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著作权法 个人使用问题研究 ——以数字环境为中心

STUDYING ON PERSONAL USE IN COPYRIGHT LAW:
FROM THE DIGITAL ENVIRONMENT
CENTERED PERSPECTIVE

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总 序

作为人类探索世界和改造世界的精神成果，社会科学承载着“认识世界、传承文明、创新理论、资政育人、服务社会”的特殊使命，在中国进入全面建成小康社会的关键时期，以创新的社会科学成果引领全民共同开创中国特色社会主义事业新局面，为经济、政治、社会、文化和生态的全面协调发展提供强有力的思想保证、精神动力、理论支撑和智力支持，这是时代发展对社会科学的基本要求，也是社会科学进一步繁荣发展的内在要求。

江西素有“物华天宝，人杰地灵”之美称。千百年来，勤劳、勇敢、智慧的江西人民，在这片富饶美丽的大地上，创造了灿烂的历史文化，在中华民族文明史上书写了辉煌的篇章。在这片自古就有“文章节义之邦”盛誉的赣鄱大地上，文化昌盛，人文荟萃，名人辈出，群星璀璨，他们创造的灿若星辰的文化经典，承载着中华文明成果，汇入了中华民族的不朽史册。作为当代江西人，作为当代江西社会科学工作者，我们有责任继往开来，不断推出新的成果。今天，我们已经站在了新的历史起点上，面临许多新情况、新问题，需要我们给出科学的答案。汲取历史文明的精华，适应新形势、新变化、新任务的要求，创造出今日江西的辉煌，是每一个社会科学工作者的愿望和孜孜以求的目标。

社会科学推动历史发展的主要价值在于推动社会进步、提升文明水平、提高人的素质。然而，社会科学的自身特性又决定了它只有得到民众的认同并为其所掌握，才会变成认识和改造自然与社会的巨大物质力量。因此，社会科学的繁荣发展和其作用的发挥，离不开其成果的运用、交流与广泛传播。

为充分发挥哲学社会科学研究优秀成果和优秀人才的示范带动作用，促进江西省哲学社会科学繁荣发展，我们设立了江西省哲学社会科学成果出版资助项目，全力打造《江西省哲学社会科学成果文库》。

《江西省哲学社会科学成果文库》由江西省社会科学界联合会设立，资助江西省哲学社会科学工作者的优秀著作出版。该文库每年评审一次，通过作者申报和同行专家严格评审的程序，每年资助出版 30 部左右代表江西现阶段社会科学研究前沿水平、体现江西社会科学界学术创造力的优秀著作。

《江西省哲学社会科学成果文库》涵盖整个社会科学领域，收入文库的都是具有较高价值的学术著作和具有思想性、科学性、艺术性的社会科学普及和成果转化推广著作，并按照“统一标识、统一封面、统一版式、统一标准”的总体要求组织出版。希望通过持之以恒地组织出版，持续推出江西社会科学的最新优秀成果，不断提升江西社会科学的影响力，逐步形成学术品牌，展示江西社会科学工作者的群体气势，为增强江西的综合实力发挥积极作用。

祝黄河

2013 年 6 月

内容简介

本文系江西省哲学社会科学成果文库入选项目和教育部人文社会科学
研究青年项目（课题编号：13YJC820048）的研究成果。

自著作权法产生伊始，人们一直尝试通过规范使用行为来确立著作
产权的保护边界，即寻找一种行之有效的权利作用“焦点”。从传统理论
和社会实践来看，著作权法主要通过规制竞争者对作品的商业利用行为来
实现权利人的财产利益回报。将使用行为的“商业性”和“公/私性”作
为判断是否构成著作权侵权行为的重要标准，一方面，能较好地实现对著
作权人创作及投资付出的必要回报，有效激发创作的“涟漪”效应，从
而推动文化事业的进一步繁荣与发展；另一方面，这种判断标准能够贯彻
著作权法的根本宗旨，即在推动文化繁荣的基础上，通过为公众预留必要
空间（即私域使用范围）来促进人的信息摄取和知识学习，推动文化的
自由交流，实现人的自身发展。通过设置使用行为的“公”“私”划分标
准，著作权法可以为公众合理地使用作品提供文化交流自由的必要空间。
正因为著作权法在传统意义上主要规制公开性的商业利用行为，才使得个
人使用在发挥公众文化之自由交流作用的同时，能够实现个体私权与大众
民主之间的利益平衡。所以，从著作权不保护什么的否定性视角来看，个
人使用如同著作权保护什么（即公开性的商业利用行为）一样，发挥着
划定著作权保护边界的权利作用“焦点”功效。

伴随着数字技术特别是互联网技术的迅猛发展,个人使用对著作权人的作品市场利益带来的消极影响备受世人关注,“个人使用是否依然合理”、“著作权法是否需要个人使用”以及“如何解决著作财产权与个人使用之间的冲突”等成为著作权法最具争议的问题。与此同时,著作财产权的不断延伸乃至扩张却使著作权法传统意义上给予使用者自由接触、分享信息的有限空间受到多重排挤,个人使用的必要空间和合法性皆呈消减之势。这一结果与其说是单纯由技术发展催生,毋宁说是技术背后人为因素推动的体系闭合使然,对此我们可以从国际政治经济学的视角加以认识。回归至现实中的个人使用困境,我们既要梳理出数字环境下个人使用的现实出路,更应解决好数字技术时代亟须构建何种著作财产权保护愿景的理论问题。遵循这样的思路,本文除导言以外,正文共分五章,主要内容如下:

第一章是个人使用界定,主要梳理以下几个问题:第一,通过对国际条约和示范法、欧盟著作权协调指令以及代表性国家有关“个人使用”的立法例进行考察,厘清著作权法个人使用的立法现状及发展轨迹。第二,从关系价值论的角度,对个人使用在著作权生态关系中的“公共”价值与“个人”价值进行考察。从哈贝马斯在政治学层面探讨的“公共领域”(public sphere)概念出发,本文认为,“公共领域”一词应放到更宽泛的范畴中加以理解,它不仅指政治性事务的公共商谈,还可用于市民文化生活的集体塑造。正是个人使用“私域”这一有限的必要空间,推动着信息在社会文化交往与互动中产生“涟漪”效应。个人使用在著作权生态关系中具有不容忽视的重要“公共”价值。同时,个人使用在个人表达自由和私域自治两个层面还有着重要的“个人”价值。此外,在对个人使用进行价值考察时,不能脱离著作权生态关系。著作权人和使用者都是著作权生态关系的主体和参与者。就著作权人实现作品价值而言,应放在与他人及整个社会关系的联系和比较中加以衡量。在著作权生态关系中,法律不能过度延伸著作权人“财产自由”的个人价值欲求。第三,在立法例梳理及价值考察的基础上,对个人使用进行界定。综合对“personal use”“private use”的辨析以及个人使用定义的几种观点评述,个人使用的概念可以从主体、使用范围、使用目的及影响、使用类型四个

方面来界定。在确立个人使用的使用类型时，应从社会实践与规范意义这两个层面加以区分。规范意义上的个人使用，主要是指自然人为了不具商业性的个人目的以及与关系密切的亲友在家庭或类似家庭范围内使用的目的，对作品实施的复制行为以及翻译、改编等演绎行为。

第二章主要论述数字技术发展中的个人使用困境以及技术发展与个人使用困境之间的关系。数字技术特别是互联网技术的飞速发展，一方面有效推动信息在公众之间的自由传播，另一方面使“著作权侵权主体特征由职业转变成非职业”，呈现大众化的蔓延趋势。对作品使用行为是否侵权进行定位时，不应过度夸大数字环境下个人使用对著作权人利益的消极影响，真正对著作权人的利益造成实质性影响的应是未经授权的作品传播行为。相反，数字技术却史无前例地为人所左右，控制着公众对信息的接触与交往自由。在数字环境下，由于技术控制下的作品拟物化、合同规则的“意思自治”滥用以及复制权的过度延伸态势，欧美立法传统意义上给使用者自由接触、分享信息的必要空间——个人使用，在结构性控制系统（包括代码、合同、法律等）的多重作用下，受到严重限制与挤压。如果我们忽视个别事件，以验证历史规律为唯一目标，将会助长历史偶然的规律化。在把握技术发展与个人使用困境之间的关系时，应避免片面性地套用机械主义的技术决定论，把社会历史的规律绝对化，否则就会得出个人使用受到多重挤压是历史必然的谬论。是故，应抛弃机械主义的技术决定论“宏伟史诗”般的叙述方式。在肯定技术能够催生制度环境变迁的基础上，我们应反思技术与制度会因为人为因素而可能产生的价值偏向与消极影响。

第三章主要运用国际政治经济学的方法尝试构建一种阐释框架，解读造成个人使用困境的体系闭合动因。本文认为，数字环境下的个人使用日益受到挤压，并非技术发展造成的必然结果，而在一定程度上是特定历史条件下欧美发达国家主导的体系闭合使然。这一结论主要从以下三个方面加以论证：第一，以芝加哥学派为代表的新自由主义经济学，自20世纪80年代开始在西方经济学占据主导地位并呈现出全球范围的兴盛态势，推动欧美发达国家偏重于著作权制度在促进国民经济增长中的重要作用，从而使著作权保护观念过度信赖新自由主义经济学宣扬的市场经济价值决定论。然而，新自由主义经济观念具有内在局限性，它可能激发完全自由市

场机制下的极端利己行为，致使著作权人与使用者之间脱离良性循环的著作权生态关系，影响市民社会的公共文化塑造，进而违背著作权法实现“最大多数人的最大幸福”的社会福利最大化目的。对此，就连自由主义经济学的开创者——亚当·斯密，其思想在晚年也从早先的市场放任的自由主义转变成具有某种建构倾向的德性主义，开始正视人性与社会性、私利与公益之间的非一致性。第二，在欧美私人（产业）利益集团特别是寡头精英的行动策略影响下，欧美著作权内外政策的制定呈现出一种自上而下的推行过程，这也是著作权体系闭合的主要驱动力之一。由于利益集团政治中的“议价”能力差别，分散性的社会力量（如著作权政策制定中的使用者群体）很难在政策制定过程中发挥像财富和权力集中的垄断利益集团那样的作用和政治影响。国际知识产权体系重构中的集团（包括欧美发达国家和发展中国家两大阵营）政治亦是如此。这一结论可以运用曼瑟尔·奥尔森公共选择理论当中的集体行动逻辑来解释。第三，包括隐喻式的符号修饰与因果颠倒在内的单向话语体系，误导性地宣扬对著作权的强保护既有利于发达国家，同时更有利于发展中国家。这一单向话语逻辑承袭了新自由主义经济学的片面观点，与发达国家在赶超发展阶段所实际采用的演化发展经济政策并不一致。发展中国家在遵循国际著作权闭合制度最低保护标准的基础上，应积极开拓符合自身国情的著作权保护思路，不应盲目追从发达国家。

第四章通过对著作财产权的反思与体系重构，来间接阐释个人使用的著作权法定位问题，纾解数字环境下的个人使用困境。从抽象物、知识产品以及自由信息三个层面分析，作品分别具有非物质性、非稀缺性、非竞争性、有益外部性与互动性等自然公共属性。著作财产权的工具性作用在于效率、激励与必要回报，其创设目的及政策内涵旨在实现作品在文化参与、民主政治等层面上的社会福利最大化，并不能简单视同于建立在“个人效用”基础上的市场利益最大化。著作财产权的权利作用“焦点”结构表明，著作财产权的支配权能并非指向被独占的作品，而是限制他人对作品的某些使用行为。著作财产权是支配作品某些使用方式并获取经济利益的“法律之力”。就著作财产权的权利体系而言，以复制权为基础的传统理论应在数字困境中予以重构。体系简化后的“大传播权”设计，

既能较合理、清晰地划定著作财产权的权利边界，以明确著作权人通过支配何种使用行为来实现自身的财产利益，同时还有助于消弭公众因误解著作财产权而产生的逆反心理，对公众逐渐认同、接受和遵守著作权法起到积极的引导作用。就著作财产权体系的权利限制设计而言，应避免当下欧美各自适用合理使用原则和三步检验法时出现的“闭合”趋势，设置一种真正意义上的开放式“安全阀”。互联网环境下，随着分散式 P2P (peer to peer) 技术的不断发展，特别是比特流技术的普及，使用者的下载行为构成一种个人复制与传播的并合态势，即所有的 P2P 用户都可能被认定为非法传播作品的侵权主体。从欧美法律实践的发展态势来看，著作权人和立法者正逐渐将侵权责任主体的重心从可能承担间接责任的网络服务提供商转移到个人使用者身上，这点从美国托马斯案与法国 HADOPI 法可见一斑。作为一种利益配置机制，著作权法应以协调多元参与性主体之间利益的合理、公平分配作为政策衡量的基础，故应以各参与性主体之间的“合作关系”作为利益实现的基点。通过综合运用“强制许可”补偿金机制、“自愿集体许可”机制、“批量许可”商业模式以及其他方式，P2P 网络环境下的个人使用困境才有可能从排异性的“零和”博弈现状转变成一种互利共赢的合作局面。

第五章是对个人使用的著作权法未来进行重构。在著作权法的观念层面上，工具主义的法定权利说仅解释了著作权的“术”现象，并未确立其“道”本质。应强调以“道”驭“术”，构建著作权最终指向“公共福利”社会责任的道德哲学基础。同时，“使用者权”是宪法人权在著作权法中的具体化，著作权法既是包括作者在内的著作权人的法律，更是关涉使用者的法律，故著作权和使用者权应看作一个整体的有机组成部分。另外，著作权法应秉持“技术中立”原则，既充分体现技术自身的发展规律和特性，同时又符合人类社会可持续发展的价值准则，使技术朝着符合人性的、有利于科学文化事业进步的方向发展，这就需要将市场行为和伦理责任结合起来考察，既关注经济价值，又充分考量公共福利、民主政治、自由文化、技术创新等多元社会价值。在著作权法的制度层面上，应合理界定使用行为的“商业性”和“公/私性”，对反技术规避规则的相关缺陷以及著作权私力救济滥用问题进行必要的立法完善与制度健全。由

于数字互联网环境与实体环境之间存在差异，有必要采用著作权法的“双轨”治理模式，在数字互联网环境下应淡化著作权尤其是复制权的财产专有权属性，实现著作权保护的侧重点由“控制”（或“支配”）权能到“收益”权能、由“财产规则”向“补偿责任规则”渐进转变，重新配置著作权在互联网环境下“补偿责任规则—财产规则”并存的二元结构体系。

关键词：个人使用；数字技术；新自由主义；著作财产权；社会价值

Abstract

Since the appearance of copyright law, we have been trying to define the boundaries of economic rights in copyright and search for the focal point of copyright functions by regulating the use of works. In traditional theories and social practice of copyright, economic interests of copyright owners are mainly realized by regulating competitors' exploitation of works. Commerciality and public-private features of the use of works should be regarded as highly important criteria of copyright infringements. This can not only make the ripple effect on creation of works and further cultural boom, but also accelerate free dissemination of culture, knowledge acquisition and self-development of users by reserving indispensable space for the public. As a result, it can keep interests balance between copyright owners and the public. From the negative perspective of copyright protection, that is what are not protected by copyright law, personal use serves as a focal point in drawing the boundaries of economic rights in copyright.

With the development of digital technologies, especially that of the Internet technology, so-called negative impact of personal use on copyright owners is exaggerated. Personal use has become the most controversial field of copyright law nowadays. However, the indispensable space and legality of personal use tend to decline because expanding copyright protection is squeezing the limited

space where users have access to and share information freely. This consequence is not aroused by the development of technology, but the closed copyright system propelled by human factors. We can understand this by means of political economics. Faced with the dilemma in personal use, we should not only find solution for personal use issues, but also reshape theoretical vision of copyright protection in the digital age. The paper falls into five chapters with more than 180000 words besides the preface.

Chapter I is the introduction and definition of personal use. Part one discusses the legislative situation and historical development of personal use in copyright by examining statutory details about personal use in international conventions, international model laws, EC Directive and domestic laws of representative countries. Part two analyses public value and private value of personal use by means of axiology of social relations. In public politics of Jurgen Habermas, Public Sphere does not only relate to public negotiations concerning political affairs, but also to the collective shaping of citizens' cultural life. The private sphere of personal use intensifies the ripple effect on works and promotes cultural boom. Both public value and private value exist in personal use. When analyzing the value of personal use, we can not disregard the relationship of different parties. Copyright owners and users are participants of the ecological relationship of copyright. When copyright owners are going to achieve their economic interests, they ought to consider interests of others and the public. In the ecological relationship of copyright, the overexpansion of copyright owners' interests is unreasonable. After making a distinction between personal use and private use and commenting on several viewpoints on personal use, Part three tries to define personal use from four aspects, namely, subject, range, motivation and types of behaviors. In terms of types of behaviors, we should distinguish personal use in social practice from personal use in copyright law. In copyright law, personal use refers to the reproduction, translation, adaptation or other transformative use of copyrighted works in family and other private spheres similar to family for a natural person's own personal and private use.

Chapter II analyzes the dilemma of personal use in digital technology age and the relationship between technological development and the dilemma of personal use. The development of digital technology, especially that of the Internet, can promote the free flow of information in public. On the other hand, because of their development, copyright infringements are changing from professional to non-professional and becoming popular. The judgment of copyright infringements shouldn't exaggerate the negative influence of personal use on interests of copyright owners in the digital environment. In fact, only the unauthorized dissemination of works has a substantial damage on interests of copyright owners. On the contrary, the digital technology unprecedentedly controlled by human beings has been impeding the free flow of information. Under the structural control system including digital technology, the abuse of autonomy of will and the expansion of copyright, the limited sphere of personal use is squeezed severely. If we ignore individual incidents only for verifying the law of history, haphazards in history will become law. As far as the relationship between technological development and dilemma of personal use is concerned, we should avoid the overreliance on technological determinism and absolutization of historical law. Otherwise, we may reach the absurd conclusion that personal use ought to be squeezed with the development of digital technologies. It is high time that we discard the narrative style of historical story. After recognizing the causal connection between developing technology and dilemma of personal use, we should introspect the value bias and negative influences brought by technology and copyright system due to human behaviors.

Chapter III, by means of international political economics, discusses causes behind the closed copyright system resulting in the dilemma of personal use. The squeezed personal use is not an inevitable result of technological development, but a consequence of the closed copyright system dominated by Euramerican developed countries. This part explains the view from the following aspects. First, Neoliberalism Economics such as the Chicago School Economics has dominated in western economics and caught on around the world since 1980s.

It leads developed countries to place extra emphasis on the economic role of copyright regimes and causes the overemphasis of protective idea of copyright on Market Determinism of Neoliberalism Economics. However, there are inherent limitations in the ideas of Neoliberalism Economics. It can hasten extreme self-interested actions in laissez-faire market mechanism and violate the primary purpose of copyright law, which is to realize the greatest wellbeing of most people. For that, the ideology of Adam Smith changed from market liberalism to virtue constructivism at his later years. It is clear that in his old age Adam Smith came to realize the inconsistency between self-interest and public interest. Second, copyright policy-making in Euramerican developed countries is also an compression implementation process from top to bottom under the influence of private interest groups' strategic action especially those of monopoly enterprises, which is another cause behind the closed copyright system resulting in the dilemma of personal use. Because the bargaining power of social groups such as users group is different from the monopoly enterprises in groups politics. It is difficult for users group to take part in the policy-making of copyright. Copyright policy-making in reshaping international conventions system is also difficult, which can be explained by the Public Choice Theory of Mancur Olson. Third, one-dimensional discourse system composed of Metaphorical symbols and Post Hoc propaganda has been advertising misleadingly that high protection of copyright is helpful to developed countries and more beneficial to developing countries. This viewpoint, based on Neoliberalism Economics, is different from evolution economics theory adopted by these developed countries in their economic-overtake period. Therefore, abiding by the minimum standard of copyright protection, developing countries such as China ought to explore actively one new path for copyright protection in line with their own national conditions and not blindly follow developed countries.

Chapter IV indirectly discusses the orientation of copyright law by introspecting and reconstructing the copyright protection system with the view to relieving the dilemma of personal use in the digital environment. Through

analyzing from three perspective of abstraction, intellectual products and free information, works have public features such as intangibility, absent scarcity, non-excludability, positive externality and interactivity. The instrumental roles of copyright system is manifested in efficiency, incentive and limited return. The legislative purpose and policy connotation of copyright law is to realize the maximization of social value rather than the maximization of market value in works based on individual utility. The focal-point structure of copyright functions indicates that the exclusive power of copyright is directed to some use of works rather than works themselves. As far as economic rights system of copyright is concerned, we should reshape the theoretical foundation of copyright from traditional copy right centrality to dissemination right centrality. The dissemination right centrality of copyright system can more clearly draw the boundaries of economic rights in copyright and establish behavioral norms for realizing the property interests of copyright owners. On the other hand, it can eliminate reverse psychology of the public due to their misunderstanding of copyright law and lead the public to acknowledge, accept and obey copyright law. In terms of copyright restrictions system, we should avoid the closed trend in Euramerican developed countries resulting from their respective fair use principle and three-step test and design a real "open safety valve". With the development of P2P technologies, especially that of Bit Torrent technology, downloading of users constitutes a combinative behavior between personal copying and dissemination in network environment. Therefore, all end users of P2P could be copyright infringers who disseminate copyrighted works without permit. Judging from the tendency of legal practice in Euramerican developed countries, the focal point of liability subjects have been changing from network intermediaries to private users, which can be seen in *Capitol Records, Inc. v. Jammie Thomas* in U. S. A and *HADOPI* of France. As an interests allocation mechanism, copyright law ought to emphasize the partnership among all subjects involved and be based on the rational allocation and harmonization of all parties' interests. By synthesizing compulsory licensing, voluntary collective licensing, mass licensing

and so on, the digital dilemma of personal use in P2P technological environment can possibly turn into a reciprocal cooperation situation from a zero-sum game.

Chapter V tries to reconstruct copyright law in order to relieve the dilemma of personal use. At the conceptual level of copyright law, statutory right theory of instrumentalism is technique phenomenon rather than the intrinsic spirit of copyright. In line with the intrinsic spirit of copyright, copyright law should construct the moral philosophy foundation of social responsibility for public welfare. Meanwhile, users' rights are the concretization of constitutional basic rights in copyright law. Copyright law should be regarded as the law of copyright owners and the law of users. Both economic interests of copyright owners and users' rights are important parts of the ecological relationship of copyright. Furthermore, we should uphold the principle of technology neutrality that requires us to observe the law of development and interior characters of technology, to integrate market behaviors with ethical responsibility and to pay close attention to polynary social values such as public welfare, democratic politics, cultural freedom and technological innovation in order to develop technology in a direction that enhance cultural boom and meet human needs. At the institutional level of copyright law, we should define the commerciality and public-private distinction of works behaviors reasonably. Moreover, it is necessary to eliminate legislative defects in anti-circumvention rules so as to reduce misuse of self-help remedy. Due to the distinction between digital condition and analog environment, it is helpful to adopt the double-track administrative structure. We ought to weaken the exclusive functions of copyright especially as reproduction right and rearrange the dual structure of property and liability rules in digital environment by gradually changing the focal point of copyright protection from possession power to gains purpose and from property rules to liability rules.

Keywords: personal use; digital technologies; Neoliberalism; economic rights of copyright; social value