例，第二编10个案例，其中大部分源自德国法院。欧盟法院对这些案例的判决在一定程度上创设了欧盟知识产权案例审理的判例法。所选案例结合了案情、法院判决和观点，以及相关评论，并有编译者的点评。需说明的是，本书的翻译并非完全依照原文，作为参考，本书将所选案例的英文原文摘编附录于后，可供读者参阅。

读者对象：知识产权领域的科研人员和实务工作者，以及普通大众。

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English Language Cases (Part 1 and Part 2)

Foreword

The practice of international exchange has long being pursued by the EU—China Projects on the Protection of Intellectual Property Rights. Bringing experts in contact facilitates the exchange of views and ideas, results on deeper understanding of intellectual property laws and of intellectual property right protection, fosters the formulation of common conclusions. The level of expertise acquired through the exchanges establishes a stronger confidence to deal with more complex cases of intellectual property protection.

International cooperation exchanges involve institutions, including enforcement authorities, judges, and academia. The publication of the present work marks one additional step, by making available to a larger public of IP specialists and students selected results of the international collaboration.

The authors have performed a reasoned selection of intellectual property cases of high relevance in the Chinese and European jurisdictions. Each of the Court cases is drafted and commented to an extent the authors deemed necessary to make the case itself, and the related jurisprudence, accessible by international readers. Tailored to different readers, the English and the Chinese versions of a same case are not literal translations but differ in content.

The EU — China Project on the Protection of Intellectual Property Rights (IPR2) acknowledges the dedication of all authors to the completion of this publication, and express its gratitude for the authors' guidance and advices throughout the drafting process. An additional word of gratitude is addressed to the faculties of the Tongji University Law School, who made possible the actual publishing of the work.

The two volumes of this publication have been produced with the financial assistance from the EU—China Project on the Protection of Intellectual Property Rights (IPR2). The work results from a long standing collaboration of international leading experts and institutions.

The authors take responsibility for the content and opinions presented in the two volumes of this publication. The views expressed herein can in no way be taken to reflect the views of the European Union, nor other authorities party to the EU — China Project on the Protection of Intellectual Property Rights (IPR2).

编译说明

本书共选取了21个欧洲知识产权领域的典型案例，第一编11个案例，第二编10个案例，其中大部分源自德国法院。欧盟法院对这些案例的判决在一定程度上创设了欧盟知识产权案例审理的判例法。通过这些案例的判决，读者可以看到，欧盟在一体化的进程中，一方面尊重成员国法律，另一方面则更注重欧盟统一市场的融合，特别是货物流通和贸易自由化，因此，当成员国法律和欧盟的基本原则以及欧盟相关条约或指令相抵触的时候，欧盟法院则更倾向于通过解释条约或指令协调成员国之间的法律差异，以维护共同体市场的统一。当然，欧盟法院在知识产权案例的判决中，也完全遵从《伯尔尼公约》和《罗马公约》的知识产权相关规定，使之不违反国际法原则。

本书的案例结合了案情、法院判决和观点，以及相关评论，使读者能够通过了解案情之后，更好地理解法院判决的说理要点以及同时能够参考编译者的点评。需要说明的是，本书的翻译并非完全依照原文，作为参考，本书附上了每一个案例的英文原文摘编附录于后（见Part 1 和 Part 2），有兴趣的读者可以参考原文阅读。

本书的翻译历时近半年，其间获得了中国—欧盟知识产权保护项目（二期）（IPR2）和德国马普知识产权与竞争法研究院院长、同济大学知识产权学院荣誉院长约瑟夫·施特劳斯教授（Prof. Dr. Dres. h. c. Joseph Straus）以及德国法院法官、杜塞尔多夫大学荣誉教授、同济大学国际知识产权研究院联合院长彼得·迈尔-贝克博士（Dr. Peter Meier-Beck）等的大力支持。其中，施特劳斯教授为本书选取了11个案例（参见本书Part 1），迈尔-贝克法官为本书选取了10个案例（参见本书Part 2）。

在此，我们要感谢如下人员参与了该书的编译工作：

江清云（同济大学法学院）：第一编案例一、三以及第二编案例五、六；

张怀印（湘潭大学法学院）：第一编案例二、九；

丁晓婕（同济大学法学院）：第一编案例四、五；

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柳建朋和夏楠楠也参与了校对工作，在此表示感谢。同时，要特别感谢中国—欧盟知识产权保护项目（二期）负责人潘凯洛先生（Mr. Carlo Pandolfi）对本书出版的关心和支持，以及中国—欧盟知识产权保护项目（二期）对本书编译出版的资助。

编者　单晓光　江清云
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于同济三好坞

目录—Content

Part 1

Part 2

引　言

判例在欧盟和中国知识产权法律体系中的地位和作用

为了最大化保障欧洲市场上商品的自由流通，欧盟必须在各成员国之间进行协调，使各国迥异的知识产权和反不正当竞争法律与相关欧共体的条约、条例和指令保持一致性，以免那些附着于有形商品之上的无形财产权因为各国法律规定的不一致而成为商品自由流动的障碍。

欧盟法院有关知识产权的判决，在促进欧洲知识产权法律体系的发展过程中发挥着举足轻重的作用。按照《欧共体条约》规定，欧盟法院拥有对欧盟法律（包括条约和条例）进行解释和适用的权力。当成员国法院在审判过程中遇到与欧盟法律的理解或适用问题，可以请求欧盟法院作出解释，成员国法院再依据这个解释作出判决。围绕《欧共体条约》的相关规定，欧盟法院通过一系列典型案例，对欧盟知识产权法律框架和具体制度作出了巨大贡献。如通过对 Philip Collins 案的判决，欧盟法院通过对《欧共体条约》第 7 条关于非歧视原则的解释，于 1993 年 10 月 29 日判决不得依国籍对来自于另外一个成员国的作品实行歧视，从而澄清了非歧视原则并非针对成员国法律之间的差异，而是保证欧共体成员国公民在任何一个成员国都应当获得国民待遇。欧盟法院在此后的判例中确立了著作权“非歧视性”原则，如 2002 年的 Puccini 案。

通过判例，《欧共体条约》第 30 条中关于限制或禁止商品自由流动的豁免措施之一的“工商业产权”除了被认为包括专利权、商标权、外观设计和制止不正当竞争的权利外，被扩展到了著作权和邻接权；通过判例，欧盟法院确立了“权利的存在与权利的行使”原则，来解决欧盟市场上商品自由流动与各国知识产权法律和政策不一致之间矛盾，据此，知识产权的授权条件和程序由各成员国的法律决定，一旦涉及知识产权的行使，则应当遵循欧盟法律，不得妨碍商品的自由流通；通过判例，欧盟法院确立了“知识产权的特定主题”原则以及具体的判断标准，用来识别那些在知识产权行使过程中构成对商品任意歧视或者掩盖性限制的行为；通过判例，欧盟法院还在欧洲共同体范围确立了“权利用尽原则”，认可了欧共体范围内著作权、商标和专利平行进口的合法性。

欧盟法院作出的判决不仅通过解释欧盟相关法律的方式，影响各成员国有关知识产权纠纷案件的结果，还在很大程度上促进了相关欧共体条例和指令的出台。事实上，在很多有关知识产权的欧共体条例和指令出台之前，欧盟法院就已经积累了丰富的判例为条例或指令的起草与通过提供司法实践上的支持。例如，Warner 案之于《出租权与出借权指令》。此外，如果欧共体的机构、成员国的政府、组织或个人，对欧共体通过的某项指令持异议，或者政府在贯彻指令时不力，相关主体也可以向欧盟法院提出请求，要求后者进行审查。欧盟法院在这个过程中作出的判决直接发挥确保成员国相关的知识产权法与欧共体条例或指令一致性的作用。

事实上，就法系多元化带来的困扰这一点来说，中国与欧盟是一样的。由于在法律继受过程中糅合了德国、美国等国家的知识产权法，中国目前的知识产权法律体系呈现出混合的特点，有关法律术语或概念在内涵和外延上，都比以往任何时期都更处于不确定状态。然而，在中国，由于沿袭成文法而非判例法传统，即便是最高人民法院审理并生效的案例都不能“作为先例并据以决案”，因此严格意义上讲，我国并不存在判例。法院不能突破法律的规定，作出超前的判决，尽管这样的做法时有发生，例如王蒙等六作家诉世纪互联侵犯著作权纠纷案，但是，单纯的成文法毕竟有一定的局限性，其固有的抽象性在丰富多变的社会现象面前有时不免捉襟见肘。

为了弥补成文法的不足，我国最高人民法院通过颁布司法解释的方式，对相关的法律条款和法律适用作出解释，以便指导各级法院的审判实践，在知识产权领域更是如此。面对知识产权纠纷中不断涌现的新的权益类型、新的侵权行为表现方式，最高人民法院制定和修订了大量的知识产权司法解释，涉及专利、商标、著作权、植物新品种、集成电路布图设计、技术合同、不正当竞争、权利冲突、计算机网络域名、知识产权犯罪、案件管辖和审理分工等内容。最高人民法院还通过案例指导等形式，明确了许多具体法律适用问题。

Introduction
The Role and Application of IPR Case Law in EU and China

To ensure the free movement of products in the European market at utmost, EU shall continue to make effort to harmonize the different national laws on Intellectual Property, Competition Laws with the relevant EU Treaty, EU Regulations and Directives, so as to eliminate the hindrance of free movement of products arising from different national laws on the intellectual property.

The relevant Court decisions made by ECJ have played a decisive role in promoting the development of EU IPR legal system. According to the stipulations in EU Treaties, ECJ enjoys the right to interpret and apply EU laws (*incl.* Treaties and Regulations). The national Court of the member state can send a plea to ECJ to interpret the laws whenever there is confusion on the understanding or application of EU laws, and then make its own decision based on the interpretation of ECJ. The ECJ has made great contribution to the legal framework of IP laws and specific IPR system through a series of decisions on the issues related to EU Treaty. For example, through the decision on *Philip Collins* Case, which is based on the interpretation of Article 7 of EC Treaty, the ECJ decided on 20 October 1993 that it is prohibited to discriminate the works originated from other member state on basis of nationality, and clarified that this non-discrimination clause was not about differences between national laws, but to ensure that in any EU country, citizens and foreigners from other EU countries were treated equally. Since then, the ECJ has established the rule of "non-discrimination" applicable to copyright, e. g. the *Puccini* Case in 2002.

Through practicing of case law, the "Industrial and Commercial Right" set forth in Article 30 of EC Treaty as one of exemption measures to limit or prohibit the free movement of products, apart from its original application to patent right, patent design, trademark and prohibiting unfair competition, has now been extended to copyright and its neighboring rights; through the practicing of case law, the ECJ has also established the rule of "the existence of a right and its enforcement", to solve the contradiction arising from the free movement of products in EU market with the different national IP laws and policies. In this context, the granting of IPR and its procedure are in accordance with the national laws, but as long as it concerns the enforcement of IPR, the EU laws shall prevail and the national laws shall not become a hindrance to free movement of products. With the case law practice, the ECJ has established rule of "Specific Subject-matter in IPR" and its specific judgment criteria for identifying those arbitrary discrimination or disguised limitation measures against free movement of products in the course of IPR enforcement. Through the case law practice, the ECJ has further established "Right

Exhaustion" rule within the European common market and confirm the legality of parallel import of copyright, trademark and patent within EU.

The decisions made by the ECJ have not only influence the consequence of the IP disputes in member states by the interpretation of relevant EU laws, but also promoted the promulgation of relevant EU regulations and directives. Indeed, before the promulgation of most of these EU regulations and directives, the ECJ has already accumulated abundant experience via case law practice and therefore obtained support in the drafting of relevant EU regulations and directives. For example, the *Warner* Case is influential to the "Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property". Furthermore, in case a specific EU institution, government of a member state, organization or individual is not consenting to a directive promulgated by the EU, or the implementation of the directive is not fully supported by the government, the relevant party can also submit an application to the EJC for scrutiny. Therefore, the decision made by the ECJ in this regard has played an important role in harmonizing the national IP laws with the EU regulations and directives.

In fact, China faces the same challenge of different sources of law as EU. The current Chinese intellectual property law has a mixed feature due to its transplantation from German and the U. S. , therefore its legal terms or legal concepts are unstable than ever before in terms of its connotation and extension. However, as China follows a civil law tradition rather than a case law tradition, even the cases adjudicated by the People's Supreme Court of PRC cannot be treated as precedent cases which fall within the rule of "stare decisis", therefore, from a strict definition, China does not have case law. The Court cannot make a judgment based on precedent decision and thus go beyond the existing laws. Even though such practice does happen sometimes, like *Wang Meng* Case, in which *6 authors incl. Wang Meng v. the internet provider VNET* for infringement of their copyright. It is worth to note that there is a limitation of civil law since its inherent abstract concept is out at elbows to deal with the fast changing society.

To offset the disadvantage of civil law, the People's Supreme Court of PRC has promulgated some legal interpretation on relevant legal clauses and on legal application by the form of judicial interpretation, so as to guide the trial activities of the lower level Courts. This is especially in the field of intellectual property right. Challenged by growing new types of legal rights in IP disputes and the new forms of infringement, the People's Supreme Court of PRC has promulgated and rectified plenty of judicial interpretation on IP, including the laws of patent, trademark, copyright, new varieties of plant, integrated circuit layout design, technical contract, unfair competition, conflict of rights, computer internet domain, IP crime, case jurisdiction and division of judicial work etc... The People's Supreme Court of PRC also clarified many specific issues on legal application through guidance on case judgment.

第一编