

北京大学 知识产权学院 / 主办  
法治研究中心

Peking University Intellectual Property School  
Peking University Center for the Study of Rule of Law

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Qu Sanqing, Executive Editor



# 北大知识产权评论

Peking University Intellectual Property Review

第2卷

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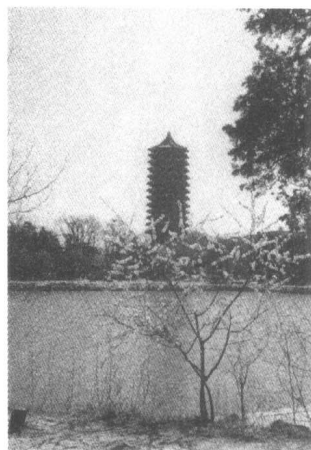
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# 专论

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## Monographs



花儿又开了



## 透视中国版权制度的实质和发展

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Towards an Understanding of the Nature and Development  
of a Copyright Scheme in China

曲三强

Qu Sanqiang \*

**摘 要** 作者立足于客观的立场,以第三者的眼光分析了中国版权制度发展的历史、现状和特点;揭示了现行中国版权制度存在的问题和薄弱环节;指出了中国在加入世界贸易组织前后调整和规范知识产权的重要性。文章深入分析了现行中国版权法律及其司法基础,特别是对影响或限制中国版权制度形成与发展的外部因素,以及版权侵权责任的内部结构进行了研究。此外,文章还认真地回顾了中国的版权理论和版权法所走过的曲折道路;检讨了传统文化和社会主义政治法律制度对上述历史发展过程的影响;分析了西方版权观念对中国版权保护制度的理论与实践的深刻影响。作者旗帜鲜明地指出,影响中国版权法发展和运行的最基本障碍来自于从西方移植过来的版权观念与根生于中国传统文化中的社会意识形态之间的冲突和矛盾。正是这种冲突和矛盾极大地影响了中国版权法和司法。作者总结道,隐含在中国版权法和版权理论中的传统文化价值观念遭遇了现代西方版权思想的挑战。中国正在进行的经济体制改革和对外开放政策的推行更是加剧了这种挑战。面对挑战,中国必须重新整合它的政策和法律,以适应国际社会普遍认同的版权保护标准。

为在中国建立切实有效的版权保护制度,中国必须摆脱长期来社会主义与资本主义的政治分野,兼收并蓄西方法律思想和制度中的先进内涵,并合理地继承和发扬中国传统文化的精髓,从而建立起具有中国特色的版权保护制度。当然,欲达此目的,中国仍然有很长的路要走。作

---

\* Qu Sanqiang, associate professor, Intellectual Property School, Peking University.

者相信,在可预见的未来,中国的版权保护制度仍然还会沿着一条蜿蜒曲折的道路前进,仍然会继续受到包括政治和经济因素在内的各种重要因素的影响;但是,走向世界,走入国际社会大家庭却是中国版权保护制度发展不可逆转的方向。

**Abstract** This thesis is a comprehensive research upon copyright law and its jurisprudential basis in the PRC. The examination focuses on both the external conditions which may affect or restrict the formation and development of copyright law and policy in China, and the internal structure of the law, which deals with liabilities for infringement of copyright.

The thesis reviews the tortuous process of development of copyright theory and law in China. It explores the underlying influences of Chinese traditional culture and the socialist political system upon this process. It also analyses the significant influence of Western concepts of copyright on the theoretical and practical development of a Chinese system of copyright protection. It argues that the fundamental barriers to the development and operation of copyright law in China result from the persistent gap between notions that are forced upon the legal system and those embodied in social axiology. The conflicts and tensions created by this have affected both the making and the enforcement of copyright law.

The conclusion produced from the thesis is that the traditional values inherent in Chinese theories and law of copyright are now being challenged by contemporary Western copyright ideas. The economic reform program and "open door" policy currently being implemented in China have intensified this challenge. To resolve this tension, China needs to adjust its law and policy to conform with standards of copyright protection commonly accepted by international communities.

By harmonizing its approach to copyright China should eventually escape from the dilemma of socialism versus capitalism. However, this objective is still a long way from realization and, with little internal incentive or enthusiasm for enforcing copyrights, there is no reason to expect much progress in the near future unless pressure is applied from outside China. This would be a discouraging observation, were it not for the steady progress towards a market economy where investors at last have the freedom to enforce their own rights.

However, the residual strength of traditional values ingrained in the socialist system means that copyright law in the PRC will continue in the foreseeable future to be determined by political as well as economic considerations, and the direction and pace of its development will fluctuate according to the relative influence of these factors, as it has in the past.

**Key words** copyright, protection, dynasty

It has long been a controversial issue whether or not legal protection of copyright existed in feudal China. Some scholars believe that there was indigenous copyright protection in imperial China even before the first codified Chinese copyright law was

promulgated at the beginning of the 20th century.<sup>[1]</sup> They contend that the concept of copyright could be dated from the emergence of printing during the Tang Dynasty (618 - 907).<sup>[2]</sup>

Although the evidence they present shows that some legal regulations relating to authors' rights did indeed exist in feudal China, this fact in itself cannot provide a positive answer to the question. What the feudal law provided was substantially different from the modern concept of copyright, because the latter by nature is a kind of private property right which can be enforced or maintained against anyone else, even the state. From a historical point of view, Chinese feudal law did not provide any conditions favourable for the development of a copyright system. The Chinese concept of copyright was basically borrowed from Western jurisdictions.

In the eyes of Western scholars, China is often regarded as a large and important country which does not have a comprehensive copyright law:

This fact alone should give pause for thought. Even more so since China possesses one of the most distinct and continuous literary and artistic traditions in the world without any system of rules that could be compared to Western copyright concepts. Neither classical nor modern China seems to have felt the need for Western-type copyright protection.<sup>[3]</sup>

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[1] Zheng Chengai, a well-known Chinese intellectual property scholar, contends that: "It is commonly recognised that copyright originated side by side with the invention of type printing techniques. In the West, Gutenberg of Germany in the fifteenth century is credited as the inventor of such a technique. However, in China, Bi Sheng (in the Song Dynasty) first used type printing at a much earlier date in the eleventh century, and this is borne out in the relevant historical records of many countries." Zheng gives the example of a book printed in the Southern Song Dynasty and entitled *Biographical Sketch of the Capital of the Northern Song*, which has a stamp declaring: "printed by the Cheng Family of Mei Shan. The right has been registered with the competent authority. No reprinting without authorisation is allowed", See Zheng, C., 1987, *Chinese Intellectual Property and Technology Transfer Law*, Sweet & Maxwell, London, 86. See also: Zheng, C. and Pendleton, M., 1991, *Copyright Law in China*, CHH International, Sydney, 11; Ye, D., 1920, *Quiet Talks Among the Bookstacks* (reprinted 1957), Ancient Books Reprinting House, Beijing, 36.

[2] "The emergence of printing with movable type was a leap in the history of printing. The fact that the concept of copyright was formed after such a leap shows that the development of law always follows the development of technology. It also shows that a new development in technology must lead to changes or additions of new legal concepts"; Potter, P. B., "Riding the Tiger: Legitimacy and Legal Culture in Post-Mao China", (1994) *June China Quarterly* 14.

[3] Ploman, E. W. and Hamilton, L. C., 1980, *Copyright*, Routledge & Kegan Paul, London, 140.

This is no doubt true as an overview of Chinese history, although it indicates a lack of understanding of the economic, political and cultural factors which contributed to this situation.

Feudal China was strongly influenced by Confucian philosophy, which is essentially contradictory to the notion of copyright. In addition, the enclosed natural economy and powerful centralism of the feudal state did not provide a favourable environment for development of a concept of copyright. In fact, there were no recorded attempts to form an indigenous system governing copyright protection in Chinese history until the Western notion of copyright was first introduced into China at the beginning of the 20th century.

This article will review the history of copyright protection in China. The historical background in which a copyright system might have existed will first be examined; then, the attempt by the late Qing government to create a copyright code in the early 20th century will be discussed. The normative dislocation brought about by the administration of the Kuo Min Tang (KMT) government will be assessed and, finally, there will be an analysis of the progress in copyright protection that has been made since the PRC was founded in 1949.

### **1. A Question of Indigenous Copyright Protection in Feudal China**

The idea that copyright arose soon after the advent of printing enjoys wide currency in Chinese academic circles.<sup>[4]</sup> This notion is mainly produced from a comparison with similar developments in Europe. Indeed, the emergence of copyright concepts in Europe was tied to a specific level of social and technological organisation symbolised by the invention of printing and the development of book publishing in the 15th century. However, in both these areas, history indicates that China was in advance of Europe; printing techniques had been invented in the middle of the 11th century. The highly sophisticated organisation of social and cultural life had by then had a longer tradition than anything comparable in Europe.<sup>[5]</sup>

Against such a background, it is true that there was some evidence of restriction on the unauthorised publication or reproduction of certain books, symbols, and products,

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[4] See Zheng and Pendleton, fn. 1 at 11.

[5] Ploman and Hamilton, fn. 3.

but this can hardly be regarded as constituting what we nowadays typically understand as copyright law, because the purpose of such restrictions was neither to protect property nor to protect other private interests, but merely to control publication and maintain high cosmic harmony in the feudal state.

If we take the view that the purpose of copyright law is in essence to entitle individuals to prevent others (including the government of the state) from violating their works, we would find that neither legal regulations concerning copyright nor an informal concept of it existed in feudal China until the early 20th century. No wonder such a historical phenomenon bewilders some Western scholars: why did a civilisation that for centuries paid particular attention to the regulation of publications, and that for a long time was a world leader in science and technology, and celebrated at least certain types of innovation, not provide more comprehensive protection for its rich bounty of creation? [6]

Finding the real reasons for this historical phenomenon would require an extensive analysis of Chinese culture and philosophy to explain the differences in underlying philosophy, political system and social structure. In this context, attention must be paid to the following aspects. First, the enclosed natural economy in feudal China did not provide a favourable environment for development of a copyright system. Second, the powerful domination of Confucian culture, over both the bureaucratic structure and the associated education system, was in essence contradictory to the notion of copyright. Third, the political system of feudal autocracy did not allow the development of an independent copyright system in China.

### 1.1. Economic Reasons

Generally speaking, copyrights are by nature a concomitant of industrialisation in general or a response to a particular technological breakthrough. [7] The emergence of copyright in a given society was largely determined by the economic development of that society. Prior to the late Qing Dynasty, feudal China was basically a society with an enclosed natural economy. Following the Spring and Autumn Period (770 BC – 476 BC), almost every dynasty of feudal China pursued a policy of “chongben yimo”

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[6] See Needham J., 1900, *Science and Civilisation in China*, Cambridge University Press, London, 38.

[7] See e.g. Adelstein, R. and Peretz, S., “Competition of Technologies and Markets for Ideas: Copyright and Fair Use-An Evolutionary Perspective” (1985) 5 (2) *International Review of Law & Economics* 210.

(stressing agriculture and neglecting commerce and handcraft industry).<sup>[8]</sup> This policy considerably hampered the development of a market-oriented economy in China. As a result, China had virtually no national industry or market until the late Qing Dynasty.

Under the model of a natural economy, people worked individually for “self-support and self-sufficiency”. Most people worked in basic farming with primitive methods. It is true that there were some advanced technologies and inventions in feudal China, but they did not represent the basic level of the feudal economy. The demand of the society as a whole for cultural consumption and intellectual creation was relatively low. No evidence can be found before the 20th century that feudal China had developed an inexpensive mass production system, which some scholars regard as constituting an impetus to the establishment of copyright protection.<sup>[9]</sup>

## 1.2. Traditional Culture

Although economic factors should not be ignored in the effort to understand why feudal China did not provide systematic protection for intellectual creation and innovation, it is the traditional culture that one must turn to for an explanation as to why there were no contemporary ideas of copyright law throughout feudal Chinese history.<sup>[10]</sup> Generally speaking, Chinese culture excluded the idea of copyright:

As a legal concept, copyright seems even less attuned to the Chinese concept of law with its reluctance to rely upon rigid codification and abhorrence of litigation. The traditional Chinese conception of law is so different from the Western concept that it has often been described as a rejection of the idea of law.<sup>[11]</sup>

Basic to feudal Chinese philosophy and social conduct was Confucianism, which was, to a large extent, in contradiction to the notion of copyright. There were two major reasons for this.

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[8] See Kuang, Y., 1985, *Kongzi Pingzhuan* (Comments on Confucius), Qilu Publishing House, Shandong, 387.

[9] See Zheng and Pendleton, fn. 1 at 14.

[10] See Ch'ien, T. (Tsien, T. H.), Paper and Printing, in 1973, *Science and Civilisation in China*, Part I, vol. 5, Cambridge Macdonald & Co., London, 29.

[11] See Ploman and Hamilton, fn. 3 at 142.



First, in Confucianism, social order is achieved by action which is in accordance with the order of nature. Natural order and social order react constantly upon one another. The reflection of this approach in what the West would regard as legal discourse is through the concept of *li*, which has been translated as ceremonies, rituals or rules of social conduct, or more generally that which conforms to social order and universal harmony. <sup>[12]</sup>

Confucianism advocated using *li* instead of law for dealing with various social relationships. "In the conception [of *li*], there is no place for law in the Latin sense of the term. Strictly speaking, there are not even individual rights sanctioned and guaranteed by the law. There are only duties, mutual permutations, governed by notions of order, responsibility, hierarchy, harmony..."<sup>[13]</sup> As Granet concludes, under the influence of Confucianism there was "a subtle regime of interdependence and solidarity which could never be based upon unconditional prescriptions: upon law... In the idea of rule there is no more than the idea of model. The Chinese notion of order excludes the notion of law in all its aspects".<sup>[14]</sup>

Second, Confucianism resisted the notions of equality and individuality that provide a basic premise for claiming copyright. Confucianism stressed that the *li* were a great means in the hands of a ruler. "Jun jun, chen chen, fu fu, zi zi" (a king was a king, a subject was a subject, a father was a father, a son was a son) was an important moral principle in Chinese feudal society.<sup>[15]</sup> As Alford comments:

The notion of the Chinese people as a family, with the ruler as parent, is one that has had great and enduring currency since preimperial times. In that capacity, the ruler had a fiducial obligation to provide for both the spiritual and physical well-being of the populace, who, in turn, were expected to be loyal and productive.<sup>[16]</sup>

However, "the very nature of this relationship was such that public, positive law

[12] *Id.*

[13] Quoted in Ploman and Hamilton, fn. 3 at 145.

[14] *Id.*

[15] See Kuang, fn. 8 at 200.

[16] See Alford, W. P., 1995, *To Steal a Book Is an Elegant Offence: Intellectual Property Law in Chinese Civilization*, Stanford University Press, California, 20.