# 写作评价样本分析

## 2006法学

### 董事违反注意义务的责任

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| 公司法上，注意义务制度是董事义务的一个重要组成部分，对董事的行为的指引、行为评价具有重要的现实意义。  本文主要通过比较分析和案例研究的方法对董事注意义务的理论的提出、标准、构成要件以及董事违反注意义务责任的缓和免除机制进行论述。本文亦对完善我国《公司法》中董事注意义务制度提出了一些意见和建议。 | In corporation law, the duty of care is one of important parts of board directors’ duties. The duty of care for board directors has an important realistic meaning for guiding and valuing board directors’ behaviors.  These essay mainly exposits the liabilities that board directors breach the duty of care through using the methods of the comparative analysis and case research. The content includes the standard of the duty of care, the business judgment rule and board director’s liability easing system. This essay also proposes some opinions for improving China’s Corporation Law about board directors' duty of care. |

### WTO补贴规则对中国国有企业改革的规制

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| 在一定程度上，当今国有企业改革法律研究中存在着关于WTO补贴规则的忽视和误解。一方面，这些忽视和误解的根源来自于对于规制中国的WTO补贴规则的渊源认识不充分,而另一方面，这些忽视和误解的延续和传播很可能导致改革后的国有企业承受WTO其他成员的反补贴措施的风险。  约束中国政府的WTO法律渊源不光包括GATT和《SCM协定》这样的多边协定，而且还包括中国在《入世议定书》和《工作组报告》中也做出了大量的实质性的具体承诺。  本文随后澄清了WTO补贴规则对中国规制的不容乐观的真实状况。然后，在此基础上，以国有企业改革中的“债转股”的做法为例，分析了国有企业改革中的措施在WTO规则下遭遇反补贴措施的可能性。最后作者提出了国有企业改革中协调对国有企业的援助需要与遵守WTO补贴规则的需要的几条意见。 | To some extent, the regulations of subsidies under WTO are ignored or misunderstood in the research concerning Reform of State-owned Enterprises (SOEs). On one hand, the origin of ignorance and misunderstanding is the result of the inadequate knowledge of the Sources of WTO Rules binding on China. On the other side, the continuance and dissemination of ignorance and misunderstanding will cause the SOEs to bear the risk of countervailing measures by other members of WTO. The resources of WTO law binding on China do not just contain multilateral agreements such as GATT and SCM Agreement, but also a lot of material promises in China Accession Protocol and Work Group Report. Based on the real regulation of WTO to Chinese government’s subsidies policies, the author use the example of “debt to equity” to analyze the possibility for SOEs which benefited from government’s reform policies to encounter other member’s countervailing measures. Lastly, author gives some pieces of advices to get a harmonized result balancing between the need to aid SOEs in reforms and the need to obey the WTO subsidy rules. |

### 3. 中国名誉侵权实证研究－－以新闻侵权为视角

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| 近年来，我国公民的人身权利保护意识逐渐增强。同时，新闻媒体也越来越注重发挥其舆论监督的作用。这两者的结合导致了媒体侵害名誉权纠纷案件出现了大幅度上升，且此类案件常因涉及面广、案情复杂、损害后果严重而引起公众的关注。 在平衡宪法所确立的言论自由这一基本权利与部门法（民法、刑法）所保护的民事主体的名誉权的过程中，我国在司法实践中出现的主要问题是法院对新闻媒体行使舆论监督权的限制过于苛刻，从而难以真正实现新闻自由、独立与真实。 本文的基本观点是，在媒体侵害名誉权案件中，应当从法律上对诉讼主体进行区分，并给予不同标准的名誉权保护。我国应当将诉讼主体分为三类，分别是：国家公职人员、公众人物和普通人。 本文采用案例讨论的研究方法，依据上述分类标准选取近年来五个比较有代表性的案例，在对每个案例加以评论后详细讨论该案的最独特之处，探究影响法官判决的因素以及未来可能的发展趋势等，期望可以以此涵盖当前媒体侵害名誉权诉讼的热点问题。同时，在每种分类形式下辅之以若干在某一问题上具有突破性意义的案例，补充说明观点和提出建议。并且，文章参考了英美法系的相关著作和判例进行比较法研究，进一步分析指出我国司法机关应当如何对英美法规则进行有选择性的采纳。 | In the recent years, Chinese people tend to think more of the protection to their personal rights; the media play a more and more important role as a Watchdog. This leads to a dramatic raise of the cases on Torts to Reputation brought by media. On the process of balancing the right of freedom of press and the protection of reputation, our court seems making too much limitation to prohibit the free exercise of media, the freedom and independence of press was infringed in some cases.  This article holds the point that the plaintiffs should be legally divided into three groups: Public Official, Public Figure and Ordinary People, the range and degree of protection should also subject to change in accordance to the identity of plaintiffs.  A research method of case analysis is adopted in this article. After reviewing each case, the most unique point is particularly construed, especially on the side of factors to affect the judgment and the possible and changes in the future. Meanwhile, several cases are also involved as supplemental evidence to the argument. Literature and cases in the Common Law countries are taken as reference to conduct the Comparative Law research; moreover, the article indicates the ways of how to adopt rules in Common Law system with modification. |

## 2007法学

### 4. 商标显著性丧失的认定标准研究——以中美法律制度比较为视角

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| 商标显著性是指商标区别商品或服务来源的属性。商标一旦缺乏或丧失显著性，就不可能获得注册，已注册商标的功能也不能正常延续。   笔者采用实证案例、比较分析的方法，通过介绍和分析中美两国法律制度下对商标显著性丧失的法律规定、理论学说、典型判例，对在商标显著性丧失的三种典型途径——商标变成通用名称、商标混淆和商标淡化之下，商标丧失显著性的认定标准进行了全面、系统、详细的研究，提出了对完善我国相关法律制度的建议。 | The distinctiveness of trademarks is one of the most basic and important characters of trademarks. Without distinctiveness, trademarks can not get trademark registrations and the absence of distinctiveness will also cause the ending of the existing of trademarks. Generally, turning to generic terms, confusion and dilution, which included two catalogs, blurring and tarnishment, are the three common ways of losing distinctiveness to trademarks.    The author summarized the principles of determining lost of distinctiveness to trademarks through introducing and analyzing the law, rules, theories, case in the USA and China, in order to make suggestions respect to the legislation in the future of China. |

### 5. 我国海外投资保险代位权法律问题探析

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| 许多国家建立了海外投资保险制度，对本国海外投资者在国外可能遇到的政治风险提供保险。我国也应当建立海外投资保险制度，代位权是这一制度的核心内容。海外投资保险代位权的行使必须有国际法上的依据，本文介绍了实践中存在的双边投资保护协定和外交保护原则这两种法律依据。据此，海外投资保险制度又分为双边、单边以及混合三种不同的模式。根据国情，本文认为我国应当选择混合的海外投资保险代位权模式。 | Overseas investment insurance system which has been established in many countries is very important to protect overseas investments against political risks in foreign countries. We should establish overseas investment insurance law in China and have a good consideration on the subrogation-the most critical parts of overseas investment insurance system. The overseas investment insurance organizations can get subrogation according to its domestic law; while they must perform it according to international law. This paper introduces two kinds of legal bases of subrogation, including bilateral investment protection agreements and the principle of diplomatic protection. There are three kinds of overseas investment insurance systems: bilateral, unilateral and mixed modes. In recent years, the overseas investment of our country has grown rapidly. We have signed bilateral treaties with more than 100 countries and had some overseas investment operations. This paper compares these three modes and draws the conclusion that we should establish mixed overseas investment insurance system in China. |

### 6. BOT方式中的政府保证再认识

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| 作为吸引私人资本进入基础设施建设领域的有效方式，BOT在经济迅猛发展的今天拥有广阔的运用前景。政府保证是BOT特许协议的核心内容之一，直接影响到特许协议的成立。鉴于学界对政府保证的一些基本问题尚无清晰的界定，本文从政府保证的概念与性质入手，初步建立了政府保证的概念体系，进而重新梳理了政府保证的分类。随后，本文整合了学界有关政府保证权限的观点，通过法理分析和现行法梳理，明确了现行法下政府做出政府保证的权限。最后，本文简要分析了政府保证权限设置的考量因素，明确了权限设置的基本立场，并对具体权限的设置提出了合理化的建议。 | As an effective way to attract private capital into the infrastructure construction, the use of BOT has a broad prospect, especially in the time of business prosperity. Government undertaking, directly influencing the conclusion of the project agreement, is one of the core elements of the agreement.   As the basic problem has not been clearly defined, this paper begins with the definition and nature of the government undertaking, then, the paper renews the classification of government undertakings. Subsequently, the paper reviews the academic research on the competence of the government to give government undertakings. Through jurisprudential analysis and existing-law review, the paper expounds the practical competence of Chinese government. Finally, this paper concisely analyzes elements needed considering, during the authorization, the basic position on the authorization, and some specific government undertakings. |

### 7. 利用P2P软件共享淫秽电子信息行为的成因、定性与规制

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| 随着网络技术的发展与运用，利用根据Peer-to-Peer（简称P2P）技术原理开发的应用软件传播淫秽电子信息的现象愈演愈烈并有蔓延失控之势。P2P软件为用户提供的“共享”功能是行为人传播淫秽电子信息的主要途径。文章以在北京高校风靡的Maze软件为例，首先对P2P软件的技术特点与Maze的系统优势进行实证研究，揭示了“共享”这一传播方式与传统的利用互联网站传播淫秽物品的区别和对现行法律提出的严峻挑战。在此基础上，文章从现行法律规制的漏洞与滞后、Maze积分机制的激励、Maze非法文件屏蔽技术的局限与处罚规则的乏力等方面分析了此现象多方面的成因。文章着重研究了利用P2P软件共享淫秽电子信息行为的法律定性，对诸如“共享”行为的法律定性、Maze积分的法律定性、多镜像下载情形下的数个共享行为的法律定性等问题进行了初步的开创性的探讨。文章认为，利用P2P软件共享淫秽电子信息的行为应视是否具备法定情形而分别构成传播淫秽物品罪或传播淫秽物品牟利罪。文章对P2P环境下认定传播淫秽物品罪的几类特殊问题一并进行了讨论，并且对网络犯罪刑法规制的必要性、模式选择和技术中立原则提出了建议 | With the development and application of the network technology, spreading pornographic electronic information by means of software developed from peer-to-peer (hereinafter referred to as P2P) technology has become increasingly worse and has the tendency of out of control. “Sharing” function provided by P2P software has been the main method for the doer to do so. The article took “Maze” as an example to make an empirical research on the technical characteristic of P2P and the superiority of Maze. In above foundation, the article analyzed various reasons of this phenomenon. The article centralized its attention on the research of legal nature of spreading pornographic electronic information by means of “sharing” function. The main conclusion of this article is that such behavior should be punished as the crime of spreading pornographic articles for seeking profits or the crime of spreading pornographic articles according to the Criminal Law. The article also discussed some special questions about the crime of spreading pornographic articles under the circumstance of P2P, and put forward some suggestions on the necessity of criminal law constraint on network crimes and the principle of technology neutrality, etc. |

## 2008法学

### 8. 论绑架杀人的共犯

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| 绑架杀人罪即刑法第239条第1款后半句规定的“杀害被绑架人”。绑架杀人行为由绑架和故意杀人两行为构成，属于结合犯。未参与绑架行为的人中途参与杀人行为的，成立故意杀人罪的共犯；后行为人独立实施杀人行为的，前行为人与后行为人成立绑架杀人罪的共犯；前行为人杀人后，后行为人加入的，后行为人只对加入后的行为承担责任；绑架行为人中的一方独立实施杀人行为的，视另一方有无共同故意、共同行为或者有无保护被绑架人生命的作为义务，判断另一方是否成立绑架杀人罪的共犯。 | The crime of kidnapping murder is "the killing of kidnapped people" in the latter phrase of the Penal Code Article 239, paragraph 1. It is a combination crime constituted by kidnapping and intentional homicide. perpetrators who are not involved in the kidnapping but take part in the killings, only establish an accomplice to the crime of intentional homicide.The poeple who are not involved in the kidnapping but commit intentional homicide themselves,set up the collusive crime of kidnapping murder with the people who comimt kidnapping.After the people who commit kidnapping kill the victims, the sequela is only responsible for the actions after his entry;If some of the criminals of kidnapping kill victims independently, judging whether the others set up an accomplice to the crime of kidnapping murder depends on whether there is co-intentional, common acts and the obligations of protection the victims’lives. |

### 9. 对德国民法上的“纯获法律上利益”的理解及其对中国民法的启示

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| 本文借助《德国民法典》、学术理论与德国法院判例，分别从判断标准、判断方法、与物权行为理论的联系等角度，具体分析德国民法中“纯获法律上利益”规定及其相关联的未成年人民法保护制度，并将中国法上的相关规定与之相比较。由于我国民法未采物权行为理论，使得在我国区分法律利益与经济利益的意义不大，但“纯获法律上利益”对我国相关制度的完善有一定的借鉴价值。 | With "German Civil Code", academic theory and the German court case, this paper analyses the "receive only a legal benefit" in the German civil law and its associated civil provisions of Minors protection from the point of judging standard, judging methods, and the relation to the theory of Juristic Act of Real Right. This paper also compared the relevant Chinese law with it. Because the Chinese civil law does not adopt theory of Juristic Act of Real Right, it is not so meaningful to distinguish the legal benefit and economical profit. However, the associated regulations of "receive only a legal benefit" are good reference for the perfection of the relevant Chinese system to some extent. |

### 10. 布朗案与法律的平等保护——Derrick Bell对布朗案的批判

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| 1954年布朗案毫无疑问是美国历史上最著名的案件之一，它推翻了普莱西案所确立的“隔离但平等”的种族隔离制度。自判决下达以来，布朗案已经成为了美国最受人爱戴的法律和政治符号。本文试图通过Derrick Bell及其种族批判理论，揭示布朗案既没有解决黑人的教育问题也没有解决平等问题，反而导致了90年代以来“重新隔离”的出现；而如果美国这种白人主导的社会和种族结构不发生根本改变，黑人的利益和权利只有在能够服务于白人或者社会更大的利益时才被考虑，布朗案判决就是这种“利益融合”的典型。 | On May 17, 1954, the Supreme Court of the United States handed down one of its most famous opinion—Brown v. Board of Education of Topeka, Kansas, and overturn the Plessy v. Ferguson and its doctrine of “separate but equal”. In the thesis, I attempt to discuss Brown by the Derrick Bell’s race critical theory, and point out Brown improved neither the educational equity of black children nor the subordination status of black people; In the America white-dominate society, black interests and rights are recognized and protected for only so long as they advance the white’s interests, and the Brown is just a typical “interest-convergence covenants”. |

### 11. 天然气输送管网第三方准入的制度研究

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| 大力发展天然气产业是我国优化能源结构的重要举措，为此中国制定了天然气的发展规划。但是天然气输送管网具有自然垄断性，缺乏有效监管将损害消费者利益。打破管网垄断，需要建立第三方准入制度。  本文从概念入手，首先分析了该制度的理论基础，第三方准入既是政府有效监管的方式，是降低社会成本和反不正当竞争的要求；也是法律为保护公共利益而确立的一种强制缔约。在比较借鉴美国、英国和欧洲大陆的天然气管网准入改革的经验的基础之上，结合我国该领域的行业现状和法律现状，本文提出了我国天然气输送管网第三方准入的制度构建。 | China has made a plan to promote the development of natural gas, which will play a key role in the optimization of Chinese energy structure. Natural gas pipeline network is a natural monopoly and the lack of effective supervision will damage the interests of consumers. Third party access system is essential for breaking monopoly.  Giving a definition, this paper analyzed the theoretical basis of the system. Third party access is a way of effective regulation, social cost reduction and anti-unfair competition. In addition, it is law confirmation of compulsory contracting in the natural gas transaction. The paper summarized the experience of establishing third party access of pipeline network in the United States, Britain and continental Europe countries. Then it introduced the development status of natural gas pipeline and current legislation. Based on the foreign experience and national conditions of China, The paper proposed specific measures for system construction of third party access in natural gas pipeline network. |

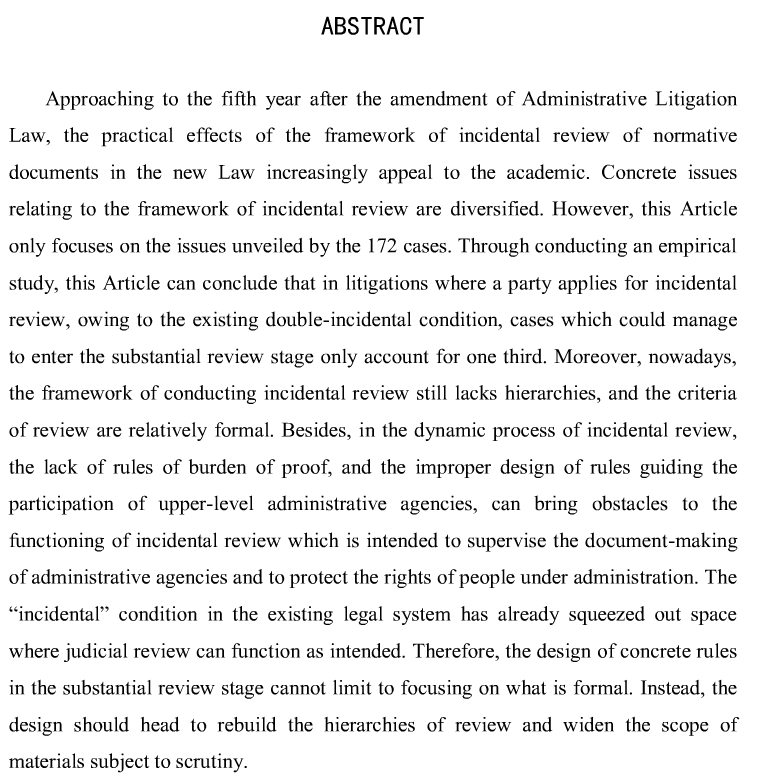
### 12. 私有协议：创新时代的垄断

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| 私有协议是一个由单独企业或者组织发展出来的通讯格式，是基于网络效应形成的事实标准。从加入 WTO协议开始，我国民用高科技发展进入全球化阶段，在这一阶段我国民用高科技产业开始遭遇到各种各样的危机，其中之一就是跨国企业通过掌握私有协议，主导和控制产业的发展方向，主持产业的利润分配。  知识产业中的竞争表现出与传统产业部门不同的特征，原有的垄断认定标准是否还适用于知识产业就成为各方关注的问题。鉴于学界对高科技领域的反垄断问题仍然机械地适用反垄断法的情况，本文从私有协议入手，以小见大地分析了各国（地区）的各种反垄断措施及其异同和原因，将创新作为本文的主线，对于创新时代的反垄断法和知识产权法的关系提出了新的分析角度。 | Proprietary Protocol is a kind of Communication Formats developed by a single firm or a group of cooperated firms. It is a de facto standard resulted from network effects or network externalities. From the year China joined into the WTO, Chinese civilian high-tech industries have begun to face kinds of crisis in the globalization phase, one of which was being held-up by multinational through Proprietary Protocol.   The question addressed by the paper is whether standard procedures and widely accepted insights of antitrust law remain valid when one deals with potentially anti - competitive conduct in innovative industries. The question of appropriateness arises because competition in these industries displays features that are radically different from those encountered in traditional sectors of the economy. As the standard antitrust analysis involving a step - wise procedure is still of use in innovation industries, the paper begins with the definition and nature of Proprietary Protocol, introducting and distinguishing the differences methods among countries and regions and finding out the reasons, it also analyzes elements needed considering between antitrust law and intellectual property law in innovations industries and offers a new point of view. |

## 2019法学

### 13. 规范性文件的附带司法审查 ——以172个案例为分析样本；

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| 临近《行政诉讼法》修改后的第五年,新法设计的规范性文件附带审查制度究竟在司法实践中实效如何,引人属目。,有关这一制度的具体话题涉及方方面面, 但本文仅贴合172个司法案件所反映的事实进行论述。基于实证研究,文章初步得出经验性的结论,在行政相对人提出附带审查申请的案件中,由于双重附带性条件的存在,真正能够进入实质审查环节的案件仅占总量的三分之一。而且,目前实践中合法性审查展开的层次依然较为单一,具体的审查标准偏重形式的判断。  此外,在司法审查的动态展开中,举证责任规则的缺失、上级行政机关参与规则建构的偏差,都会对附带审查制度监督依法行政、保障公民权利功能的发挥造成障码。现行制度为司法审查设计的附带性条件,已经挤压了审查功能发挥的空间, 因此实质审查阶段的规则设计不可再固守形式,更应在司法资源合理运用的前提下朝着深化审查层次、拓宽审查解明程度的方向发展。 | Approaching to the fifth year after the amendment of Administrative Litigation aw, the practical effects of the framework of incidental review of normative documents in the new Law increasingly appeal to the academic. Concrete issues relating to the framework of incidental review are diversified. However, this Article only focuses on the issues unveiled by the 172 cases. Through conducting an empirical study, this Article can conclude that in litigations where a party applies for incidental review, owing to the existing double-incidental condition, cases which could manage to enter the substantial review stage only account for one third. Moreover, nowadays the framework of conducting incidental review still lacks hierarchies, and the criteria of review are relatively formal Besides, in the dynamic process of incidental review.  the lack of rules of burden of proof. and the improper design of rules guiding th participation of upper-level administrative agencies, can bring obstacles to the functioning of incidental review which is intended to supervise the document-making of administrative agencies and to protect the rights of people under administration. The incidental"condition in the existing legal system has already squeezed out space where judicial review can funetion as intended. Therefore, the design of concrete rules in the substantial review stage cannot limit to focusing on what is formal, Instead, the design should head to rebuild the hierarchies of review and widen the scope of materials subject to scrutiny |



### 《文字蒙求》版本及象形卷研究

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| 王筠《文字蒙求》是甲骨文发现之前19世纪中叶汉字本体研究的代表作。历来多被视为蒙学之书，很少作为独立学科从文字学角度来探讨此书的学术价值。《文字蒙求》前后不同版本正反映了作者依据当时所能见到的材料，对汉字认识的不断深入，其中许多见解竟与后来出土的甲骨文吻合。本文试图收集《文字蒙求》所有版本信息，通过对王筠《文字蒙求》的版本及相关研究著作的全面考察，特别是通过对《文字蒙求》象形卷的版本比对，系统讨论王筠的六书观念、象形观念、象形分类等具体问题，力求客观判定《文字蒙求》的文字学价值，探讨前甲骨文时代汉字本体研究的学术成果和局限。 | Wang Yun’s Wenzi Mengqiu（The Preliminary Pamphlet Of Characters）was a characteristic work on Chinese philology in the middle of the 19th century before oracle bone inscriptions were unearthed. However, it had historically been considered more as a primer than a composition as an independent subject that deserved a philological insight into its academic importance. The variation among versions tells the fact that the author, Mr. Wang, kept sharpening his understanding of Chinese characters so steadily that his results even agreed with oracle bone inscriptions discovered later, thanks to the accumulation of research materials available at that time. This paper aims to encompass all the versions of Wenzi Mengqiu, commanding a systematic discussion of concrete topics such as Wang’s concept of Liushu（the six categories of Chinese characters）, pictographic characters of pictographs and their classification by giving a full-rounded investigation of all its versions and relevant research results, particularly by a holistic comparison of its pictographic versions, in order to objectively valuate this works in philology and probe into the research results and their limits on the origin of Chinese characters before the times of oracle bone inscriptions. |