IP 知识产权专题研究书系

LINJIEQUAN GUISULUN

邻接权归宿论

刘 洁 著

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摘　要

邻接权概念是作者权体系国家的特有概念，但与作者权体系立法一贯遵循的严谨作风不同的是，邻接权概念没有体现出应有的逻辑性。如果按照法律文字的表述来适用的话，凡是和著作权相关的权益都可采用邻接权进行保护，邻接权制度逐渐在许多国家发展成为对不具有独创性、无法成为作品但又与著作权相关的利益进行保护的兜底性制度。邻接权理论上的匮乏与立法中的扩张之势，势必造成著作权法律体系的混乱。探究邻接权本质是否可以识别、是否符合著作权制度的价值体系，是本书选题的初衷。

从邻接权概念产生到今天，各国立法、国际公约以及各国的法学家对邻接权的认识依然存在巨大的差异，甚至在作者权体系国家与版权体系国家存在概念有无的差别。但是从权利保护的内容来看，两大体系的差别正在日渐缩小。在作者权体系立法中，由于固守严格的作品构成要件，邻接权的对象因不具备作品构成条件而成为异于作品的独立的权利保护对象。这种障碍在版权体系国家并不存在，对于作者权体系国家采用邻接权进行保护的对象，版权体系国家则通过将其认定为作品或者以其他方式进行保护。各国在邻接权立法体例上的复杂化与国际公约在保护内容上的趋同化，预示着研究邻接权制度本身无法揭示出自身的本质，而是必须追溯到邻接权概念产生之初。邻接权概念跻身于著作权制度中，其中蕴含着怎样的机缘？

一方面，随着技术的发展，在著作权制度中，新的与作品相关的利益主体欲跻身而入，邻接权的权利主体不断扩张，同时传统邻接权主体也在奋力抗争，为维护自己的利益不断扩大权利保护的范围；另一方面，邻接权自身的正当性都未能证明。这样的情形之下，邻接权总是面临着被质疑，同时又一再地提醒研究者：邻接权的扩张趋势绝不是仅仅与著作权相关就能做到的！从录音制品开始，邻接权的重大发展总是伴随着新技术产生带来的利益斗争与调和。这很容易遮蔽人们对邻接权本质的认识——论者常常将新技术带来的新经济形态的发展需要作为考虑扩张邻接权的主要因素，而忽略了邻接权与著作权之间的逻辑关系研究。在制度设计的过程中，如果盲目地规定本无必要规定的“新权利类型”，或者赋予权利人本无必要的权利，就有可能在制度层面形成与经济基础的要求不适应的因素，进而反过来会影响产业的发展。因而邻接权的产生虽源自利益分配的需要，但是邻接权主体的利益保护需求如何能升格为绝对的财产权利；同样处于传播者行列的出版者为何被排除在权利主体之外，只能享有专有出版权这种独占性债权；邻接权的这种设权保护是否合理，其中权利确认的正当性是值得思考的。邻接权与著作权权利对象属性的分析比对为邻接权权利正当性的确认提供了依据，更是为邻接权找到了权利的归属。

本书论证的前提是不否认邻接权制度的利益分配的工具属性，也并不否认在作品传播过程中对投资主体的利益保护。但是邻接权利益分配的工具性是其作为财产权所具有的共性，未能突出邻接权本身的特质。本书的论证是为邻接权寻找真正的权利归属，为邻接权制度寻求权利的正当性依据。采用邻接权来保护的利益是需要建立在与著作权体系相同的正当性基础上

的。体系化思维的运用引导本书结论的方向。

本书共分为七章，综合运用历史分析法、比较分析法以及逻辑推理与论辩推理分析相结合的方法，将研究邻接权的视角引向著作权价值取向下的权利归属。

首先，对邻接权的产生和发展轨迹作介绍，邻接权主体的权利产生于著作权扩张的过程中，伴随着著作权权利内容的扩增。邻接权的出现正是各国处于技术发展下带动经济迅猛增长的时期，利益的争夺掩盖了邻接权的本质，权利正当性探讨的缺失，使邻接权进入著作权制度之后始终未能稳固立足。在邻接权发展的过程中，旨在统一保护标准的国际公约的推动作用非常明显，这也是受世界经济发展一体化趋势的影响所致。通过邻接权国际公约的内容阐述推衍出邻接权的内容不断增加的轨迹，国际公约对各国邻接权国内立法的影响可见一斑。无论基于怎样的原因，各国对邻接权保护的对象有了统一的发展趋势，这一现象表明各国对邻接权立法体例的不同并不代表各国邻接权保护对象在性质上截然对立，不可调和。

其次，针对邻接权问题在作者权体系国家与版权体系国家的不同处理方式，对版权理念产生和发展的历史进行追踪，探究版权得以确立的正当理念，以及版权理念在版权发展过程中发生的转折。版权的产生和发展过程中，同样隐藏着利益团体的斡旋和操作，但是版权的正当性论证使得作者在与出版商利益抗衡的对弈中确立了其在版权制度中稳固的主体地位。据此得出的结论是，邻接权在著作权制度中的正当性论证也是不容忽视的步骤。经济发展的需要，国家间贸易的繁荣，同样的国际立法历程在著作权领域出现，国际立法统一的趋势扰乱了各国国内立法坚持的原则，作者权体系与版权体系的差别缩小，

这反映了两大体系在著作权制度价值取向上的趋同。

最后，论证的视角转向著作权制度的价值取向。从权利的本原进行论证，权利自身对价值的追求决定了私法中的权利是经过价值判断的正当利益。在版权的产生过程中曾深受法律哲学理念的影响，这也是版权体系与作者权体系分野的重要原因。然而随着法律哲学理念的不断演进，曾经对立的自然主义哲学和功利主义哲学两大阵营已经出现融合，在著作权立法中单一地坚持自然主义或功利主义的哲学导向，都会使立法的价值取向发生偏离。版权体系与作者权体系融合下的价值取向走向了回归鼓励知识创造，增进公共利益的原点，以应对两大体系共同面临的著作权制度的基本矛盾。

邻接权产生过程中的理论基础和现有以揭示邻接权本质为目的的学说未能有效地阐明邻接权的权利归属。从法律关系的构成来看，邻接权与著作权在主体、内容上存在相互混淆的关系，方法最终回归到关注两者权利对象的属性。著作权的对象是作品，其根本属性在于独创性的表达。在对邻接权概念的基本范畴进行分析之后，邻接权对象与著作权对象具有共同的上位概念，即表达。但是在现有邻接权保护对象中既存在独创性表达，也存在非独创性表达。在体系化思维下，对于邻接权对象属性的界定，应确定为独创性的表达，以保证著作权体系内对象属性的统一，这也是著作权体系下价值判断的结果。在这样的情形下，传统邻接权的概念分崩离析，新的邻接权对象属性重新确定。

在新的邻接权对象属性确定之后，邻接权的设权保护要求权利的确认有一个相对确定的标准。邻接权的确认本着内在制约和外在限制的机理，在权利范畴上具有相对稳定性，不再是

保护不构成作品的对象利益的兜底性制度。本书建议在立法中将享有邻接权的对象参照作品的立法模式以明示的方式列举。在确认邻接权的标准建立以后，对现有邻接权范畴进行检讨，以甄别不应介入邻接权范围进行保护的权益。为了应对邻接权扩张之势，对欲加入邻接权的权益作出判断，属于邻接权人应有之权利应予以确认，但如果仅存在利益保护需要而不具备邻接权构成要件的权益则应当坚决地拒绝。对这样的利益应当保护，但是要采用恰当的模式。

Abstract

Being a unique concept in the author's right system, the concept of neighboring rights does not reflect the logic, which is different from the strict style of legislation of author's right system. If applied according to legal text expression, interests related to copyright could be seen as neighboring rights and get legal protection. Neighboring rights system gradually have become the one to protect interests in the objects which have no originality and thus cannot be works but relate with copyright in many countries. The lack of theory and potential expansion of legislation of neighboring rights will inevitably lead to confusion in the legal system of copyright. Exploring whether the essence of neighboring rights can be identified, and whether it conforms to the value of copyright system is the intention of this dissertation.

During the historical development of the concept of neighboring rights, huge differences still exist in national legislation, international conventions and the understanding of national jurists. Even as to the question of whether the concept of neighboring rights do exist or not, the author's right system and copyright system have different answer on it. But as to the protection content of the rights, the gap between the two systems has increasingly narrowed. In author's rights system, because of the strict adherence to certain constitutive re-

quirements, constructive, the object of neighboring rights which does not satisfy these requirements become an independent object with rights protection. This obstacle does not exist in those countries with the copyright system. Objects which obtain neighboring right in author' rights system countries are protected by identified as works or through other ways in copyright system countries. The complication in legislation of different countries and the convergence in international conventions on protection content, indicate that the system itself can not reveal its own nature. We must trace back from the origin of the neighboring rights. When neighboring rights come into the copyright system, what kind of opportunity will we have?

On the one hand, with the development of new technology, new stakeholders associated with the work enter into the scope of legal protection. So that the range of subjects enjoying neighboring rights is expansion. Meanwhile the traditional subjects in neighboring rights are struggling to resist and safeguard their own interests, continually expanding the rights protection range. On the other hand, neighboring rights fails to prove its legitimacy. Under such circumstances, neighboring rights has been constantly questioned. But at the same time it also repeatedly reminds us that its expansion trend should not be related to copyright.

Beginning with the object of recordings, the major development of neighboring rights is always accompanied by the benefits reconcilability brought by new technologies. It's easy to mask people's awareness on neighboring rights system. Scholars often hold the view that only new economic trend brought from technology development trend

should be considered as new elements of neighboring rights. But this view ignores the logical relationship between neighboring rights and copyright. In the process of system designing, if we make provisions of "new types of right" which is unnecessary, it is possible to form factors unfit the economic basis, which in turn will affect the industry development. Although neighboring rights was generated from the need of interests' distribution, how can it become to be an absolute property right? As being in the same rank of publisher, why the communicators can only enjoy the exclusive right as exclusive creditor's right? We need to think that whether the protection setting as neighboring rights is reasonable, and whether there exist the legitimacy of confirming such right. The analysis and comparison between neighboring rights and copyright provides the basis for legitimacy of neighboring right, and help to find the essential attribute of neighboring rights.

The prerequisite of this dissertation is admitting that the tool characteristic of neighboring rights system on interest distribution, and not denying interest protection for investors in the process of works communication. The tool characteristic on benift distribution is common of property right, which has failed to highlight the characteristic of neighboring rights itself. This dissertation is looking for the real destination for neighboring rights, and the legitimacy of its system. The legitimacy of using neighboring rights to protect the interests need to be built on the same basis as copyright system. The way of systematic thinking leads to the direction of this conclusion.

This dissertation is divided into five chapters. The comprehen-

sive use of historical analysis, comparative analysis and the analysis of logical reasoning will lead the neighboring right to the orientation of the right of copyright ownership.

This dissertation first introduces the emergence and development track of neighboring right. Neighboring rights emerged in process of expansion of copyright, including the content expansion of copyright.

The emergence of neighboring rights was in the period when the technology development was driving rapid economic growth in various countries. Competing interests of the rights conceal the nature of neighboring rights. Being lack of the legitimacy, neighboring rights has failed to secure foothold in the copyright system. In the process of neighboring rights development, the international conventions promoting role of Convention for the purpose of unifying international standard of protection play an obvious promoting role, which is affected by the integration trend in economic development. Whatever reasons, there is a trend for integration on the protection objects of neighboring rights in various contrives. This phenomenon shows that different legislation styles of neighboring rights in various countries do not mean that the nature of protection object in neighboring right is diametrically irreconcilable.

Secondly, as to the different treatments for neighboring rights in the author's right system and the copyright system, we should track back the emergence of the copyright concept and its development history and explore how the legitimate concept of copyright established and how is transformed during the development process. In

the process of copyright's emergence and development, operations and mediations from interest groups also existed. But the justification argument of copyright enabled authors to establish a strong dominant position in countering publishers to compete in the interests of the copyright system. Accordingly the conclusion is drawn that the legitimacy argument for neighboring rights in the copyright system is an indispensable step not to be neglected. Because of the needs of economic development and the prosperity of trade between countries, the same process of international legislation has occurred in the copyright field. The unified trend of international legislation broke the principle of domestic legislation in various countries. The differences between the author's right system and copyright system have been narrowed, which reflect that the orientation of value of the two systems is in convergence.

Then, the perspective turns to the value orientation of the copyright system. Arguing from the right origin, pursue for the value of the right determines the right must be legitimate interest through value judgment by private law. The copyright development process had been deeply influenced by philosophy, which is also the important reason why the copyright system and the author's right system are separated. However, following the continuous evolution of philosophy, the two big camps of naturalism philosophy and utilitarian philosophy which once were opposed against each other have emerged the trend of integration. If we insist of naturalism philosophy or utilitarian philosophy alone in legislation, the legislative value orientation would have deviation. In the integration of the two systems, the

copyright system values return to the origin, which create and promote knowledge and encourage the public interests, dealing with the basic contradiction the two systems face together.

In the process of neighboring rights' emergence, some basic theories and concepts in order to reveal the essence doctrine of neighboring rights have failed to expound the rights of ownership effectively. Judging from the constitution of legal relationship, there is confusion in the subject and the content between neighboring rights and copyright. Eventually we should return to pay attention to the attribute of both right objects. The copyright's object is work, whose basic attribute lies in the original expression. Through analyzing the basic categories of neighboring rights, we find the attribute of neighboring rights' objects is expression which is the common superior concept to the object of copyright. However, the protection of neighboring rights objects exists in both original expression and non - original expression. In the systemization thinking, the neighboring rights object properties should be defined as the originality expression which is the result of value judgment in order to ensure the unity of the object properties within the copyright system. Under such situation, the traditional neighboring rights' concept is disintegrated and the new neighboring rights' object is redefined.

After the characteristic of new neighboring rights' object is determined, the neighboring rights protection requires that its confirmation should have a relatively defined criteria. Recognized the internal constraints and external constraints in line with the mechanism, neighboring rights have relative stability in the category of ob-

ject, and it is no longer the fallback of the system for the non – original expression. This dissertation proposes that the object enjoying neighboring rights should be expressed in a set pattern in legislation, which is relevant to the legislative model for works. After the confirmation standards for neighboring rights were established, we should carry on the self – criticism to its existing category, and screen the interests which should not be involved in neighboring rights to protect. In response to deal with the potential expansion of neighboring rights, we should judge the rights and interests which want to join into neighboring rights. Right belongs to neighboring rights' subject should be recognized. If there only exist interests in need of protection, and isn't provided with constitution of neighboring rights, the interests shall be thoroughly rejected. For such interests should be protected, but should be in a different and appropriate mode.

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