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西方版权沿革与贸易

The Evolution and Trade of Western Copyright

总主编／苏世军　主　编／陈凤兰　吕静薇

河南人民出版社

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The Evolution and Trade of Western Copyright

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内 容 提 要

该书介绍了西方主要国家的版权法的历史起源与演变，其中有版权法的性质和特点、制法依据、法律框架、国际版权协议与欧盟国家间的版权贸易协定产生的原委；此外还包括国际版权贸易的理论与实务，如版权贸易的基本内容与形式、版权的国际保护范畴、起诉侵权行为的法律手段和程序、侵犯版权的诉讼案例、避免侵犯版权的原则、利用版权开展业务的纲要、版权贸易合同的格式和内容等。

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前　言

这套出版贸易英语系列教材从策划、选材、编写到交稿付梓已历时五个春秋，在此期间有相当一部分内容已成为我院英语专业的必修课教材，也作为国家新闻出版总署教育培训中心英语学习班讲义试用，而且还将继续使用。这种教学实践是检验我们编写工作的试金石，开阔了我们的思路，丰富了我们的素材，增添了我们的信心。

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基于这种理念，这套出版贸易英语系列教材包括《西方出版概况》(Highlights in Western Publishing)、《西方编辑理论与实践》(Theory and Practice of Western Editing)、《西方出版法规》(Western Publishing Law)、《西方版权沿革与贸易》(The Evolution and Trade of Western Copyright)、《西方出版物市场营销》(Western Marketing for Publications)等五种，其内容分别简述如下：

《西方出版概况》重点介绍了当今西方主要发达国家出版产业的现状和发展趋势，包括政策与管理、组织机构与改革、教育模式与科研方法、人才市场的挑战与机遇、国际化与区域化的关系、出版物品位与国家历史和现实的渊源等方面；此外还简要概述了重大事件如造纸、印刷术、网络技术、战争与动乱对出版业的影响以及出版对国家和社会生活的重大作用。

《西方编辑理论与实践》从西方编辑的概念出发，介绍了编辑的范畴与职能、编辑队伍的结构与建设、不同级别编辑之间的关系、编辑与作者之间的关系、编辑与管理和市场的关系、选题策划、编辑流程、编辑加工技巧、采访作者的报道与书评写作的实例、跨文化

交流应注意的编辑问题、禁书典型等方面，系统地论述了当代西方编辑的理论与实践。

《西方版权沿革与贸易》介绍西方主要国家的版权法的历史起源与演变，其中有版权法的性质和特点、制法依据、法律框架、国际版权协议与欧盟国家间的版权贸易协定产生的原委；此外还包括国际版权贸易的理论与实务，如版权贸易的基本内容与形式，版权的国际保护范畴，起诉侵权行为的法律手段和程序，侵犯版权的诉讼案例，避免侵犯版权的原则、利用版权开展业务的纲要、版权贸易合同的格式和内容。

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《西方出版物市场营销》以西方出版经济学的基本概念为起点，介绍了出版物市场的结构和范畴、销售队伍的素养和职责、领导与被领导之间的关系、决定市场走向的诸多因素、各种营销战略和手段、不同种类出版物的市场预测、重大事件给市场带来的机遇和挑战、网络营销与传统营销的关系、英美出版物消息报道实例等方面，从理论和实践两方面构筑出从事出版物市场营销工作应掌握的基本要素。

除了《西方编辑理论与实践》由12个单元所组成外，其余四本都是10个单元，每个单元内容包括课文、课文注释、生词表、多项选择阅读理解题、难点重点意群汉译、讨论题目或作文题目。课文注释内容包括语言难点或背景知识；生词表所选入的单词大多为英语专业四级以上的词汇；阅读理解题涉及到语言点、知识点、段落大意、中心思想或逻辑推理；汉译主要包括结构复杂的、语义非常的句子；讨论题或作文题涉及对课文具体内容和观点，特别是要求学生利用所学的知识来分析和解决实际问题，通过课堂讨论和课后作文以期提高学生出版贸易英语的口头和笔头的交际能力。

早在我国入世之前的上个世纪90年代末期，我国出版界和教育界的有识之士就提出了出版贸易方向的外语专业本科教育培养方案，获得了国家新闻出版总署的肯定和支持，培养方案启动五年来的实践表明我国出版贸易人才市场的缺口所面临的形势依然十分严峻，只有大力加强出版贸易人才培养才能从根本上扭转我国国际与国内出版贸易比例严重失调和我国的国际出版贸易逆差高达十多倍的不利局面，早日赶上和超过西方发达国家国际出版贸易的水平。如果这套教材能为我国出版贸易人才的培养起到积极的作用，那就是我们最大的心愿。

本套教材立项后曾荣获2002年北京市教委精品教材项目的资助，这对我们的编写工作给予了极大的鼓舞和鞭策。在编写过程中还得到了英国曼彻斯特都市大学印刷媒体学院高级讲师克里斯托弗·格林博士、美国俄亥俄大学新闻学院教授安娜·古博·陈

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由于我们手头所掌握的资料有限，加之出版特别是网络出版的发展日新月异，网络对出版市场的影响与日俱增，这套教材肯定存在许多不足之处，我们殷切地希望读者不吝指教，以便日后进一步完善。

编　　者

2004 年 8 月于北京

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Chapter 1

Background and basic principles

1.1 What Is Copyright?

The purpose of copyright laws is to encourage and reward authors, composers, artists, designers and other creative people as well as the entrepreneurs — publishers, for example — who risk their capital in putting their works before the public. [1] This is done by giving to the author, or in some case his employer, certain exclusive rights to enjoy benefit of the created subject matter for a limited time, usually the life of the author and 50 entire calendar years. This right is called the copyright, because initially it consisted of the right to prevent others from copying the work without permission, for instance by printing copies of a book or play. Nowadays the term is apt to be a little misleading; for example, the owner of the copyright in a novel usually has further privileges, such as the right to stop others from performing some version of it in public, broadcasting it, and so on. When the term of the copyright expires it is said to fall into the public domain, and then anyone may use it without permission.

The law of copyright rests on a very clear principle: that anyone who by his or her own skill and labor creates an original work of whatever character shall, for a limited period, enjoy an exclusive right to copy that work. No one else may for a season reap what the copyright owner has sown. [2]

Copyright is a property right that subsists in certain specified types of works. Examples of the works in which copyright subsists are original literary works, films and sound recordings. The owner of the copyright subsisting in a work has the exclusive right to do certain acts in relation to the work, such as making a copy, broadcasting or selling copies to the public. These are examples of the acts restricted by copyright. The owner of the copyright can control the exploitation of the work, for example, by making or selling copies to the public or by granting permission to another to do this in return for a payment. A common example is where the owner of the

copyright in a work of literature permits a publishing company to print and sell copies of the work in book form in return for royalty payments, usually an agreed percentage of the price the publisher obtains for the books. Anyone else who does any of these things (known as the acts restricted by copyright) without the permission of the owner infringes copyright and may be subject to legal action taken by the owner for that infringement. Ownership of a copyright is alienable and it can be transferred to another or a license may be granted by the owner to another, permitting him to do one or more specified acts with the work in question.

A broad classification can be made between the various types of copyright work. Some, such as literary, dramatic, musical and artistic works, are required to be original. Other works such as films, sound recordings, broadcasts, cable programmes and topographical arrangements can be described as derivative or entrepreneurial works and there is no requirement for originality; for example, repeat broadcasts each attract their own copyright. [3] Copyright extends beyond mere literal work in public and other acts relating to technological developments, such as broadcasting the work or storing it in a computer.

1.2 The Nature of Copyright

Fundamentally and conceptually, copyright law should not give rise to monopolies, and it is permissible for any person to produce a work which is similar to a pre-existing work as long as the later work is not taken from the first. It is theoretically possible, if unlikely, for two persons independently to produce identical works, and each will be considered to be the author of his work for copyright purposes. For example, two photographers may each take a photograph of Nelson's Column within minutes of each other from the same spot using similar cameras, lenses and films, after selecting the same exposure times and aperture settings. The two photographs might be indistinguishable from each other but copyright will, nevertheless, subsist in both photographs, separately. The logical reason for this situation is that both of the photographers have used skill and judgment independently in taking their photographs and both should be able to prevent other persons from printing copies of their respective photographs.

Another feature of copyright law which limits its power is that it does not protect ideas, it merely protects the expression of an idea. Barbara Cartland does not have a monopoly in romantic novel, since the concept of a romantic novel is an idea and not protected by copyright. However, writing a romantic novel by taking parts of a Barbara Cartland novel infringes copyright, because the actual novel is the expression of the idea. [4] Just how far back one can go from the

expression as formulated in a novel to the ideas underlying the novel is not easy to answer. If a person gleans the detailed plot of a novel and then writes a novel based on the detailed plot, there is an argument that there has been an infringement of copyright even though the text of the original novel has not been referred to further or copied during the process of writing the second novel. A detailed plot, including settings, incidents and the sequence of events can be described as a non-literal form of expression. However, the boundary between idea and expression is notoriously difficult to draw. [4] Suffice to say at this stage that judges have been reluctant to sympathize with a defendant who has taken a short cut to producing his work by making an unfair use of the claimant's work, especially when the two works are likely to compete.

Copyright is also restricted in its lifespan; it is of limited duration, although it must be said that copyright law is rather generous in this respect. For example, in UK, copyright in a literary work endures until the end of the period of 70 years from the end of the calendar year in which the author dies. Approximately, therefore, copyright lasts for the life of the author plus 70 years. This temporal generosity can be justified on the basis that copyright law does not lock away the ideas underlying a work.

Ownership of the copyright in a work will often remain with the author of the work, the author being the person who created it or made the arrangements necessary for its creation, depending on the nature of the work. However, if a literary, dramatic, musical or artistic work is created by an employee working during the course of employment, his employer will win the copyright subject to agreement to the contrary. [5] Additionally, copyright, like other forms of property, can be dealt with; it may be assigned; it may pass under a will or intestacy or operation of law, and licenses may be granted in respect of it.

Copyright law adopts a very practical posture and takes under its umbrella many types of works which lack literary or artistic merit and may or may not have commercial importance. Thus, everyday and commonplace items, such as lists of customers, football coupons, drawings for engineering equipment, tables of figures, a personal letter and even a shopping list, can fall within the scope of copyright law. One important reason for protecting such things is that some of them are likely to be of economic value and usually will be the result of investment and a significant amount of work, such as a computer database. Without protection there are many who would freely copy such things without having to take the trouble to create them for themselves and who would be able, as a consequence, to sell the copied items more cheaply than the person who developed or produced the original. If this were to happen, the incentive for investment would be severely limited. Neither is copyright generally concerned with the quality or merit of a work, the rationale being that it would be unacceptable for judges to become arbiters of artistic

or literary taste or fashion. Copyright implicitly accepts that tastes differ between people and over a period of time. If the converse were true, many avant garde works would be without protection from unauthorized copying and exploitation.

1.3 The Objectives of Copyright

A lot has been written on the foundations and objectives of the copyright system. The objectives perused by each system constitute an Important factor in the determination of the scope of rights conferred on rights owners. In the presence of uncertainties in the law, lawmakers will have the tendency to revert to the rationales behind particular provisions in order to interpret, apply, or modify them. [6] The fact that a particular copyright regime is based primarily on utilitarian principles, rather than on natural law principles, gives an indication as to where the balance rests between the conflicting interests of the rights holders and the public.

The American copyright and the continental European *droit d'aueur* regimes are well known as opposites. One is said to peruse utilitarian objectives, while the other derives from the author's personality rights. Several commentators have attempted to reconcile the historical foundations of both regimes and to show that the differences between the American copyright and the droit d'auteur regimes should not be overemphasized. [7] The movement of harmonization of copyright principles at the international level has led countries from the *droit d'auteur* tradition to adopt measures more akin to public interest considerations and countries from the copyright tradition to recognize concepts which had until then remained foreign to their legal regime. Moreover, as Davies points out, while the world generally tends to be divided into countries of common law tradition and those of civil law tradition, the considerable differences existing among the national systems make it difficult to draw a distinct and consistent line between the two groups. In fact, as will become obvious later on in this book, there are substantial differences of approach in each tradition. Although the foundations and objectives of the copyright system could be subdivided into several components, the following pages below focus on three main arguments.

1.3.1 Natural Rights Argument

Centered on the person of the author, the natural rights argument holds that "all human beings who create works of the mind are entitled to a specific right embracing protection of their moral and economic interests and covering all use of their works". The statement can be broken

down into two elements: the "personality rights" element, and the "reward" element. Both elements find their justification in the ideology of the "personal creation", i. e., in the intimate relationship that the authors entertains with their work. [8] Both attest to an essentially individualistic approach to the copyright protection, where the "reward" argument puts the accent on the material interest of the author (i. e., exploitation rights), while the "personality rights" argument concerns the immaterial interest of the author (i. e., moral rights). The natural rights theory evolved as a result of the accentuation of the individuality throughout the Renaissance and Enlightenment periods, which culminated in the French Revolution of 1789. According to the natural rights philosophy, authors' rights are not created by law but always existed in the legal consciousness of man. John Locke's *Second Treatise of Civil government* of 1690 inspires this philosophical conception. In his chapter on the justification of individual property, Locke wrote:

> "Thought the earth, and all inferior creatures, be common to all men, yet every man has a property in his own person: this no body has any right to but himself. The labour of his body, and the work of his hands, we may say, are properly his. Whatsoever then he removes out of the state that nature hath provided, and left it in, he hath mixed his labour with, and joined to it something that is his own, and thereby makes it his property. It being by him removed from the common state nature hath placed it in, it hath by this labor something annexed to it, that excludes the common right of other men: for this labor being the unquestionable property of the labor, no man but he can have a right to what that is once joined to, at least where there is enough, and as good, left in common for others."

Although Locke was referring to physical property, his theory undeniably applies to intellectual property. Following Locke's postulation, the author, through her intellectual labour, has a right on her own creation. In modern times, Locke's theory has been extended thereby recognizing that an author should be able to profit from the fruits of her intellectual labour, provided that "enough and as good" is left for others.

The naturalist approach is generally associated with the continental European droit d'auteur tradition, above all with the French and German systems. In France, the natural rights argument has gained renewed importance in the copyright literature of the last fifty years, where the "personality rights" element has been to the fore. This approach is often said to find its origins in 1791 with the famous words of Le Chapelier: "the most sacred, the most invulnerable, and (...) the most personal of all properties is the work, fruit of the intellectual thought of its writer." [9] Contemporary scholars rely on the natural rights theory to insist that moral rights consti-

tute the most important aspect of the French *droit d'auteur* system. In Germany, the author's immaterial interest in her work is protected under Article 5 of the *Grundgesetz* (GG), which guarantees freedom of expression, and under Article 1 (2) of the GG, which guarantees the author's right to personality. The author's material interests are protected as a property right guaranteed under Article 14(1) of the GG. Similarly, the interests of authors have received protection under Article 27(2) of the Universal Declaration of Human Rights, which guarantees everyone "the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author". This provision has been invoked on occasion to support the claim that copyright constitutes a human right. And although the American copyright regime is officially based on utilitarian principles, natural rights arguments are not entirely absent from the courts' and commentators' analysis of the foundations of the copyright system.

1.3.2 Uitilitarian Argument

However, the natural rights argument has failed to explain certain aspects of the copyright regimes, which not only protect the individual interests of the author, but clearly follow public interest objective of the copyright system is to promote the social good, by encouraging the creation and the dissemination of new works to the public. This theory is based on the principle of utility, or the ability of an action to please individuals and more particularly its ability to please as many individuals as possible, thereby achieving "the greatest good for the greatest number". Late eighteenth and nineteenth century English philosophers and economists Jeremy Bentham and John Stuart Mill established that human behavior is limited to the extent of avoiding as much "pain" and seeking as much "pleasure" as possible by way of action, therefore, would depend upon the minimization of "pain" and maximization of "pleasure" resulting from it in the largest group of people possible. The role of government is to, as a result, achieve utility by this simple "pleasure-pain scale" for any action, with the most favorable action giving the most pleasure to the largest number of individuals possible. The way the legislator usually achieves the social good is by rewarding and punishing individual actions to induce society to follow a desired path.

The utilitarian approach is generally associated with the American copyright law system. The U. S. Constitution leaves no doubt as to the utilitarian basis of the American copyright regime. Congress has indeed been given the power to legislate in the field of copyright "to promote the Progress of Science and Useful Arts". The adoption of the laws on copyright is subservient to a specific policy goal: it is a means to an end.[10] As the Supreme Court has constantly reaf-

firmed, the economic philosophy behind the clause empowering congress to grant copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in "Science and useful Arts". The reward to the owner therefore becomes a secondary consideration under American copyright law. The focus of the utilitarian argument inside copyright law is thus to find a balance between those aspects of the common good that are best served by recognizing intellectual property rights and those that are best served by preserving the public domain and disseminating information.

In this sense, it is believed that the "incentive" argument put forward by the utilitarian differs significantly from the "reward" argument recognized by the naturalists. Admittedly, the utilitarian "incentive" and the naturalist "reward" are both concerned with the author's material interests and this might explain why these concepts are sometimes confused with each other. But the "reward" is attached to the person of the author and is granted as compensation for her creative effort, whether or not it can serve any other possible benefit to society. On the other hand, the "incentive" is awarded to the author with a view to achieving a certain result for the benefit of society. If the social good is deemed to be better served by the preservation of the free circulation of ideas, then there is no reason to give authors an economic incentive in the form of an intellectual property right. From this perspective, one can easily understand that the determination of the scope of the utilitarian "incentive" plays an important role in the dissemination of new works to the public. The determination of the form of the author's "incentive" to create new works may also serve as a tool in the hands of lawmakers for example in the maintenance of free competition, the defense of freedom of speech values, the elaboration of an information policy, and the enhancement of democracy.

Even in countries like France and Germany, where the copyright regimes are strongly rooted in natural law principles, the notion that the law must preserve a balance between the interests of authors and those of users is generally accepted. Contrary to French or Dutch copyright law, the public interest dimension of the German copyright system is expressly laid down in the German Constitution.[11] While the economic rights granted under the German Copyright Act have been recognized as a form of constitutionally protected property, these rights must also serve the public interest pursuant to Article 14(2) of the GG. This requirement is unique to Germany and is known as the principle of *Sozialbindung*, according to which the legislator has the explicit task of determining the content and limits of property rights in a manner that not only takes account of the interests of authors, but also of those of the general public. Among the different public interest objectives pursued by the continental European copyright regimes are the safeguard of fundamental freedoms, including freedom of expression, the right to privacy, and the