

A CONFUCIAN ANALYSIS ON THE EVOLUTION OF CHINESE PATENT LAW SYSTEM



中国政法大学

张南 (Nan Zhang) 著

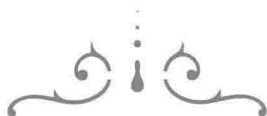


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内容提要

本书深入讨论中国的专利制度不仅借鉴了国际条约, 又保持了自身的法律文化并满足国内经济发展的需求等特点, 指出这才是促进创新和改善专利保护的基础。同时, 本书通过对创新、文化与制度史的考察, 并结合中国《专利法》第四次修改的最新动态, 借用儒家文化中的经典理论, 通过历史分析和比较法分析方法, 为进一步完善中国专利制度提出了积极建议。

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Table of Abbreviations

A2K	Access to Knowledge
AD	Anno Domini
ALM	Additive Layer Manufacturing
ARV	Antiretroviral
AVS	Audio Video Standard
BC	Before Christ
CAD	Computer Aided Design
CEO	Chief Executive Officer
CPC	Communist Party of China
CSC	Chinese Supreme Court
CSPP	Chinese Supreme People's Procuratorate
CTU	China Television Union Technology Ltd.
DNA	Deoxyribonucleic Acid
DVD	Digital Video Disc
Ed.	Editor
Eds.	Editors
EPO	European Patent Office

EU	European Union
FDA	Food and Drug Administration (US)
FDI	Foreign Direct Investment
F. 2d	Federal Reporter, 2nd Series (US) Fed. Cir. Federal Circuit (US)
GDP	Gross Domestic Product
Ibid.	Ibidem
IBM	International Business Machines Corporation
IGRS	Intelligent Grouping and Resource Sharing
IP	Intellectual Property
IPR	Intellectual Property Right
IT	Information Technology
Jr.	Junior
JVC	Victor Company of Japan, Ltd.
Ltd.	Limited
No.	Number
NPC	National People's Congress (China)
MSG	Monosodium Glutamate
ODM	Original Design Manufacturer
OEM	Original Equipment Manufacturer
op. cit.	opere citato
p.	page
PCT	Patent Cooperation Treaty
PNYPNY	Technologies of Parsippany New Jersey
PRC	People's Republic of China
PSI	Platform Solutions, Inc.
R&D	Research and Development
SAIC	State Administration of Industry and Commerce (China)

SC	Supreme Court
SFDA	State Food and Drug Administration (China)
SIPO	State Intellectual Property Office (China)
S&P	Standard & Poor
SMEs	Small and Medium-sized Enterprises
TRIPS	(agreements on) Trade Related Aspects of Intellectual Property Rights
TV	Television
UK	United Kingdom
UN	United Nations
US	United States
USD	United States Dollars (US currency)
v.	versus
WIPO	World Intellectual Property Organisation
WTO	World Trade Organisation

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1. Introduction

1.1 Clarifications of the Arguments and Contributions

This book fully discusses the features of the Chinese patent law system that it does not only legally transplant the international treaties, but also maintains Chinese legal culture and satisfies domestic economic growth. This is the foundation of encouraging creativity and improving patent protection. Meanwhile, based on the classic principles of the Confucianism, this book provides constructive suggestions on further improving the Chinese patent law system. Through a thorough study of the Chinese patent system, the main contribution made by this book will be the analysis of new trends and future strategies for local industries in the legal, cultural and sociological sectors within China. For example, Chapter 1 provides the clarification and hypothesis of this book with a thorough literature review and discussion on the legal system in China. Chapter 2 will point out that industrialisation is the main reason behind social change and the boom of patents in China. Chapter 3 analyses the effects of traditional Chinese culture and reveals the Confucian

emphasis on creativity and innovation which is different from most of the previous scholarship in the same field. Chapter 4 not only discusses the ancient innovation in China, but also examines the early history of Chinese patent law. Chapter 5 focuses on China's Updates in Patent Law, analysing relevant factors in the patent enforcement. Chapter 6 discusses patent infringement challenges and new enforcement measures adopted by China. The new amendment of Chinese patent law and the emphasis on rewarding intellectual work are analysed as new waves in the field. Chapter 7 reviews the discussion throughout the book and outlines the five key themes of intellectual property policy and development; namely, education and access to knowledge, culture, industry, social and creative group; and commercial strategy. These themes are the fundamental basis for developing a successful programme of patent system in China.

1.2 Literature Review

The first literature in this field that needs to be discussed is Professor William Alford's book *To Steal a Book Is an Elegant Offense—Intellectual Property Law in a Chinese Civilisation in 1995*.^① The propositions in this book have limitations because They do not foresee the new progress and development of intellectual property law and enforcement in China after 1995. Professor Alford examined the development of Chinese patent system starting from the late Qing Dynasty to the period around 1995 in his book.^② In the next two decades, Chinese patent law

① William Alford, *To Steal a Book Is an Elegant Offense—Intellectual Property Law in a Chinese Civilisation*. Stanford University Press, 1995.

② William Alford, *op. cit.*, pp. 9–94.

system has been improved by the 2001 amendment, 2009 amendment and the undergoing current amendment. *For China's international trading partners to build trust in China, international trading partners, upgrading the local legal system is inevitable if the trade is to be sustained.* The reality is the latest figures showing that direct foreign investment into China has increased 5.25% in 2013 than 2012. ^① Both Chapter 5 and Chapter 6 analyse current attempts to reconcile the concept of patent with China's present and future and find this reconciliation getting better.

Professor Wei Shi discussed *Cultural Perplexity in Intellectual Property: Is Stealing a Book an Elegant Offence?* in his 2006 article^② that *Confucianism valued the concepts of communal property which is different from the Western ideas emphasising the importance of personal rights and property*^③ Also, he noted that Confucianism reflects the natural order and emphasises the obligation necessary to maintain it. ^④ Furthermore, Professor Wei Shi foresaw that China's WTO accession would lead to a decrease in the infringement of intellectual property. ^⑤ He specified the reasons as follows: "When economic growth creates the development of more sophisticated and competitive home grown enterprises, and the domestic enterprises display entrepreneurial enthusiasm to protect their own

① The Ministry of Commerce, 'The Usage of Foreign Investment of January to December 2013', Statistics and Data, the official website of Ministry of Commerce, 20 January 2014. http://www.fdi.gov.cn/1800000121_33_3918_0_7.html.

② Wei Shi, 'Cultural Perplexity in Intellectual Property: Is Stealing a Book an Elegant Offence?', North Carolina Journal of International Law and Commercial Regulation, Volume 32, 2006, p. 4.

③ *Ibid.*, pp. 8–9.

④ *Ibid.*, p. 9.

⑤ *Ibid.*, p. 31.

intellectual property rights, the intellectual property infringement levels will reach a plateau and start to decrease.”^① This view will receive further consideration in the analysis of the history of Chinese innovation in this book and the rise of creative group in the final chapter.

Professor Peter Yu from Drake University analysed the main issues occurring in the Chinese patent system's development in his 2013 article *Five Oft-Repeated Question about China's Recent Rise as a Patent Power*.^② In particular, he discussed the attitudes of industries and commentators about the rise of China's indigenous innovation; in other words, the need to develop a critical mass of local stakeholders to help promote stronger intellectual property protection from the inside became the key argument over the last decade.^③ In this article, he also pointed out the advantage of this change. The advantage is that many nations now realise the importance and benefits of indigenous innovation.^④ The more local innovation there is, the more likely Chinese policymakers and the general public will support more massive intellectual property reforms in the future.^⑤ A recent official opening speech of Chinese Vice Premier Yang Wang at the 18th China International Fair for Investment and Trade^⑥ provides three clear messages on 8 September, 2014.^⑦ Firstly,

① *Ibid.*, pp. 31–32.

② Peter Yu, 'Five Oft-Repeated Question about China's Recent Rise as a Patent Power', *Cardozo Law Review*, *De Novo*, 2013, p. 88.

③ *Ibid.*, pp. 91–92.

④ *Ibid.*, p. 92.

⑤ *Ibid.*

⑥ see the official website of the 18th China's International Fair for Investment and Trade. <http://www.chinafair.org.cn/china/index/index.aspx>.

⑦ Yang Wang, 'The Road of China's International Investment Cooperation Will Be Wider', *News Release*, the official website of Ministry of Commerce of People's Republic of China. <http://www.mofcom.gov.cn/article/ae/ai/201409/20140900723575.shtml>.