them in the care of local authorities or with foster parents. In the business world, too, the law regulates the activities of the limited company, the partnership and the trade union. Financial deals between people in business are subject, normally, to the law of contract, at least in theory, and there are many obligations contained in Acts of Parliament such as the Companies Acts, with whose regulations all companies must comply.[1]

貳、案例檢選

E.I. DU PONT DE NEMOURS & COMPANY, INC. v. CHRISTOPHER
431 F.2d 1012
United States Court of Appeals, Fifth Circuit
August 25, 1970

GOLDBERG, JUSTICE. This is a case of industrial espionage in which and airplane is the cloak and a camera the dagger. The defendants-appellants, Ro1fe and Gary Christopher, are photographers in Beaumont, Texas. The Christophers were hired by an unknown third party to take aerial photographs of new construction at the Beaumont plant of E. I. du Pont de Nemours & Company, Inc. Sixteen photographs of the Du Pont facility were taken from the air on March 19, 1969, and these photographs were later developed and delivered to the third party.

Du Pont employees apparently noticed the airplane on March 19 and immediately began an investigation to determine why the craft was circling over the plant. By that afternoon the investigation had disclolsed that the craft was involved in a photographic expedition and that the Christophers were the photographers. Du Pont contacted the Christophers that same afternoon and asked them to reveal the name of the person or corporation

[1] 參考 phil Harris, An lntroduction to Law, 7th ed., (Cambridge, UK：Cambridge University Press, 2008) .pp 11-12.

requesting the photographs. The Christophers refused to disclose this information, giving as their reason the client's desire to remain anonymous.

Having reached a dead end in the investigation, Du Pont subsequently filed suit against the Christophers, alleging that the Christophers had wrongfully obtained photographs revealing Du Pont's trade secrets which they then sold to the undisclosed third party. Du Pont contended that it had developed a highly secret but unpatented process for producing methanol, a process which gave Du Pont a Competitive advantage over other producers. This process, Du Pont alleged, was a trade secret developed after much expensive and time-consuming research, and a secret which the company had taken special precautions to safeguard. The area photographed by the Christophers was the plant designed to produce methanol by this secret process, and because the plany was still under construction parts of the process wee exposed to view from directly above the construction area. Photographs of that area, Du Pont alleged, would enable a skilled person to deduce the secret process for making methanol. Du Pont thus contended that the Christophers had wrongfully appropriated Du Pont trade secrets by taking the photographs and delivering them to the undisclosed third party. In its suit Du Pont asked for damages to cover the loss it had already sustained as a resuly of the wrongful disclosure of the trade secret and sought temporary and permanent injunctions prohibiting any further circulation of the photographs already taken and prohibiting any additional photographing of the methanol plant.

The Christophers answered with motions to dismiss for lack of jurisdiction and failure to state a claim upon which relief could be granted. Depositions were taken during which the Christophers again refused to disclose the name of the person to whom they had delivered the photographs. Du Pont then filed a motion to compel an answer to this question and all related questions.

On June 5, 1969, the trial court held a hearing on the pending motions. The court denied the Christophers' motions to dismiss for want of jurisdiction and failure to state a claim. The court granted Du Pont's motion to compel the Christophers to divulge the name of their client. Agreeing with the trial court's determination that Du Pont had stated a valid claim, we affirm the decision of that court.

This is a case of first impression, for the Texas courts have not faced this precise factual issue, and sitting as a diversity court we must sensitize our Erie antennae to decide what the Texas courts would do if such a situation were presented to them. The only question involved in this interlocutory appeal is whether Du Pont has asserted a claim upon which relief can be granted. The Christophers argued both at trial and before this court that they committed no "actionable wrong" in photographing the Du Pont facility and passing these photographs on to their client because they conducted all of their activities in public airspace, violated no government aviation standard, did not breach any confidential relation, and did not engage in any fraudulent or illegal conduct. In short, the Christophers argue that for an appropriation of trade secrets to be wrong there must be a trespass, other illegal conduct, or breach of a confidentioal relationship. We disagree.

It is true, as the Christophers assert, that the previous trade secret cases have contained one or more of these elements. However, we do not think that the Texas courts would limit the trade secret protection exclusively to these elements. On the contrary, in Hyde Corporation v. Huffines, 1958, 158 Tex. 566, 314 S. W. 2d 763. the Texas Supreme Court specifically adopted the rule found in the Restatement of Torts which provides:

One who discloses or uses another's trade secret, without a privilege to do so, is liable to the other if

⑷ he discovered the secret by improper means, or

⑸ his disclosure or use constitutes a breach of confidence reposed in him

by the other in disclosing the secret to him.

Thus, although the previous cases have dealt with a breach of a confidential relationship, a trespass, or other illegal conduct, the rule is much broader than the cases heretofore encountered. Not limiting itself to specific wrongs, Texas adopted subsection (a) of the Restatement which recognizes a cause of action for the discovery of a trade secret by any "improper" means.

The question remaining, therefore, is whether aerial photography of plant construction is an improper means of obtaining another's trade secret. We conclude that it is and that the Texas courts would so hold. The supreme court of that state has declared that "the undoubted tendency of the law has been to recognize and enforce higher standards of commercial morality in the business world." Hyde Corporation v. Huffines, supra 314 S. W. 2d at 773. That court has quoted with approval articles indicating that the *proper* means of gaining possession of a competitor's secret process is "through inspection and analysis" of the product in order to create a duplicate. Later another Texas court explained：

The means by which the discovery is made may be obvious, and the experimentation leading from known factors to presently unknown results may be simple and lying in the public domain. But these facts do not destroy the value of the discovery and will not advantage a competitor who by unfair means obtains the knowledge *without paying the price expended by the discoverer.* （Brown v. Fowler, Tex. Civ. App. 1958, 316 S.W. 2d 111.）

We think, therefore, that the Texas rule is clear. One may use his competitor's secret process if he discovers the process by reverse engineering applied to the finished product; one may use a completitor's process if he discovers it by his own independent research; but one may not avoid these labors by taking the process from the discoverer without his permission at a time when he is taking reasonable precautions to maintain its secrecy. To obtain knowledge of a process without spending the time and

money to discover it independently is *improper* unless the holder voluntarily discloses it or fails to take reasonable precautions to ensure its secrecy.

In the instane case the Christophers deliberately flew over the Du Pont plant to get pictures of a process which Du Pont had attempted to keep secret. The Christophers delivered their pictures to a third party who was certainly aware of the means by which they had been acquired and who may be planning to use the information contained therein to manufacture methanol by the Du Pont process. The thired party has a right to use this process only if he obtains this knowledge throght his own research efforts, but thus far all information indicates that the third party has gained this knowledge solely by taking it from Du Pont at a time when Du Pont was making reasonable efforts to preserve its secrecy. In such a situation Du Pont has a valid cause of action to prohibit the Christo phers from improperly discovering its trad secret and to prohibit the undisclosed third party form using the improperly obtained information.

We note that this view is in perfect accord with the position taken by the authors of the restatement. In commenting on improper means of discovery the savants of the Restatement of Torts said：

f. Improper Means of Discovery. The discovery of another's trade secret by improper means subjects the actor to liability independently of the harm to the interest in the secret. Thus, if one uses physical force to take a secret formula from another's pocket, or breaks into another's office to steal the formula, his conduct is wrongful and subjects him to liability apart from the rule stated in this section. Such conduct is also an improper means of procuring the secret under this rule. But means may be improper under this rule even though they do not cause any other harm than that to the interest in the trade secret. Examples of such means are fraudulent misrepresentations to induce disclosure, tapping of telephone wires, eavesdropping or other

espionage. A complete catalogue of improper means is not possible. In general they are means which fall below the generally accepted standards of commercial morality and reasonable conduct.

In taking this position we realize that industrial espionage of the sort here perpetrated has become a popular sport in some segments of our industrial community. However, our devotion to freewheeling industrial competition must not force us into accepting the law of the jungle as the standard of morality expected in our commercial relations. Our tolerance of the espionage game must cease when the protections required to prevent another's spying cost so much that the spirit of inventiveness is dampened. Commercial privacy must be protected from espionage which could not have been reasonably anticipated or prevented. We do not mean to imply, however, that everything not in plain view is within the protected vale, nor that all information obtained through every extra optical extension is forbidden. Indeed, for our industrial competition to remain healthy there must be breathing room for observing a competing industrialist. A competitor can and must shop his competition for pricing and examine his products for quality, components, and methods of manufacture. Perhaps ordinary fences and roofs must be built to shut out incursive eyes, but we need not require the discoverer of a trade secret to guard against the unanticipated, the undetectable, or the unpreventable methods of espionage now available.

In the instant case Du Pont was in the midst of constructing a plant. Although after construction the finished plant would have protected much of the process from view, during the period of construction the trade secret was exposed to view from the air. To require Du Pont to put a roof over the unfinished plant to guard its secret would impose an enormous expense to prevent nothing more than a school boy's trick. We introduce here no new or radical ethic since our ethos has never given moral sanction to piracy. The market place must not deviate far from our mores. We should not require a

person or corporation to take unreasonable precautions to prevent another from doing that which he ought not to do in the first place. Reasonable precautions against predatory eyes we may require, but an impenetrable fortress is an unreasonable requirement, and we are not disposed to burden industrial inventors with such a duty in order to protect the fruits of their efforts. “Improper” will always be a word of many nuances, determined by time, place, and circumstances. We therefore need not proclaim a catalogue of commercial improprieties. Clearly however, one of its commandments does say “thou shall not appropriate a trade secret through deviousness under circumstances in which countervailing defenses are not reasonably available.”

Having conculded that aerial photography, from whatever altitude, is an improper method of discovering the trade secrets exposed during construction of the Du Pont plant, we need not worry about whether the flight pattern chosen by the Christophers violated any federal aviation regulations. Regardless of whether the flight was legal or illegal in that sense, the espionage was an improper menas of discovering Du Pont’s trade secret.

The decision of the trial courts is affirmed and the case remanded to that court for proceedings on the merits.

參、案例釋明

一、事實（FACT）

此為一件有關「工商業間諜」之訴訟案件。

原告杜邦公司控告被告克利斯多福兄弟在被告生產甲醛之工廠上空，拍照（在飛機上空拍照）原告新近研發出來生產製造甲醛之工廠景觀。原告聲稱被告之拍照行為並未獲得原告之允許，且將照片在拍照之後交給「未透露」之第三者。這些照片如果經由有經驗之人士的研判解析，可以推斷出原告生產製造甲醛之「製程」。

applies to all races, decisions of this Court firmly establish that discrimination on the basis of racial affiliation and association is a form of racial discrimination…

We therefore find that the IRS properly applied Revenue Ruling 71-447 to Bob Jones University.

The judgments of the Court of Appeals are, accordingly, Affirmed.

參、案例釋明

一、事實（FACT）

鮑伯瓊斯大學（Bob Jones University）是一所教授基督教基本教義派信仰」（Fundamentalist Christian Beliefs）的大學。

在 1971 年之前，它完全拒絕黑人的入學。在 1971 至 1975 年期間，它開始接受了夫妻雙方均為黑人之申請入學。在 1971 至 1975 年期間，它開始接受了夫妻雙方均為黑人之申請入學。在 1975 年之時，校方允許未婚之黑人的註冊入學；但是卻執行了一個嚴格的政策，那就是禁止不同種族學生之間的約會與結婚，而且開除入何主張那樣想法的學生。

根據美國「國稅局」（Internal Revenue Service; IRS）對於「免稅」（Tax-Exempt）資格的解釋是：如果任何一個機構要合乎「免稅」之資格，那它必須是「普通法」（Common Law）意義下之「慈善機構」（Charitable Institution）。而根據普通法之認定，一個機構如果它的活動違反了「公共政策」（Public policy），那麼它就不是可以合乎「免稅」規定的慈善機構。而美國國稅局即認定鮑伯瓊斯大學前述的作為是一種「種族歧視」政策的執行，它的作法明顯的違背了國家教育政策的禁止種族歧視的作法。基於鮑伯瓊斯前述的種種美國國稅局認定是違反「慈善機構」的免稅規定，而宣布它意圖「挑戰」（Challenge）該大學之「免稅」地位，而撤銷了該大學之「免稅」地位。訴訟因此而起。

聯邦地區法院認定國稅局的撤銷行為超越了「委任授權」的範圍，而判國稅局敗訴。案子因此由「國稅局」上訴至美國聯邦上訴第四巡迴法院，推翻了聯邦地區法院的判決。

二、爭點（ISSUE）

㈠美國國稅局的撤銷鮑伯瓊斯大學的免稅資格是否逾越了美國聯邦國會之「委任授權」之權限範圍？

㈡鮑伯瓊斯大學之之拒絕給予不同種族之間的約會與婚姻人士的入學許可，是否在本質上為一種「種族歧視」的行為而合乎撤銷其免稅之地位？

㈢撤銷免稅地位之行為是否違反了第一增補案之宗教自由條款？

三、法則（RULE）

自從開始設置「國稅局」這個機關之時，聯邦國會即賦予國稅局廣泛之權力，來「解釋」稅方面的法律規定。聯邦國會賦予行政機關這樣的行政責任，來行使它的權力，用以因應情況之改變以及新問題之處置。行政機關的權力如果運作的不夠妥當，那麼聯邦國會應該可以修正既有之法規或制定新的法律，來「導正」行政機關權力之行使；如果聯邦國會「選擇」不去這樣「導正」；那麼行政機關之行使權力，就聯邦國會而言，是沒有什麼問題的。因此，聯邦國會如果認定行政機關的作法是「獨斷獨行」（Arbitrary）或是「濫用」（Abuse）了它的「權力」，那麼聯邦國會自然可以「有所作為」，避免類似的行為或作法在未來繼續發生。

就「宗教自由」而言，政府可以「正當化」（Justify）它對於「宗教自由」的限制，祇要政府能夠證明它的限制作法乃是基於一個「高於其他的」（Overriding）「政府利益」（Government Interest），而這樣的政府利益就存在於在「教育」的領域範圍內，消除種族歧視的利益，遠遠的高於宗教自由的信仰。

四、分析（ANALYSIS）

㈠本案所遇到的法律種類相當多，例如：憲法、制定法行政規範（Regulatory）、行政程序法、判例法以及傳統之普通法。憲法的問題是鮑伯瓊斯所主張之宗教自由信仰的抗辯。制定法的問題是指法院所提及的對於國稅局所作的稅法條規之「解釋」（Interpretation）。普通法則是國稅局對於「慈善機構」在本案中的定義之認定。對於國稅局是否有「權」（Authority）來「宣告」（Promulgate）相關稅法條款是屬於行政法的問題；而對於國稅局的使用「慈善機構」（Charitable Organization）來「宣告」它的行政規定則是「規範法」（Regulatory Law）的問題。

㈡本案驗證了「少數權」（Minority Rights）與「多數決」（Majority Rule）之間的衝突。我們沒有理由去懷疑該大學教職人員對於種族觀點的「誠懇性」（sincere）或者是他們基於宗教信仰所產生的觀點。然而，聯邦最高法院的意見，則是很清楚的指出鮑伯瓊斯大學的種族觀點與三權分立政府體制下所主張的「公共政策」（Public Policy）不能「匹配」（Compatible）。進一步來分析，所論及之不匹配，已經成為一種「衝突」（Conflict）型態之發生。換句話說，這裡之衝突即是指該大學的作法乃是在落實它虔誠的宗教信仰自由，為憲法第一增補案所賦予之權利，然而，如此一來，卻又與全國人民在三權分立的民主體制之下「多數決」要求去除在教育領域下的任何種族歧視的行為，有所不合。

㈢本案之程序與判決驗證了「法院」（即指司法權）在三權分立的政府官僚體制下，所扮演之角色。代表司法權行使之聯邦最高法院必須要作出決定，美國國稅局的取消鮑伯瓊斯之免稅資格，是否「合理」（Reasonable）？是否逾越了聯邦國會所給它之「委任授權」範疇。或者是鮑伯瓊斯大學之作法合乎憲法第一增補案的保障宗教信仰自由的權利。

㈣本案說明了在英美法系下，法官如何作出判決——此為一種「法官造法」（Judge-Made Law）亦即「判例法」（Case Law）的表現。而代表鮑伯瓊斯大學的律師又是提供了周延的抗辯，指稱受到免稅資格的機構只要是「慈善的」「或是」「教育的」機構即可，而無須是「慈善的」「以及」「教育的」機構。而法院則往往在「解釋」一個模糊的制定法或行政法規時必須要忠實的「確認」（Ascertain）聯邦國會的真意。其至於在「解釋」時有一個以上的解釋均是「合理」（Reasonable）時，仍然必須作出選擇其中之一。在像本案一樣的具有深遠影響及「里程碑」（Milestone）地位的重要性之案件，選擇哪一種解釋，將會對未來形成「先例」（Precedent）具有相當寬闊的影響力。就是像本案一樣的情形，才能顯示「法律」是一個在演進中的概念，雖然表面上看來，它似乎是一個「靜態的」（Static）的規定文字，而實際上它卻是不斷地在「改變」（Change）。亦即是它是一個「現在進行式」的規範概念，而不是一個「現在完成式」的指定要求。

五、結論（CONCLUSION）

英美法之發展，因時、因地，以及其他各種因素之交互影響之下，到了二十世紀的社會，呈現出來的意義與內涵，在事實上很難適應；因此，從各種不同的角度以及不同的層面去剖析它、去適用它，難免不會有「自我矛盾」的現象產生。本案是一個例子來說明這樣的現象。而多數美國人民對於這樣的「法律」適用，也抱有這樣的矛盾的情感。推究這樣的感覺之源頭，大概可以這樣的說明，就是說美國人民在新大陸的民主法治的成長與發展之下，對於下列三個問題，沒有辦法取得共識：㈠法律是什麼？㈡法律的來源為何？以及㈢法律應該用來做什麼？

上述的內在衝突，其實是美國人民對於法律的認知有所不同之結果，而且是有關於法律與其所存在之社會，彼此之關聯性難與取得「共識」（Consensus），所自然形成之現象。進一步來解析，美國人民大致上可以去同意「法治」（Rule of Law）的想法，卻不盡然會去同意

「法治」的意義與內涵。而這樣的結果，無須去分辯誰對或誰錯；或是對於這樣的問題去把它作出單一的解答或多重的解答。追根究底，法律是什麼的這樣的問題，一個中肯的答覆要端賴一般人對於法律的功能為何？以及法律的來源在哪裡，才能得到一個比較實際而可以接受的答案。

肆、教學評量題目

一、請問 Bob Jones University v. United Stats 包括了哪幾種法律？

二、請說明在 Bob Jones University v. United States 一案中 Minority Right 與 Majority Rule 之間的衝突。

三、請明說法院在督導政府「官僚體制」方面所扮演之角色。

四、請說法官如何作出他（她）的判決？

第十一章　契約法

壹、基本概念與名詞定義

一、Contract：契約

契約是指一個能發生法律後果的具有拘束力的協議，而所謂拘束力乃是指能夠在法院被要求「履行」或執行之意。更進一步來分析契約，一個契約是一個「承諾」（Promise）或一組承諾，一旦承諾有被違反時，法律上會給予救濟（Remedy），而且對於這樣的「承諾之履行」（Performance of Promise）法律上會將其認定為一種「義務」來看。

二、Formation of Contract：契約之形成

契約之形成要件有三：㈠必須要有兩個或兩個以上的當事人，而每一個當事人必須具有「法律人之資格或『能力』」（Legal Capacity）來簽訂「協議」（Agreement）；㈡必須要有「同意」（Consent）的存在（亦即一方提「要約」而他方作出「接受」要約的表示）如此來反映出在兩造之間對於協議之「要素」（Essential Elements）的相互瞭解；以及㈢這樣的「協議」要受「約因」（Consideration）或「義務」之履行的支撐。

三、Breach of Contract：契約之違反

契約成立中的任何一方，未能履行契約所列出來的條件，即違反了契約中所賦予之義務，則會被契約之他方提起法律訴訟，要求他方履行他的「契約義務」（Contractual Duty）。

四、Quasi-Contract：準契約

在許多情形下，法院在處理一些相關的糾紛時，會「認知」（Perceive）到有必要將金錢「回復」（Restore）給原告，即使被告根據契約乃至於侵權法的「一般法則」（Usual Rule）並不必受到拘束而要回復金錢補償給原告。而「準契約法」的發展，則提供了那樣的救濟。

五、Remedies for Breach of Contract[1]：契約違反之救濟

The most common remedy for breach of contract is for the court to assess monetary damages against the wrongdoer. Many contracts provide for liquidated damages—that is, a predetermined sum to be paid in the event of nonperformance. Compensatory damages are designed to place the aggrieved party in the economic position in which he would have been had the contract been performed; they constitute the most frequent type of award. Punitive damages, which are designed to punish intentional or malicious wrongdoers by heaping additional costs upon them, are generally not awarded in traditional contract cases. In contract law, the plaintiff may recover those damages which "may fairly and reasonably be considered … arising naturally, i.e., according to the usual course of things, from such breach of contract itself" as well as those damages "such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it."

The result is that damages will be assessed only for the harm that was foreseeable when the contract was made. A corollary legal rule imposes an affirmative duty on the aggrieved party to mitigate damages stemming from the breach and not to sit idly by allowing the damages to mount. The courts do not look kindly upon such procrastination and may reduce the

[1] James V. Calvi and Susan Coleman, American Law and Legal system, （Englewood Cliffs, N.J.: Prentice Hall, 1989）, pp.228-229.

amount of damages awarded; on the order hand, the aggrieved party is required to take only reasonable steps that do not lead to undue expense or humiliation.

六、Consideration[2]：約因

Every legal system distinguishes between promises which it chooses to enforce and promises which it will not enforce. One who seeks to enforce a promise in a common law jurisdiction must affirmatively establish a basis for finding the promise to be enforceable. There is no assumption or presumption that because a party made a promise, the promise should be enforced.

The primary basis for promise enforcement in the common law system is consideration. A distinction is made between gratuitous promises and those which are made as a part of bargained exchange. While there are other rules which will permit enforcement of certain gratuitous promises, the first inquiry should be to determine whether a promise was given in return for something or whether it was gratuitous.

Restatement, Second, Section 71 (1) provides: "To constitute consideration, a performance or a return promise must be bargained for." "Bargained for" does not require a bargaining process of offers and counter-offers such as might take place in a flea market. It simply means that the performance of the promisee, or the promise to perform, must have been given in exchange for the promise which the promisee is seeking to enforce.

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[2] Gordon D. Schaber and Claude D. Rohwer, Contracts, (st. Paul, M.N.: West Publishing Co. 1984), P.66.

第二十五章　法律與科技

壹、基本概念與名詞定義

一、Interaction between Technology and Law：科技與法律之互動[1]

科技的創新進步，對人類生活及行為造成巨大有變化，也關係到整體社會利益的持續增長；為確保科技發明能為人類帶來福祉，健全法制環境的建構乃維護創作研發成果及社會利益的要件；可見透過科技發展與法制建構的良性互動，方能維繫社會福祉與正義。也因此，科技的創新進步，使得科技在配合或主導社會活動發展之際，也與規範社會活動之法律產生互動，並且經由科技衍生的相關議題，逐漸形成「科技與法律」此一法律學門。

研究「科技與法律」此一新興領域科目，除了科技與法律兩項要素之外，也不能忽視科技的運用與法律的實行終究離不開「人」的要素，應以人為本之價值作為發展此一學科內涵與深度之依據。隨著科技不斷的演進，「科技與法律」此一學門固然無法有一確定的議題範圍，然其實質內涵，終究不脫將科技衍生的法律問題交由既有的傳統法學來處理，舉凡憲法、行政法、民法、刑法、民刑訴訟法、智慧財產權法、公平交易法、國際經貿法等等，均屬研究「科技與法律」學門的範疇（法律層面）。即使就二十一世紀的新興科技，例如網際網路與生物科技而言亦然。

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[1] 張瑞星、周天與程法彰，科技與法律，臺北，元照出版社，2008，第 1 頁。

二、Importance of Technology and Law：科技與法律之重要性[2]

㈠法律可視科技發展的程度調整各方利益的平衡

以著作權法為例，在保護著作權利人與保護著作使用者兩種法益權衡之間，最終之目的仍著眼於整體社會甚或人類文明是否因著作的產生而受益上。因此，兩種法益固然不能獨厚一方，然而如何在兩者之間取得平衡，卻是有著作權歷史以來一再重複發生的問題，此涉及著作權法的基本結構與長期以來立法者的立法意圖。法益的原始平衡往往在新一波科技發明之後遭到破壞，迎合科技而為之著作權法修正又使衝突的法益得到暫時的平衡；如此一再破壞與平衡間的折衝，造就了現今的一套著作權法。因此，在科技發明而破壞著作權法益平衡與修正著作權法而試圖平衡法益這兩者間的著作權法演進過程中，科技的發明與隨之而來的著作權法修正歷史實則已完全融入於著作權法典中，而為整部著作權法的核心。

㈡法律幫助解決科技發展所引發的各種規範問題

科技的發展猶如一把雙面刃:一方面賦予人類征服自然、改造自然的新手段，提高人類的生活品質並帶來社會經濟利益的巨幅成長；另一方面，科技發展也改變著人類的生活方式，許多傳統的法律與規範已不能因應新時代的需要，勢必帶來許多前所未有的規範衝突，此在新興的網際網路與生物科技方面所涉及的法律問題上表現得最為明顯。例如網路雖然帶領人類進入一個嶄新的數位時代，但是電子商務衍生的交易安全、網路犯罪、垃圾郵件等問題卻需要法律加以解決；而在生物科技方面，固然可以提升藥廠設計新藥的能力以更有效率地治療病患、預防疾病，但是例如基因科技所引發的人格權、倫理、禁止界限及風險等問題，也亟需一套有正當性與執行力的規範基礎。

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[2] 同前揭註；第 3 頁至第 4 頁。

㈢法律協助科技發展並確保科技發明成果

法律確保科技成果研發活動的進行，提供所應遵循的基本原則，例如專利法第 1 條所示：「為鼓勵、保護、利用發明與創作，以促進產業發展，特制訂本法。」法條內所謂的「鼓勵」是指政府鼓勵企業投入研究發展，而企業因其科技研發活動的成果，可能得到一個專利的獨占權；「保護」是指由國家賦予研發活動成果一種排除他人使用的排他權，以保護研發成果並給予經濟上誘因持續研發；而「利用」則有雙重意義：一是將研發成果提供大眾使用，提升生活品質，大眾則提供使用的回饋予研發者；另一意義則是指將他人研發成果作為再改良、再進步的基礎，避免資源的重複浪費，加速研發成果。因此，法律適度地規範政府、企業、個人在科技成果研發活動中的地位及各自的權利和義務，並從公平交易法、租稅法、促進產業升級條例等方面規定了保障科技研發成果的措施。

㈣法律協助企業對科技加以管理

智慧財產是企業競爭優勢的利基，如何利用科技研發創作的智慧資產轉化為商品並衍生出經濟利益，乃企業生存的命脈。此轉化與衍生的過程需要將資訊與企業的營運加以整合，稍有不慎即可能引發侵害著作權；商標權；專利權或營業秘密的疑慮。例如 P2P 檔案分享；KURO 音樂下載；日本 SHARP 控告國內華映科技；華映控告 LG；PHILIPS 向國內中環；錸德索取高額技術權利金；聯電和艦案；中芯半導體投資案等。可見企業對其科技管理應有智慧財產權之完整管理與規劃，方不致增加企業之營業成本與訴訟風險。因此，藉由法律的規定將智慧財產的保護納入科技企業的組織與研發中加以管理，除了可以保障科技成果的商品化、規範國際科技的競爭與合作外，也能推動和促進科技研發的順利進行。

三、Legal Framework of Technology and Law：科技與法律之法規範架構[3]

回顧科技發展的歷史不難發現，科技每往前邁進一步，科技研發或創作的權利人與享受成果的利用人間的利益平衡就需要由法律重新予以檢視；法益的原始平衡往往在新一波科技發明之後遭到破壞，迎合科技而為之法律修正又使衝突的法益得到暫時的平衡；科技發明或創作的成果，往往造就人類生活更多的便利性，然而只注重利用人的便利性而忽略發明或創作人的權利，或反之給予發明或創作人太大的權利而壓縮到一般利用人的合理空間，都是不恰當的。在法律賦予權利人和使用人利益間之平衡與隨科技而對平衡破壞間之反覆，事實上就是科技法律演進的核心，其在在都須以人類整體利益的考量為依歸；這是研究科技法律者不能輕易忽略的。

「科技與法律」此一學門正處於萌芽階段，隨著科技的急速邁進，可納入科技法律學門的領域並沒有特定的範疇，凡是經由科技活動直接或間接之刺激所帶動之法學議題，皆可被視為科技法律的一部分。。為求我國科技法學之長遠發展，能有系統性之高度成果，自有建立「科技與法律」規範架構之必要性，當然成熟之法律體系必須透過成文法、實務見解與學說理論，逐步成形，並應於該相關法規範之間構築出基本之法律原理原則及機能性之相關性。

嘗試自歷史的角度切入，探討科技相關法律因科技演變而成型的背後之政治經濟利益介入因素，再探討這些多重利益介入後，智慧財產權的強力私有化所逐步吞噬供公眾自由取用之公共領域範疇；其次，企業與企業間對於技術移轉時所產生的技術授權問題以及企業內部對於智慧財產權管理所衍生的相關法律問題，更是維繫企業命脈與經濟利益的重要議題。因此，我國「科技與法律」此一領域學門，至少應包括下述相關法規範架構：一、科技與法律的互動；二、公共領域的維護；三、網際網路的法律問題；四、生物科技法；五、技術授權的法律問題；六、企業智慧財產權管理等六大單元。

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[3] 同前註，第 6 頁。

四、Fundamentals of Law and Technology[4]：法律與科技之基礎

The concept of property is well understood in Western society. It is among the oldest institutions of human civilization. It is widely recognized that people may own real property and tangible objects. The common law and the criminal law protect private property from interference by others. The Fifth Amendment to the U.S. Constitution protects private property against takings by the government without just compensation. The philosophical bases for protection of private property are well entrenched in our culture. Private property has been viewed as resulting when labor is applied to nature, as an incentive for discovery, as an essential part of personhood, and as a foundation for an ordered economic system.

Ideas, by definition, are less tangible. They exist in the mind and work of humans. Legal protection for intellectual work evolved much later in the development of human society than did protection for tangible property. The protection of such "intellectual property" raises complex philosophical questions. Should the first person to discover a way of performing an important task—for example, a procedure for closing a wound—be entitled to prevent others from using this procedure? Should the first person to pen a phrase or hum a melody be entitled to prevent others from copying such words or singing the song? Should such "intellectual property rights" be more limited than traditional property rights（i.e., the fee simple）? This book explores the legal institutions and rules that have developed to protect intellectual property.

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[4] Robert P. Mergers, Peter S. Menell and Mark A. Lemley, Intellectual Property in the New Technological Age, 3rd ed.,（N.Y.: Aspen Publishers, 2003）, p.1.

五、Philosophical Perspectives of Intellectual Property Rights[5]：智慧財產權之思想層面

All justifications for intellectual property protection, whether based in economics or morality, must contend with a fundamental difference between ideas and tangible property. Tangible property, whether land or chattels, is composed of atoms, physical things that can occupy only one place at any given time. This means that possession of a physical thing is necessarily "exclusive"—if I have it, you don't. Indeed, the core of the Western concept of property lies in the right granted to the "owner" of a thing or a piece of land to exclude others from certain uses of it. Settled ownership rights in land and goods are thought to prevent both disputes over who can use the property for what purpose, and the overuse of property that would result if everyone had common access to it.

Ideas, though, do not have this characteristic of excludability. If I know a particular piece of information, and I tell it to you, you have not deprived me of it. Rather, we both possess it. The fact that the possession and use of ideas is largely "nonrivalrous" is critical to intellectual property theory because it means that the traditional economic justification for tangible property does not fit intellectual property. In the state of nature, there is no danger of overusing or overdistributing an idea, and no danger of fighting over who gets to use it. Everyone can use the idea without diminishing its value.

六、Contemporary Law and Technology[6]：法律與科技之現狀

The practice of law has changed dramatically in recent years. These changes and improvements are a part of the evolution of the practice of law. Twenty years ago there were no word processors. Computers filled

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5 同前註：第 2 頁。

6 Joanne B. Hames, Introduction to Law, （Upper Saddle River, N.J.: Prentice Hall, 1998）, p.426.