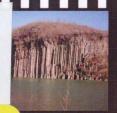
# 服务行政理念下的电影业监管法律制度研究

李敏 著











## 服务行政理念下的电影业监管 法律制度研究

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#### 内容提要

本书以服务行政的理念为指导,立足于行政法学的基本立场和政府监管的基本理论,系统地阐述了中外国家和地区电影业监管的必要性和正当性、电影业监管主体、电影产业监管方式、电影公共服务的供给与监管、电影业监管的法律监督机制等方面在理论、实践和立法上的共性与差异,并提出改革和完善我国电影业监管法律制度的基本设想,如电影审查制度改革的"三步走"方略;电影业监管主体机制的多元化、立体化和复合型构造;柔性行政方式在电影产业监管中的充分运用;对农村电影放映"2131工程"实施情况的实证调查分析;党对电影业领导的法制化、规范化问题;关于《电影产业促进法》立法的若干建议等,都体现了作者独到的思考和见解,这正是对中国电影产业持续快速发展、电影体制改革深入推进和电影基本法制定需要等社会现实问题的积极回应。

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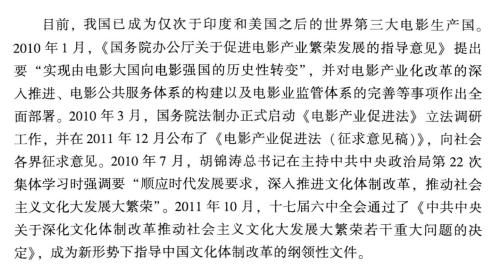
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### 内容摘要 🌡



尽管实践探索正在紧锣密鼓地进行,但法学界对电影领域的关注并不多, 仅有的一些研究主要集中在电影审查、电影版权等个别方面,缺少对整个电 影业监管法律制度的全面梳理和系统分析,无法为电影体制改革的深化和电 影基本法的制定提供充足的理论指导。因此,本书基于行政法学的基本立场 和政府监管的基本理论,对国外和中国电影业监管在理论、实践和立法上的 共性及差异进行了比较分析和论述,并提出改革和完善我国电影业监管法律 制度的基本设想,以期推动我国电影体制改革的深入发展和电影立法的改进。

政府监管理论涉及经济学、政治学等多学科的研究,而行政法学对该理论的关注主要集中在监管主体、监管行为和对监管者的"监管"(或监督)等方面,本书对电影业监管的研究也是沿着这一脉络展开的。本书由绪言、正文和结语三部分构成,其中,正文分为五章,第一章是电影业监管的必要性和正当性分析,第二章是电影业监管主体分析,第三章和第四章分别论述了电影产业和电影公共服务两大领域的监管问题,第五章是对电影业监管的法律监督机制的分析。下面分别予以概述。

本书的绪言部分主要介绍了选题的背景、本书研究的主要问题和几大亮点以及本书采用的主要研究方法。

本书第一章先以几个典型案例和事例提出电影业监管的问题,并将"电影业"框定在电影产业和电影公共服务两个方面。对"监管"作广义理解,包括市场监管、经济调节和社会管理等职能,然后分别从文化学、经济学、宪法学和行政法学的角度对电影业监管的必要性和正当性展开分析。首先,从文化的不同特性探讨了电影的多重属性和功能,介绍了"文化例外论"与"文化产品自由贸易论"的交锋和斗争。对中国关于电影属性和功能认识演变的梳理和分析进一步揭示了电影观念与电影业监管之间的密切联系。其次,由于政府监管理论肇始于经济学领域,监管产生的前提是"市场失灵",因此,笔者围绕"市场失灵"在电影领域的具体表现,从经济学的视角对电影业监管进行了阐释。再次,电影业监管还涉及对公民基本权利的限制,本书分别从表达自由、艺术自由和文化权利三个角度考察了各国宪法对电影的保障方式,这直接影响到各国电影业监管制度的安排。最后,论述了政府监管理论的兴起及其对行政法学研究的影响、中国的服务型政府建设及其与国外政府监管改革的相同之处和不同之处,提出我国的电影业监管改革面临着双重构建的任务,不能盲目照搬国外经验。

本书第二章论述了电影业监管的主体机制,并对电影审查主体进行了单独考察。首先,对监管主体的含义和分类等基本问题进行阐述,将政府监管机构和行使自律监管权的非政府组织及国际性组织都纳入监管主体的范畴。其次,综合考察了国外电影业监管的主体机制,主要由综合性的大文化部门、"一臂间隔"组织、电影业监管机构、地方政府、非政府组织、国际或区域性组织构成,但其具体设置和表现形式在各国并不相同。再次,对我国的电影业监管主体展开分析,它在有些方面开始呈现出与国外一致的发展趋势,但总体来看,与国外存在很大差别,这是由中国的历史和现实情况决定的。在此认识的基础上,笔者对新时期全国电影行政管理职能调整划转、地方综合文化行政主体改革和文化市场综合执法改革进行了评述,详细考察了地方政府、国有电影企事业单位和电影行业组织在我国电影业监管中的职能和作用,并提出具体的改革建议。最后,鉴于电影审查的重要性和广泛关注性,笔者对其进行专门论述,在表述上将"电影分级"统称为电影审查。国外的电影审查主体大致分为4种模式,中国的电影审查主体虽然倾向于中央政府机构统一审查的模式,但在实际运作上体现出鲜明的中国特色和历史色彩,

电影审查权的下放改革也具有很大的局限性,应根据现实情况的变化并借鉴 国外经验加以改革和完善。

本书第三章论述了电影产业监管的方式,并对电影审查行为进行单独考察。首先,对电影产业在中国的名称演变、电影产业的含义、监管方式的改革等基本问题进行了阐述。本书将"电影产业"界定为"通过市场机制的运作来实现电影产品的生产、流通、分配和消费等环节的一系列活动的总称。其次,根据电影产业的特点、电影技术的革新和监管方式的改革,分别从电影市场进入监管、电影市场交易监管、电影产业监管中的柔性行政方式、媒介融合对电影产业监管方式的挑战这4个方面分析考察了国外和中国的电影产业监管方式。虽然中国电影产业监管所处的历史背景和现实环境与国外存在很大差别,但也面临着许多共同的问题,如外资进入和影院安全监管、电影版权保护、视听新媒体监管等,因此,在许多方面可以借鉴国外的监管经验。最后,笔者从行政过程论的角度考察了中外电影审查行为的对象、范围、标准、决定的效力和实施等,以全面、动态地了解电影审查行为的运作特点。我国在20世纪80年代以后曾两次探索电影分级,但均未成功,电影分级制的实施条件尚不成熟。因此,本书提出我国电影审查制度的改革应分"三步走",逐步过渡到电影分级制。

本书第四章论述了电影公共服务的供给和监管,并对我国农村电影公益放映工程进行单独考察。首先,对电影公共服务在中国的名称演变、含义、基本原则、公共服务的供给和监管等基本问题进行了阐述。本书将电影公共服务界定为"为了满足公民的基本书化需求和国家意识形态宣传的需要,由政府部门、非营利组织、私人等主体共同提供电影公共产品和服务的行为及相关的制度与系统的总称",供给和监管只是电影公共服务体系的一部分。其次,系统考察了国外电影公共服务的供给模式和监管机制,包括电影公共服务供给与监管中的中央与地方关系、"一臂间隔"组织供给模式与监管、市场分散型供给模式与监管、政府主导型供给模式与监管。再次,我国电影公共服务总体上偏向于政府主导型供给模式,但又与国外存在很大差别,如中央与地方的事权和财权划分、电影公共服务供给的政治倾向性、政府部门和国有文化企事业单位对电影公共服务资源的垄断、电影行业组织和基金会的行政化色彩、"双重审批"的社会组织管理体制等,应按照服务型政府的建设要求和电影产业发展的需要并借鉴国外经验予以完善。最后,笔者通过现场访谈和实地考察的方式调查了江苏省赣榆县和河南省新蔡县的"2131 工

程"实施情况,发现了许多亟待研究解决的现实问题并提出了相应的完善建议,使之成为一项长期的、可持续发展的电影公共服务工程。

本书第五章论述了电影业监管的法律监督机制,有学者称之为"监管者的监管"。党是电影体制改革的领导者和协调者,党的领导是中国电影业监管制度建立和运行的政治保障。因此,笔者首先探讨了党对电影业领导的法制化问题,这是实现依法监管的根本前提和重要保证,也是对历史教训的深刻总结。其次,多层次的监管规范体系为电影业监管权力的设立和行使提供了依据,这里的"规范体系"既包括"硬法规范",也包括"软法规范"。笔者从规范体系的层次结构和表现形式上分别考察了国外和中国的电影业监管规范制约状况,并对中国电影业监管法规范体系的完善和辩证看待中国电影业监管中的软法规范提出自己的见解。再次,健全的监管程序机制对保证电影业监管权力的良好运作具有重要意义,本书重点探讨了国外和中国的电影业监管规则制定程序和监管行为实施程序,尤其是电影审查的具体程序。我国电影业监管的立法和实施普遍存在"重实体、轻程序"的问题,电影业监管的程序机制亟待确立和完善。

监管影响评估制度既是一种利益衡量和协调机制,也是监督监管权力、改善监管质量的重要工具,但该制度也有一定的局限性,尤其用在涉及许多不可量化因素的电影业监管领域。本书接着从评估的主体机制、适用范围、信息收集、指标和方法等方面系统地分析了电影业监管影响评估的基本制度框架,以期推动中国电影业监管影响评估制度的完善。最后,笔者以电影审查为例探讨了国外和中国电影业监管的法律救济机制,包括监管体系内部的救济机制(如电影审查的复审机制)和司法救济机制,并重点讨论了美国谢弗林案件所确立的"司法尊重原则"在我国电影业监管的司法审查中的适用问题,提出我国暂时还不宜强调这一原则,而应倡导司法审查权的积极行使,尤其是对电影业监管行为的审查。当然,上述各种法律监督机制都有其优缺点,需要相互配合、优势互补,共同监督电影业监管活动在法治框架内良好运行。

本书的结语部分提出要学会在行政服务中实现中国电影业监管目标。

#### **Abstract**

In 2010, the product of feature films in China is 526, only after India and America. In January 2010, State Council on the Promotion of Prosperity and Development of Film Industry Guidance refers to "the historic change from film power on quantity to film power on strength", also provides how to further promote film industry reform, to establish film public service system and to improve film industries regulation system. In March 2010, State Council Legislative Affairs Office officially launched the legislative research of Film Industries Promotion Law. In July 2010, General Secretary Hu Jintao chaired the twenty-second collective study of Central Committee Political Bureau, and stressed that, we should conform requirements of the times, further promote cultural system reform, push forward great development and prosperity of socialist culture. In October 2010, Seventh session of the Sixth Plenary Session drafted a number of major decisions of CPC Central Committee on deepening cultural system reform and promoting great development and prosperity of socialist culture, it is the Programmatic document which guides Chinese cultural system reform in the new situation.

Although film industries regulation reforms are being intensely carried out, legal scholars pay little attention to them, except for movie review, movie copyright and such as individual areas, lack Comprehensive study and systematically analysis of the whole legal system of film industries regulation. This can't provide theoretical guidance to the further promoting of film regulatory system reform and film industry promotion law-making. So based on the legal position and the theory of government regulation, this dissertation comparatively studies the commons and differences in theory, practice and legislation of film industries regulation reform both in foreign countries and in China, and puts forward proposals for reforming and improving the legal system of film industries regulation, to further promote the film regulatory

system and film law-making.

The theory of government regulation relates to economics, politics and other subjects, but the research from administrative law mainly focuses on the body of regulation, the action of regulation and the regulation of regulation, etc, this provide guidance and reference for my dissertation. The dissertation is composed of the introduction, the main body and the concluding part, and the main body is divided into five chapters, chapter 1 is about analysis of the necessity and legitimacy of film industries regulation; chapter 2 about the body of film industries regulation; chapter 3 and chapter 4 about regulation in film industry and in film public service; chapter 5 about legal supervision of film industries regulation.

The introduction of this dissertation is mainly about the background to choose the thesis, main problems to be solved and several parts of innovation, and main methods adopted in the dissertation.

Chapter 1 of this dissertation raises the theme first by some typical cases and examples of film industries regulation, then analyzes the necessity and legitimacy of film industries regulation, separately in cultural study, economics, constitution and administrative law perspective. The "film industries" of the theme includes film industry based on market and film public service, the "regulation" includes market regulation, economic regulation and social management. Firstly, this dissertation discusses multiple properties and functions of film by different characteristic of culture, introduces the controversy and struggle between advocate of "culture exception" and "free trade of cultural products". The analysis of the historical evolution of understanding of properties and functions of film reveals the close relationship between film concept and film industries regulation. Secondly, because the theory of government regulation originated from economics and the premise of the emergence of regulation is market failure, around the explicit reflection of government regulation in film industries, the author elaborates the theme in economics perspective. Thirdly, film industries regulation would restrict fundamental rights of citizen, so this dissertation investigates methods of constitutional protection of film in countries, separately from the freedom of expression, the freedom of art, and cultural right, this also affects the arrangements of their film industries regulatory system. Lastly, this dissertation discusses the appearance of government regulation theory and its impact on administrative law research, the common and difference between building of service – oriented government in China and reform of government regulation in foreign countries, also proposes the double tasks of Chinese reform of film industries regulation, which can't copy from foreign countries.

Chapter 2 of this dissertation discusses the body of film industries regulation, and the body of movie review or rating separately. Firstly, it analyzes fundamental aspects of the body of regulation, such as its concept, classification, the regulation by administrative organs and non-governmental organizations are all included. Secondly, it introduces the body of film industries regulation abroad, such as super cultural ministry, Quango, regulatory agency of film industries, local government, non-governmental organization, international and regional organization, but their setting and forms are different in specific country. Thirdly, it analyzes the body in China, it has consistence with foreign countries in some respects, but on the whole, they are different, this depends on Chinese historical and realistic factors. On this basis, the dissertation comments on the adjustment of film regulating functions in new times and the local forms of super cultural ministry and Comprehensive law enforcement in cultural market. It also studies the functions and effects of local government, state - owned enterprises and public institutions and film industry organizations, and makes recommendations to reform them. Lastly, in view of the importance and general concern of movie review or rating system (collectively referred to as the movie review system), the author discusses it separately. The movie review systems abroad are mainly divided into four modes, one of them is similar to Chinese practice, but they have many differences because of our history and reality. Meanwhile, our decentralization reform of movie review power is inadequate. So we should improve the body of film review according to our conditions and foreign experiences.

Chapter 3 of this dissertation discusses actions of regulation in film industry, and the action of movie review separately. Firstly, it elaborates the usage evolution of "film industry" in China, its content, the form of actions of regulation, etc. In

this dissertation, "film industry" means the general of a series of activity composed of film production, circulating, distribution and consumption by market. Secondly, according to the characteristic of film industry, the change of film technology and the reform of regulatory actions, this dissertation studies the action of film regulation both in foreign countries and in China, respectively from the side of regulation of entrance into film market, regulation of film market transaction, non-authority form of administrative way used in regulation of film market and the challenge to traditional actions of film industry regulation from media convergence. Although the Historical background and current conditions of film industry regulation in China are different from foreign countries, we have a lot of commons, such as regulation of foreign capital into domestic film market and theatre safety, film copyright protection, regulation of new audio-visual media, etc. So we could learn from foreign experiences. Lastly, based on the administrative process theory, this dissertation analyzes the object, scope, standard, force and enforcement of decisions of movie review or rating system, this will help us to understand how the movie review system works. Since the 1980s, two reforms of movie rating have held in China, but none of them succeeded for lack conditions of implementation. So the author advocates that our reform aimed at movie rating system of movie review system should be achieved by three steps gradually.

Chapter 4 of this dissertation discusses supply and regulation of the film public service, and Chinese public welfare project of film screening in countryside separately. Firstly, it elaborates the usage evolution of "film public service", its content and basic principles, the supply and regulation of public service, etc. In this dissertation, the "film public service" means the general of a series of action and system of the supply of film public products and services by government department, non-governmental organization, private and other body, to meet the basic cultural needs of citizens and the requirement of ideological propaganda. Obviously, the supply and regulation are only parts of the film public service system. Secondly, it studies systematically the supply mode and regulation system of film public service in foreign countries, such as the relationship between central and local government in the supply and regulation of film public service, the mode

mainly supplied by Quangos and its regulation, the mode mainly supplied by market and community and its regulation, the mode mainly supplied by government and its regulation. Thirdly, broadly speaking, our film public service is similar with the mode supplied by government, but they have a lot of differences, such as the division of power and finance between central and local government, the political inclination of the supply of film public service, the monopoly on public film resources by state—owned enterprises and public institutions, the bureaucracy of film industry organizations and foundations, the "double approval" system of social organizations, etc. We should reform our present supplying and regulating system of film public service, according to the need of building service—oriented government and developing of film industry, and learn from foreign experiences. Lastly, the author investigate the implementation of the "2131 project" by on—site interview and field survey in Ganyu county of Jiangsu province and Xincai county of Henan province, there are a lot of practical problems to research and solve, to make the public project sustain.

Chapter 5 of this dissertation discusses the legal supervision of film industries regulation, or in other words, the regulation of regulators. Party leadership provides guarantee for the establishment and operation of our film industries regulating system, it is also the leader and coordinator of our reform of film regulatory system. So this chapter firstly studies how to make the party leadership of film industry legalization, this is the premise and warranty of achievement to regulation according to law, is also the profound summary of our historical lessons. Secondly, the multilevel regulating norms provide basis for the establishment and exercise of film industries regulating power, this system of norms include "hard-law" and "softlaw". From the side of its levels and forms, the author studies the status quo of film industries regulation according to norms both in foreign countries and China, and puts forward my views on how to improve our system of film industries regulating norms and how to dialectically treat the soft-law of film industries regulation in China. Thirdly, perfect system of regulating procedure has significance to the wellfunctioning of regulating power, this dissertation mainly studies the procedure of rule-making and action-implementing of film industries regulation in foreign and China, especially the procedure of movie review. In China, it is widespread that substance valued but procedure belittled in film industries regulation, this situation should be changed as quickly as possible.

The system of government regulatory impact assessment is not only the system of measure and coordination of interests, but also a tool of supervising regulatory power and improving regulatory quality, but the assessment system has its limitation, especially being used in the field of film industries regulation, which includes many factors that can't be quantified. The fifth chapter analyzes the basic institutional framework of film industries regulatory impact assessment, from the side of its body, applying scope, information gathering, indicators and methods, to improve our assessment system. Lastly, this dissertation discusses the system of legal remedy for film industries regulation in foreign and China, which includes remedy from inside of the regulating system, such as system of reconsideration of movie review decisions, and remedy from courts. It also discusses the application of the principle proposed by the Chevron case of America in China. The author believes that, now the Chevron principle shouldn't be emphasized in China, on the contrary, we should encourage and promote the positive exercising of judicial review, especially review of film industries regulatory action. Of course, every method of supervision have its merit and defect, they need coordinate with each other to make the regulatory action according to law.

In the concluding part, the author refers to that we should learn to achieve the regulatory aim of Chinese film industry by action of service administration.

### 依法寻求文化权利与行政权力之间的良性平衡

莫于川❶

#### 一、法林中一个勇敢追梦的女孩

小敏是法林中勇敢追求梦想的河南女孩,多年来有成功也有挫折,但她 从不停下脚步,一直享受着并与他人分享着过程中的憧憬、快乐、痛苦和忧 虑,因此她的人生体验很丰富。这次她把博士论文修改补充后出版,希望能 为我国电影业及整个文化业的依法健康发展提供一些理论指导和决策参考, 这是很有意义的文化创造性贡献,我为此感到特别高兴。于是利用赴美访问 前夕的国庆假日,专门为这个追梦女孩写一些文字,郑重地向文化界、法学 界和广大读者作推荐。

记得小敏在中央民族大学法学院读本科时,就跟着民大的法学老师跑到人大参加学术活动,还不畏权威、大胆提问、引人瞩目。小敏如愿考进人大法学院攻读宪法行政法专业硕士生之后,犹如鸟人林海、鱼在江河,在这个宽宏的学术园地四处觅食、展翅飞翔。她在认真学好各门课程的同时,积极参加各项科研课题和学术活动,专业素养和科研能力得到很大提升,还萌生了读博士的想法。于是她埋头学习、夯实基础,又通过竞争考试获得攻读博士学位的机会,成为当年人大宪法行政法专业年龄最小的博士生,受到老师和同学们的关心和帮助、继续在我的专业指导下开始新的求学旅程。

正在专业深造、学术进步的关键时期,小敏有了恋爱机缘,于是她跟着自己的感觉走,放下手里的一切,勇敢地去恋爱、结婚、生子,一气呵成地完成了一件件人生大事,让身边的亲朋好友都来不及为她赞叹或担心,实实在在地、

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一次一次地表现出勇敢女孩的本色。在这个过程中,她没有忘记自己的身份,也没有放弃对学术的追求,在宝宝可以托付老人之后,她又返校来完成学业。

小敏本来可以在行政法总论的范畴中选择某个题目来撰写博士学位论文, 因为比较熟悉一些,她还是想尝试一下部门行政法的选题。当时她对于文化 业特别是电影业的事情深感兴趣,希望研究依法推动文化业特别是电影业健 康发展的课题。可是她对于这个领域的历史、现实和理论问题都非常陌生, 很自然,她的选题不被看好。这时她的勇敢女孩本色再次表现出来,在一片 质疑声中勇敢地选择了《服务行政理念下的电影业监管法律制度研究》作为 博士学位论文题目,开始了艰难的学术跋涉探险。经过近三年的努力终于有 了丰硕成果,就是摆在读者面前的这篇长文,以此参加答辩获得好评,如愿 戴上了博士帽。

博士毕业后,小敏有多种选择,但她为了家庭、为了爱情、为了宝宝,选择去了可以兼顾各个方面、尽到多种责任的淮海工学院,希冀在事业和家庭的良性互动中寻求发展。我欣喜地看到,在工作单位的关心照顾和热心培养下,小敏积极发挥着高端法学人才在推动地方法治和学术发展中的特殊作用。

电影业是积极依循新理念、运用新技术、追逐新目标的一个特殊领域,其强大的生产力和深刻的影响力,可谓人们已经感知但亟须深化认识的课题。小敏的博士学位论文也即本书,正是这方面的最新认识成果。本书共五章,第一章是电影业监管的必要性和正当性分析,第二章是电影业监管主体分析,第三章是电影产业监管方式革新,第四章是电影公共服务的供给与监管探讨,第五章是电影业监管的法律监督机制。在我看来,这些内容主要是在提示人们如何重新认识和依法处理文化权利、行政权力的现代定位和相互关系,找到平衡点和着力点,在建设服务型政府和法治政府的进程中,依法推动电影业及整个文化业的健康发展。

#### 二、推动文化业和文化市场发展是时代新使命

当今世界正处在大发展大变革大调整时期,文化在综合国力竞争中的地位和作用日益凸显,增强文化软实力的要求越来越紧迫。在我国深化改革开放、转变发展方式、深入转型发展的新时期,文化越来越成为民族凝聚力和创造力

的重要源泉。我们在坚持以经济建设为中心的同时,应当自觉地把文化繁荣发展作为坚持发展是硬道理的基本要求,进一步推动文化建设与经济建设、政治建设、社会建设和生态文明建设协调发展,为促进社会和谐提供坚强良好的文化条件。为此,需要大力发展公益性文化事业、保障人民基本文化权益;也需要加快发展文化产业、推动文化产业成为国民经济支柱性产业,这是党中央对于我国文化事业和文化产业发展的新要求。党的十八大的政治报告《坚定不移沿着中国特色社会主义道路前进 为全面建成小康社会而奋斗》第七部分强调指出:"要坚持把社会效益放在首位、社会效益和经济效益相统一,推动文化事业全面繁荣、文化产业快速发展。""促进文化和科技融合,发展新型文化业态,提高文化产业规模化、集约化、专业化水平。"

发展文化事业和文化产业是满足人民多样化精神文化需求的重要途径。 而要实现文化产业、文化市场的稳健发展,就要推进文化科技创新,扩大文 化消费;要把社会效益放在首位,做到社会效益与经济效益相统一;要构建 现代文化产业和市场体系,形成公有制为主体、多种经济成分共同发展的文 化产业格局;还要发挥人民群众的文化创造积极性,在全社会营造鼓励文化 创造、释放文化创造活力的良好氛围。

文化市场这一概念,在我国最早出现于 20 世纪 80 年代。1988 年 8 月在哈尔滨召开的"全国文化市场理论研讨会"上,大多数与会者接受并采纳的概念是:文化市场是以商品形式向人们提供精神产品和有偿文化娱乐服务及其场所的统称,如剧院、影院、音乐茶座、舞会、游艺室、书店报摊、投影录像点等。首先,文化市场在性质上属于一种市场,而市场的基本构成必然包含两个不可或缺的要素:商品交换(买卖)行为与商品交换场所(或媒介)。其次,文化市场属于一种特殊的市场,其特殊性体现在,其交换的商品是一种与文化相关的商品,而关键问题在于这里的"文化"应当如何理解。笔者认为应当从狭义的文化角度来理解文化市场,也即文化市场应当被界定为"文化产品和要素的交换流通以及有偿文化娱乐服务等文化经营平台及场所的总称",它是文化产业的载体。根据文化产品和服务的种类不同,文化市场可分为图书报刊市场、音像制品市场、电影市场、演出市场、娱乐市场、网络文化市场、艺术品市场、文物市场、文化产权交易市场等多种类型、它们丰富和支撑着文化产业的发展。

#### 三、文化业和文化市场监管亟须法治化

界定了"文化市场",就易于把握"文化市场监管"概念。监管是指监督和管理。文化市场监管是指负责文化市场监管的行政机关运用行政权力对文化市场进行监督和管理的活动。应该说,文化市场监管会影响到文化产品和服务的生产和消费环节(文化产品的生产和消费活动),既然是对文化市场的监管,那么监管对象主要是进入或即将进入市场流通环节的文化产品和要素的经营活动及经营场所。也就是说,文化市场监管主要是对文化产品和要素的流通经营活动、市场准入及经营场所的监管。

目前,学术界对"政府介入文化市场"有许多不同的表述,如"文化市场管理"、"文化市场法治化管理"、"文化市场综合执法"、"文化市场监管"等。本文倾向于使用"文化市场监管"这个概念,主要基于以下考量:第一,文化市场监管比文化市场管理的范围更宽广,除"管理"之外,还包括"监督",而"监督"不仅有利于维护市场信用和秩序,也为公众参与管理留出空间;第二,文化市场监管与文化市场法治化管理这一概念相比更精练、更全面,在依法治国、依法行政已成为社会共识的背景下,文化市场管理理应"法治化",应当囊括行政机关事前监督与公众参与监督;第三,文化市场监管与文化市场综合执法相比更全面,后者只是前者的一种管理方式。

另外,"文化市场监管"这一概念在近些年来频繁出现在执政党和国家的重要文件中。例如,2011 年《中华人民共和国国民经济和社会发展第十二个五年规划纲要》提出:"切实加强文化市场监管,有效遏制违法有害信息传播。"又如,2012 年 5 月文化部发布的《文化部"十二五"时期文化改革发展规划》多处使用"文化市场监管"一词:"完善文化市场监管体系","全面提升文化市场监管能力","全面加强文化市场监管","强化农村、边境文化市场监管"等。党的十八大政治报告指出,要"用法治思维和法治方式深化改革、推动发展、化解矛盾、维护稳定"。然而,在文化市场监管领域,法治化的水平和层次依然较低,主要表现在以下 5 个方面。

(1) 文化市场的监管立法比较分散、层次不高。目前,我国还没有关于 文化市场监管的统一立法,在文化领域以法律形式颁布的只有《文物保护 法》、《著作权法》、《非物质文化遗产法》。更多的监管措施在行政法规以及