

Intellectual Property Law in China

QU SANQIANG



Wolters Kluwer
Law & Business

Intellectual Property Law in China

Qu Sanqiang



Wolters Kluwer
Law & Business

Published by:
Kluwer Law International
PO Box 316
2400 AH Alphen aan den Rijn
The Netherlands
Website: www.kluwerlaw.com

Sold and distributed in North, Central and South America by:
Aspen Publishers, Inc.
7201 McKinney Circle
Frederick, MD 21704
United States of America
Email: customer.service@aspenpublishers.com

Sold and distributed in all other countries by:
Turpin Distribution Services Ltd.
Stratton Business Park
Pegasus Drive, Biggleswade
Bedfordshire SG18 8TQ
United Kingdom
Email: kluwerlaw@turpin-distribution.com

Printed on acid-free paper.

ISBN 978-90-411-3353-3

© 2012 Kluwer Law International BV, The Netherlands

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording, or otherwise, without written permission from the publisher.

Permission to use this content must be obtained from the copyright owner. Please apply to: Permissions Department, Wolters Kluwer Legal, 76 Ninth Avenue, 7th Floor, New York, NY 10011-5201, USA.
Email: permissions@kluwerlaw.com

Printed and Bound by CPI Group (UK) Ltd, Croydon, CR0 4YY.

Intellectual Property Law in China

An Introduction to the Author

Dr. Qu Sanqiang is one of the international outstanding law scholars and is widely credited with having popularized intellectual property law. Currently he is appointed as a professor of Intellectual Property Law at Peking University, and the Dean of the Law School of Beijing Institute of Technology. He is the author of *Copyright in China* (English version, 2002), *Fundamentals of Intellectual Property Law* (Chinese version, 2004), *To Steal a Book Is an Offense Indeed* (Chinese version, 2006), *Modern Intellectual Property Law* (Chinese version, 2009), *Modern Copyright Law* (Chinese version, 2011), *Modern Industrial Property Law* (Chinese version, 2012), *Intellectual Property Law in China* (English version, 2012), and several dozens of theses, essays and book reviews.

Acknowledgments

Since China established its “Open-door Policy” in the early 1980s, great achievements have been made with regards to the legal protection of intellectual property right. This book provides a wide-ranging overview of this tremendous change over the past 30 years. Here I would like to extend my gratitude to all the renowned friends who have shared their intellects in this project. Without their hard work and contributions, it would not be possible for me to have the opportunity to write these words at this very moment.

First and foremost, I offer my sincerest gratitude to Kluwer Law International, especially to Ms. Christine Robben, Ms. Hanneke Verbeek, Ms. Christa Biervliet, Mr. Srinivasan, Ms. Sharmeela A. and Ms. Srinithya, who have made the production of this edition as pleasurable and smooth as such a task could ever be. I also want to thank Ms. Zhang Shasha and Mr. Chen Xi, who introduced me to this world-famous publisher, and made a great effort in bringing this book to fruition.

During my writing of the book, a large number of people have contributed in different ways at various stages, and their support is gratefully acknowledged. I would like to thank all of my students from Peking University Law School, especially to Ms. Chen Qiyin, Ms. Qing Yue, Ms. Xia Juping and Ms. Pan Wen, who have worked tirelessly in editing the manuscript.

I would also like to thank Peking University and Beijing Institute of Technology, which have provided me with the excellent research environment and great support that can allow me to be able to conduct a thorough scrutiny on intellectual property law. Many thanks also to Mr. Liang Nianjian, Mr. Liu Fengming, Mr. Yu Weidong, and Mr. Yu Haitao from Microsoft Corporation (China) for their generous financial support for this project.

I owe a particular debt of gratitude to Dr. Yang Huaquan, who offered me so much assistance and valuable feedback. In the creation of this book, he devoted a

Acknowledgments

great deal of time and energy in clarifying issues and correcting the drafts of the manuscript. Without his support, this book would have not been made possible.

Many other people from Mainland China, Germany, US, UK, Holland, Taiwan and elsewhere in the world have offered their generous support, help and friendship during my writing of the book, and I am sincerely grateful to them. Special thanks go to Mr. Fu Junwei, who has helped me improve my English expression and writing of this book. And I would like particularly to express my thanks to Mr. Meng Zhaoping, Ms. Zhou Huijing, Ms. Xiong Xianan, Ms. Qiu Junqiong, Mr. Li Zonghui and Mr. Zhang Wenliang for their generous assistance throughout the entire process of creating this book.

Finally, greatest gratitude shall go to my wife Jingxia, who has supported me selflessly; and my son Difan, who has offered me so much enthusiasm, energy and patience during the completion of this book. And I should express my deep sense of gratitude to my father, brothers and sisters, who have constantly encouraged me with their heartfelt concern for my wellbeing and interest in my progress.

List of Abbreviations

1. States and Organizations

CCP	The Chinese Communist Party
GAPP	The General Administration of Press and Publication of the People's Republic of China
GAQSIQ	The General Administration of Quality Supervision, Inspection and Quarantine of the People's Republic of China
IPC	Intellectual Property Committee
MOFCOM	The Ministry of Commerce of the People's Republic of China
MOA	The Ministry of Agriculture of the People's Republic of China
MOC	The Ministry of Culture of the People's Republic of China
MORFT	The Ministry of Radio, Film and Television
MPS	The Ministry of Public Security of the People's Republic of China
NCAC	The National Copyright Administration of the People's Republic of China
NPC	The National People's Congress of the People's Republic of China
NPCSC	The Standing Committee of the National People's Congress
PRB	The Patent Reexamination Board of the State Intellectual Property Office of the People's Republic of China
PRC	The People's Republic of China
SAIC	The State Administration for Industry and Commerce of the People's Republic of China
SARFT	The State Administration of Radio, Film, and Television of the People's Republic of China

List of Abbreviations

SFA	The State Forestry Administration of the People's Republic of China
SIPO	The State Intellectual Property Office of the People's Republic of China
SPC	The Supreme People's Court of the People's Republic of China
SPP	The Supreme People's Procuratorate of the People's Republic of China
TAB	The Trademark Appeal Board of the State Administration for Industry and Commerce of the People's Republic of China
TO	The Trademark Office of the State Administration for Industry and Commerce of the People's Republic of China
U.K.	The United Kingdom
UN	The United Nations
UNESCO	The United Nations Educational, Scientific and Cultural Organization
U.S.	The United States of America
USPTO	The United States Patent and Trademark Office
USTR	The United States Trade Representative
WIPO	The World Intellectual Property Organization
WTO	The World Trade Organization

2. Laws and Conventions

1. Laws

China Administrative Procedure Law	The Administrative Procedure Law of the People's Republic of China
China Anti-Monopoly Law	The Anti-Monopoly Law of the People's Republic of China
China Anti-Unfair Competition Law	The Anti-Unfair Competition Law of the People's Republic of China
China Civil Procedure Law of the People's Republic of China	The Civil Procedure Law of the People's Republic of China
China Copyright Law	The Copyright Law of the People's Republic of China
China Criminal Procedure Law	The Criminal Procedure Law of the People's Republic of China
China Criminal Law	The Criminal Law of the People's Republic of China
China Patent Law	The Patent Law of the People's Republic of China
China Trademark Law	The Trademark Law of the People's Republic of China

China Technology Contract Law	The Technology Contract Law of the People's Republic of China
China Tort Liability Law	The Tort Liability Law of the People's Republic of China
DMCA	Digital Millennium Copyright Act (U.S.)
GPCL	General Principles of Civil Law of the People's Republic of China
Statute of Anne	An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of Such Copies, During the Times therein mentioned, 1710 (Great Britain)

2. Conventions

Berne Convention	Berne Convention for the Protection of Literary and Artistic Works
Brussels Convention	Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite
Budapest Treaty	Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure
CEWIPO	Convention Establishing the World Intellectual Property Organization
GATT	General Agreement on Tariffs and Trade
Hague Agreement	Hague Agreement Concerning the International Registration of Industrial Designs
Lisbon Agreement	Lisbon Agreement for the Protection of Appellations of Origin and their International Registration
Locarno Agreement	Locarno Agreement Establishing an International Classification for Industrial Designs
Paris Convention	Paris Convention for the Protection of Industrial Property
Phonograms Convention	Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms
Madrid Agreement (Indications of Source)	Madrid Agreement for the Repression of False or Deceptive Indications of Source on Goods Madrid Agreement Marks Madrid Agreement Concerning the International Registration of Marks
Madrid Protocol	Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks
Marrakesh Agreement or WTO Agreement	Agreement establishing the World Trade Organization

List of Abbreviations

Nairobi Treaty	Nairobi Treaty on the Protection of the Olympic Symbol
Nice Agreement	Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks
PCT	Patent Cooperation Treaty
PLT	Patent Law Treaty
Rome Convention	International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations
Singapore Treaty	Singapore Treaty on the Law of Trademarks
Strasbourg Agreement	Strasbourg Agreement Concerning the International Patent Classification
TLA	Trademark Law Treaty
TRIPS	Agreement on Trade-related Aspects of Intellectual Property Rights
UCC	Universal Copyright Convention
Vienna Agreement	Vienna Agreement Establishing an International Classification of the Figurative Elements of Marks
Washington Treaty	Treaty on Intellectual Property in Respect of Integrated Circuits
WCT	WIPO Copyright Treaty
WPPT	WIPO Performances and Phonograms Treaty

3. Terms

IP	Intellectual Property
IPR(s)	Intellectual Property Right(s)
MOU	Memorandum of Understanding
PVP	Plant Variety Protection

Preface

By Qu Sanqiang

A Great Challenge for China: To Launch a Intellectual Property Scheme in the Past Century

1 Introduction

It has long been a controversial issue whether legal protection of intellectual property existed in feudal China. Some scholars believe that there was an indigenous intellectual property protection in imperial China even before the first codified Chinese intellectual property law was promulgated in the late nineteenth century.¹ They contend that the concept of intellectual property could be traced from the emergence of printing during the Tang Dynasty (618-907).²

-
1. Zheng Chengsi, a well-known Chinese intellectual property scholar, contends that: "It is commonly recognized that intellectual property 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, 毕昇 (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 authorization 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, *Intellectual property 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 intellectual property 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

Although the evidence they present shows that some legal regulations relating to authors' rights did 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 intellectual property, this is because the latter by nature is a kind of private property rights 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 favorable to the development of an intellectual property system. The Chinese concept of intellectual property was basically borrowed from Western jurisdictions.

In the eyes of Western scholars, China is often regarded as a large and influential country which does not have a comprehensive intellectual property law.

This fact alone should give rise to some thoughts. Even China possesses one of the most distinctive and continuous literary and artistic traditions in the world, there is not any system of rules that can be compared to Western intellectual property concepts. Neither classical nor modern China seems to have felt the need for Western-type intellectual property protection.³

This is no doubt true; however, considering the overview of Chinese history indicates a lack of understanding of the economic, political and cultural factors which contributed to this situation.

Feudal China was strongly influenced by the Confucian philosophy, which was fundamentally contradictory to the notion of intellectual property. In addition, the enclosed natural economy and powerful centralism of the feudal State did not provide a favorable environment for the development of the concept of intellectual property. In fact, there were no recorded attempts to form an indigenous system governing intellectual property protection in Chinese history until the Western notion of intellectual property was first introduced into China in the late nineteenth century.

2 The Question of Indigenous Intellectual Property Protection in Feudal China

The idea that intellectual property arose soon after the advent of printing enjoys wide currency in Chinese academic circles.⁴ This notion is mainly produced by a comparison with similar developments in Europe. Indeed, the emergence of intellectual property concepts in Europe was tied to a specific level of social and technological organization symbolized by the invention of printing and the development of book publishing in the fifteenth century. However, in both of these areas, history indicates that China was in advance of Europe: printing techniques had been invented in the middle of the eleventh century. The highly sophisticated

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. See Ploman, E.W. and Hamilton, L.C., 1980, *Intellectual property*, Routledge & Kegan Paul, London, 140.

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

organization of social and cultural life created by then had a longer tradition than anything comparable in Europe.⁵

Against such background, although it is true that there was some evidence of restrictions on the unauthorized publication or reproduction of certain books, symbols, and products, this can hardly be regarded as constituting modern intellectual property law. This is 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 intellectual property law is essential to entitle individuals to prevent others (including the government of the State) from violating their works, we would find that neither legal regulations concerning intellectual property nor any informal concepts regarding it existed in feudal China until the late nineteenth century. This is the reason why such a historical phenomenon bewilders some Western scholars: why did a civilization 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 a more comprehensive protection for its rich bounty of creation?⁶

In order to realize the actual reasons for this historical phenomenon, an extensive analysis of Chinese culture and philosophy to explain the differences in underlying philosophy, political system and social structure would be required. In this context, attention must be paid to the following aspects. First, the enclosed natural economy in feudal China did not provide a favorable environment for the development of an intellectual property 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 intellectual property. Lastly, the political system of feudal autocracy did not allow the development of an independent intellectual property system in China.

2.1 Economic Reasons

In general, intellectual properties are by nature a concomitant of industrialization or a response to a particular technological breakthrough.⁷ The emergence of intellectual property in a given society was largely determined by its economic development. Prior to the late Qing Dynasty, feudal China was basically a society with an enclosed natural economy. Following the spring and autumn period (770-476 BC), almost every dynasty of feudal China pursued a policy of “*chongben yimo*” (stressing on agriculture and neglecting commerce and handcraft industry).⁸

5. See Ploman and Hamilton, fn. 3.

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

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

8. See Kuang, Y., 1985, 《孔子评传》 (*Comments on Confucius*), Qilu Publishing House, Shandong, 387.

This policy has 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; however, they did not represent the basic level of the feudal economy as the demand of the society as a whole for cultural consumption and intellectual creation was relatively low. No evidence could be found before the twentieth century that feudal China had developed an inexpensive mass production system, which some scholars regard as constituting an impetus to the establishment of intellectual property protection.⁹

2.2 Traditional Culture

Although economic factors should not be ignored in understanding why feudal China did not provide a systematic protection for intellectual creation and innovation, it is the traditional culture that explains why there were no contemporary ideas of intellectual property law throughout feudal Chinese history.¹⁰ In summing up, Chinese culture excluded the idea of intellectual property.

As a legal concept, intellectual property seems even less attuned to the Chinese concept of law due to its reluctance to rely upon rigid codification and abhorrence of litigation. The traditional Chinese concept of law is so different from the Western concept that it has often been described as a rejection of the idea of law.¹¹

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

First, in Confucianism, social order is achieved by actions which are in accordance with the order of nature. Natural order and social order react constantly with one another. The reflection of this approach is through the concept of *li* (i.e., courtesy), in which the West would regard it as legal discourse. *Li* has been translated as ceremonies, rituals, rules of social conduct, or in a more general context, anything that conforms to social order and universal harmony.¹²

Confucianism advocated using *li* instead of law for dealing with various social relationships. “In the conception *li*, there is no place for law in the Latin sense of the term. Strictly speaking, there are not even individual rights which are sanctioned and guaranteed by the law. There are only duties, mutual permutations, governed by notions of order, responsibility, hierarchy, harmony . . .”¹³ As Granet

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

10. See Chien, T. (Tsien, T. H.), *Paper and Printing*, in 1973, *Science and Civilization in China*, Part I, vol. 5, Cambridge Macdonald & Co., London, 29.

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

12. *Ibid.*

13. See Ploman and Hamilton, fn. 3 at 145.

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 aspects.”¹⁴

Second, Confucianism resisted the notions of equality and individuality that provide a basic premise for claiming intellectual property. Confucianism stressed that *li* was a great means in the hands of a ruler. “君君臣臣，父父子子” that is, a king is a king, a liegeman is a liegeman, a father is a father, a son is a son was an important moral principle in Chinese feudal society.¹⁵ As Alford comments that the notion of the Chinese people as a family, with the ruler as parent, is the one which has an enduring tradition since pre-imperial 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.¹⁶

However, “the very nature of this relationship was such that public, positive law could serve neither as the primary instrument for ensuring that the people genuinely understood what was expected of them nor as a means for encouraging rulers to discharge their responsibilities in a suitable fashion.”¹⁷

Confucianism also asserted “存天理，灭人欲” (observing the belief in *li* and destroying individual desire).¹⁸ The Western concept of intellectual property vested in the individual could, therefore, have little place in this structure.

In addition, Confucianism believed that the basic purpose of “law” was not to provide a criterion for distinguishing rights from wrongs; on the contrary, it was to eliminate a threat or violation of the natural order. Since the natural order includes the observation of particularities in each situation and human being, the exactitude of law becomes a negative factor and not a benefit.¹⁹ “Precedents are like traces of writing in ink: they indicate only a pattern and outline and that is all. Human nature is infinitely varied and there is never a case which is exactly the same as one that has been decided before.”²⁰

In such a context, Trials are basically condemned since they are a sign of troubled relationships. Before resorting to trial, every possible means of reaching agreement must be exhausted. The possibilities are numerous as many social groups—family, neighbors, clans, villages, guilds, associations—were ready to intervene and act as arbitrators or mediators.²¹

14. *Ibid.*

15. See Kuang, fn. 8 at 200.

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

17. *Ibid.*

18. See Bodde, D. and Morris, C., 1971, *Law in Imperial China: Exemplified by 190 Qing Dynasty Cases*, Harvard University Press, Cambridge, Massachusetts, 178.

19. See Ploman and Hamilton, fn. 3 at 142.

20. See Sprenkel, S., 1966, *Legal Institutions in Manchu China*, Athlone Press, London, 147.

21. See Ploman and Hamilton, fn. 3 at 142.

This tradition is so powerful that it remains with little change in China until this present day.²²

Third, as far as intellectual knowledge was concerned, Confucianism believed that past experiences were indispensable for a person's moral growth. Confucius said: "I transmit rather than create; I believe in and love the Ancients."²³ He believed that intellectual knowledge was the common heritage of all Chinese people as a whole and it could not be owned by private individuals. Alford analyzes the situation as follows:

The standards that were supposed to govern the ruler-subject relationship—virtue and the rules of propriety—derived their content and legitimacy chiefly from the common heritage of the Chinese people, rather than from any action, whether political, legal, or otherwise, of contemporaneous figures, including of the ruler himself.²⁴

In order to help themselves in acquiring that understanding to guide their own behavior, subsequent generations had to interact with the past in a sufficiently thorough manner as to be able to transmit it.²⁵ Confucianism thus militated against the approach which treated the fruits of intellectual creativity as private property.

2.3 Purpose and Conditions of Education

Education in feudal China was a privilege rather than a right; people had little chance of being educated. "The importance of learning was even more emphasized in feudal China than in Europe, but in a different manner."²⁶ The Confucian philosophy tended to ignore production techniques and natural science. Most feudal dynasties in Chinese history consistently pursued Confucianism, encouraging Chinese intellectuals to focus their study on the Confucian classics and the feudal moral principles, in order to win promotion and obtain material wealth through 科举考试 (the imperial competitive examination).²⁷ As Fei states "In Chinese traditional society, the intelligentsia had been a class without technical skills, who monopolized authority based on the wisdom of the past, spent time on literature and tried to show themselves through art."²⁸ Academies and schools were

22. Even today China often emphasizes a reliance on mediation, the involvement of social groups, the relative absence of written rules and what appears almost as a repugnance to apply them when they do exist. Obviously, such a tradition is quite different from the Western concept of statutorily defined and legally enforceable exclusive rights vested in the individual. See Pepinsky, H.E., "Reliance on Formal Written Law, and Freedom and Social Control in the US and the PRC" (1975) 26 (3) *British Journal of Sociology* 330.

23. See Waley, A., 1938, *The Analects of Confucius*, Allen & Unwin, London, book 7, ch. I.

24. See Alford, fn. 16 at 20.

25. See Owen, S., 1986, *Remembrances: The Experience of the Past in Chinese Literature*, Harvard University Press, Cambridge, Mass., 18.

26. See Ploman and Hamilton, fn. 3 at 141.

27. See Kuang, fn. 8 at 387.

28. Xiaotong Fei, a famous sociologist in modern China, quoted in Levenson, J., 1964, *Modern China and Its Confucian Past: the Problems of Intellectual Continuity*, Anchor Books, New York, 21.