

DO NOT KILL THE GOOSE THAT
LAYS GOLDEN EGGS:
THE REASONS OF THE DEFICIENCIES
IN CHINA'S INTELLECTUAL
PROPERTY RIGHTS PROTECTION

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March 2015

Abstract

China's intellectual property protection, which has been considered weak and discussed for decades, is playing an increasingly significant role in global trading. In the past decades, China has made great strides in its intellectual property rights (IPR) protection, while its performance is still not satisfactory, especially in the eyes of developed countries. Before taking any further coercive strategies, both developed countries and China should look into the reasons of the deficiencies in China's IPR protection so that measures could be taken more efficiently.

This thesis will focus on the detailed history of the development of China's IPR protection with a historical method, thus justifying the theory that late start and slow development are the main two reasons of the deficiencies in China's IPR system. The concept of IPR did not exist in China until the end of 19th century due to the influence of Confucianism. The weak awareness of IPR lasted till now. From the day that western forces brought the idea of IPR into China to the establishment of a genuine protection system, China experienced a violent social turbulence with many changes in regimes and guiding ideologies. Meanwhile, Chinese government was continuously in the dilemma: whether they should pursue a better IPR protection system or learn advanced knowledge and technologies from developed countries. All these factors slowed down the development of IPR in China. A comparative study will be applied in this part to show the different processes in China and other regions or countries. In modern China, its "double-tracked system" and comparatively low level of economic development are the main reasons of the deficiencies in its IPR protection.

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Acknowledgements

I would like to sincerely thank my supervisor Professor Simon Halliday for his continuous patience and support in my study and the help during my hard time.

I also want to thank my beloved parents. They work really hard to support my study and care about me in all aspects. Without them, I would not be able to complete my research.

Author's Declaration

This thesis has been submitted to the University of York to fulfil the requirements for the MPhil degree in Law. This thesis is the author's original work of under the supervision of Professor Simon Halliday. Any material that has been published has been referenced in this work. This work has not previously been presented for an award at this, or any other, University.

Chapter One Introduction

Over the past decades, with a rapidly increased economic growth, China has been actively involved in worldwide trading and cooperation. Currently China is seen to hold main economic and political power in the world given its significant role in reshaping the global economy. Despite such prominent development, China still faces problems in many other aspects. For instance, intellectual property rights (IPR) protection is one of the most popular topic which has been discussed for years both domestically and internationally. In order to develop extensive cooperation with other countries and to join the World Trade Organisation (WTO), China established a relatively mature IPR protection mechanism.¹ Although the legislation and institutions, to some extent, met some requirements of-WTO and other international organisations, its enforcement in IPR protection was reported not satisfactory. For example, it was argued that Western countries have pushed China to take measures and improve the IPR protection in order to protect their benefits from considerable infringement.² Despite the effort made to comply with these requirements, it received little recognition from the Western and remains unacceptable. Under such circumstances, finding out the reasons of the deficiencies in the enforcement of China's IPR protection is essential for both western countries and China. Only when genuinely understand the deep causes of these deficiencies could western countries see whether their strategy against China is effective; and only when clearly knowing what the root problems are could China take the most efficient steps to improve its IPR protection system and resolve the conflicts with other countries in the aspect of IPR.

The deficiencies in the enforcement of China's intellectual property protections have been discussed by many scholars. First of all, it was debated that the Chinese philosophical system such as Confucianism was the main influence to issues arose within IPR protection³. The main argument in this perspective was whether the concept of IPR and its protection existed in ancient China; if it was, has Confucianism demolished the concept in ancient time. However, other commentators paid more attention to the conflicts in current

¹ See Robert Bejesky, *Investing in the Dragon: Managing the Patent Versus Trade Secret Protection Decision for the Multinational Corporation in China*, 11 TULSA J. COMP. & INT'L L. 437, 487 (2004)

² See Zhang Jing, 'Pushing Copyright Law in China: A Double-edged Sword' (2007-2008) 18 DePaul J. Art Tech. & Intell. Prop. L., also Keshia B. Haskins, 'Special 301 in China and Mexico: A Policy Which Fails to Consider How Politics, Economics, and Culture Affect Legal Change Under Civil Law Systems of Developing Countries' (1999) 9 Fordham Intell. Prop. Media& Ent. L. J. and Peter K. Yu, 'From Pirates to Partners: Protecting Intellectual Property in China in the Twenty-First Century' (2000) 50 AM. U. L.REV.

³ See William P. Alford, *To Steal A Book Is An Elegant Offense: Intellectual Property Law In Chinese Civilisation* (SUP, Redwood 1995), also Yufeng Li, *The Law under the gun point* (Intellectual Property Press, Beijing 2006) and Wei Shi, 'Cultural Perplexity in Intellectual Property: Is Stealing a Book an Elegant Offense?' (2006) 32 N.C.J. Int'lL. & Com. Reg.

trading and cooperation between China and Western countries and therefore, emphasised on the problems themselves rather than the causes of the problems.⁴ Due to the popularity of this topic, many interesting and inspiring opinions and arguments have been developed, however, there are not without its limitations. Whilst some arguments seemed to lack deeper consideration, it was surprised that some scholars seemed to accept these ideas blindly without critical understanding and as a result they—misunderstood and misinterpreted them. For instance, although Confucianism has a great influence and has been mentioned widely, its underlying concept has not been widely explained as it should have been. Similarly, some scholars tend to agree that the concept of IPR was brought into China by the Western during the end of Chinese imperial dynasty period but the development since then was hardly described in the literatures. This suggests that whilst the topic is getting more popular, its progression has not been impressive.

Against this background, this article seeks to explore the barriers to enforcement IPR protection from the perspectives of both Western countries and China. When the factors that cause the barriers are made explicit and clear, not only it allows Western countries to re-examine the effectiveness of their strategy, it also helps China to understand their problems better which in turn would enable them to improve their IPR protection system more effectively. This would promote a better understanding between two nations and ultimately resolve the existing conflict around IPR issues. This article will contribute to the following aspects: firstly, it provides a greater clarification of Confucianism by exploring the real influence of this philosophy to people's attitude to intellectual properties. It will also examine the Chinese historical materials broadly and deeply in order to present a more transparent picture of Chinese history of intellectual property. Considering the discord times in Chinese history and the unfamiliar cultural background of this oriental nation, this historical work will allow readers to learn and comprehend the situation and difficulties of the IPR development in China to a greater extent. In contrast to other arguments which were unclear, this article will focus on the essential questions of each aspect more deeply. Some historical records about the IPR in ancient China were explained as the evidences of the existence of intellectual protection, but this research will further explore these records and therefore reaches a different conclusion. In addition, a comparative study will be used in this article where Taiwan and Japan were used to compare with China in the aspect of the development of their IPR protection system.

⁴ Weishi, 'Harmony or Coercion? Chian-EU Trade Dispute Involving Intellectual Property Enforcement' (2007) 25 WILJ, see also Paul Torremans, Hailing Shan and Johan Erauw(eds), *Intellectual property and TRIPS compliance in China: Chinese and European perspectives* (New Horizons in Intellectual Property, Edward Elgar, Cheltenham 2007) and Peter K. Yu, 'Currents and Crosscurrents in the International Intellectual Property Regime' (2004) 38 Loy. L. A. L. REV.

Finally, this article will provide more details, examples and analysis regarding to shortcomings in China's IPR enforcement system and the economic dilemma faced by IPR protection in China today.

Although this study tries to show more details from the historical materials and provide more accurate information and analysis, it still has some shortcomings. First of all, due to the limited access to a more broad range of historical literatures, especially ancient words, and the authors' limited knowledge and understanding of ancient Chinese literatures, this article only picked certain typical cases and records. Secondly, many names of ancient books are difficult to translate from ancient Chinese language into English, therefore some of them are presented based on their pronunciation. Though this is won't make much difference in the content or argument, it might cause readers some difficulties. Also due to the lack of knowledge of the official translation of certain history events or relevant materials, some of them are translated based on the author's understanding. Thirdly, in terms of the analysis of the relationship between economic development level and IPR protection level, the analysis is not professional and deep enough and this article only presents the result in plain words.

Based the research of this article, the reasons of China's deficiencies in IPR protection can be divided into two general categories: short history and slow development. First of all, the concept of intellectual property appeared relatively later in China than in other countries, which means China might not have enough time to improve its IPR protection system. However, since there are arguments against this theory, the question about whether there was concept of IPR in ancient China would be a focus to be discussed, and the answer, based on this study, would be negative. And even after relevant regulations appeared in China in late 19th century and early 20th century, the IPR protection did not have a proper environment to develop, due to the extremely unstable social situation, the immature of the awareness of IPR and the concern of the government about its political and economic requirement. However, at the same time, other countries were experiencing huge improvements in various aspects, including IPR system. Secondly, though China's IP system eventually was built up in a relatively stable social environment, there are still obstacles in its way. Those scattered reasons listed among existed literatures could be divided into three main categories: weak awareness of IPR, problems of "double-rack system" in China's IPR protection and relatively low level of economic development.

Following introduction, this study was organised into five main parts: Chapter Two which

provided a literature review to summarise the existed arguments about ancient China and the concept of IPR and its protection and to introduce the philosophy Confucianism. Chapter Three and Four discussed about Chinese history from the end of China's feudal society to the establishment of modern China and from then on to the reform and opening-up in 1978. Before it goes into history details, a general introduction of the time line of Chinese history will be provided in order to provide a general knowledge to the readers. Finally, Chapter Four discussed on the development of Taiwan and Japan's IPR protection which will then be compared to China's. Chapter Five explored on the problems within the enforcement and development of IPR protection in China, and suggestions were recommended in the end.

Chapter Two The Absence of IPR in Ancient China

The question whether ancient China had the concept of IPR and IPR protection has been debated for a long period but was never settled. Other than the misunderstanding of the ideology, one of the main reasons that the discussion is still going on is probably that researchers might have a different understanding of what having the concept of IPR and IPR protection means. Some scholars believe that the intention determines the nature of the fact,⁵ while others claim that the result should be considered as the essence.⁶ Theoretically speaking, both arguments are right; however, considering this topic, the former theory might be adequate because the intention reflects the mind which motivated the behaviour, and the motivation can decide the direction and the speed of the development of IPR. Since the whole discussion will be mainly about these two aspects of China's IPR development, the intention of the policies or orders in ancient time does play an important role.

Therefore, in this chapter, first of all, a literature review about existed works in cultural perspective will be used to present two main arguments about this aspect. After that, the dominant ideology in ancient China, Confucianism, will be given an introduction as a whole so that it will be easier to understand some of the other Chinese traditional ideas. Then by providing a deep analysis of very detailed IPR related records, it can be seen clearly that there was indeed a sprout of awareness of IPR in ancient China, but it did not

⁵ Such as Alford,

⁶ See Yufeng Li, *The Law under the gun point* (Intellectual Property Press, Beijing 2006)

develop into a proper IPR concept or protection, due to the weakness of two significant classes of ancient Chinese society: the intellectuals and the businessmen. Finally, all these details and analyses will be generally concluded in the end of the chapter.

1. Literature Review: Alford and Wei Shi

Actually, the cultural influence on the development of China's IPR has been discussed for a long time. Scholars tend to talk about this aspect when they give out the reasons of the shortcomings in China's IPR system, although there are still arguments about whether there is IPR protection or IPR concept in ancient China. However, in my opinion, despite so many works have been done in this subject, good explanations about the cultural influence on IPR (or people's opinion to IPR) are very rare.

One of the excellent monographs is *To Steal a Book Is an Elegant Offence* by William P. Alford.⁷ The author is an expert in Chinese law and sinologist at the same time. From his book, one can tell that he has very broad knowledge and deep understanding about Chinese history, culture and laws. In this book, William gives out four core claims: first of all, there was no indigenous protection for IPR in China before the introduction of Western notions of such law in the late nineteenth and early twentieth century. There is evidence of restrictions on the unauthorised reproduction of certain books, symbols and products, but this should not be seen as constitution of the typical IPR law, as their goal was not to protect property or other private interests. Secondly, the introduction of Western notions of IPR law to China in early twentieth century was not successful, as it overlooked the relevant elements required if China took the same model to develop IPR law. Thirdly, the efforts that China took to build the IPR protection system were unsuccessful because it failed to consider the difficulty when balancing the western legal values, system and models, and the Chinese historical traditions and its modern environment. Last, although the USA utilised the diplomatic leverage to deal with IPR issues with China, but the results were doubtful.

This book delivers significant amount of details about the culture, economy, politics and legal history in ancient China to later scholars. When being asked the question that why there was no native IPR law, William gave an inspiring argument against those opinions that believe in the existence of IPR protection in imperial China: "Study of legal regulation

⁷ William P. Alford, *To Steal A Book Is An Elegant Offense: Intellectual Property Law In Chinese Civilisation* (SUP, Redwood 1995)

in imperial China should thus not be limited to the penal sanctions in dynastic codes. It must, at a minimum, also address the remainder of imperial China's public, positive law; means other than public, positive law through which the state directly endeavoured to maintain social order; the ways in which the populace sought to invoke the state's authority; and the elaborate and varied fabric of indirect ordering through family, village, and guild."⁸ The public, positive law only worked as a support—it only punished the behaviours that were seriously against the customary law and guild regulations.⁹

As to the publishing censorship appeared since Song Dynasty, which many scholars considered as a sign of IPR protection, William pointed out that this was how the government was controlling people's mind. "It is more accurate to think of prepublication review and the other restrictions on reprinting... together with the absolute ban on heterodox materials, as part of a larger framework for controlling the dissemination of ideas, rather than as the building blocks of a system of intellectual property rights, whether for printers, booksellers, authors, or anyone else."¹⁰ When discussing the prototype of the trademark in ancient China, he claimed that "similarly, it is not unduly cynical to view the state's implicit and occasionally explicit support for guild efforts to protect trade names and marks as aimed at the preservation of social harmony by maintaining commercial order and reducing instances of deception of the populace."¹¹

These ideas, with massive citations from ancient regulations, records and literatures, provide a powerful argument that there was no IPR protection, at least no such system to actually protect the IPR rights of individuals. "The state's emphasis clearly was focused far more on political order and stability than on issues of ownership and private interests."¹²

He also looked into the early efforts to introduce foreign notions of IPR law in China. By studying the attempted implementation of commercial treaties between China and the UK and the US at the beginning of 20th century and later the similarly unsuccessful efforts taken by the Nationalist Chinese government to transplant the IPR law from abroad to China, he suggests that there would be "problems inherent in utilising bodies of law and

⁸ Ibid. 12

⁹ Pingliang Zhi, 'Qieshu wei Yazui' < http://blog.sina.com.cn/s/blog_4a44393c0100nf9y.html> accessed 10 December 2010

¹⁰ William P. Alford, *To Steal A Book Is An Elegant Offense: Intellectual Property Law In Chinese Civilisation* (SUP, Redwood 1995) 12

¹¹ Ibid. 17

¹² Ibid. 24

legal institutions generated in one society as a model for legal development in a second and seemingly quite different setting.”¹³ This further proves the significant role that the background of a country can play in the development of its legal system.

However, perhaps because the author has deeply studied the legal and cultural background in ancient China, the starting point of this book is relatively higher than other works. For example, it does not give a basic and general idea of Confucianism which is the dominant ideology in imperial China. Although the author did mention some contents of this philosophy when explaining certain thoughts,¹⁴ the interpretation for the Confucianism itself was clearly not enough, at least for readers who do not know much about Confucianism. It seems that the author to some extent assumes that readers should have known the basic ideas of the Confucianism, and the words are somehow too abstract. For example, he uses a paragraph to explain how the Confucianism blocked IPR protection in imperial China: “The dual functions of the past-- as the instrument through which individual moral development was to be attained and the yardstick against which the content of the relationships constituting society was to be measured—posed a dilemma. The indispensability of the past for personal moral growth dictated that there be broad access to the common heritage of all Chinese. Nonetheless, the responsibility of senior members of relationships for the nurturing of their juniors—together with the fact that reference to the past, far more than public, positive law or religion, defined the limits of proper behaviour in what were, after all, unequal relationships—demanded more controlled access. Both functions, however, militated against thinking of the fruits of intellectual endeavour as private property.”¹⁵ Although this does not make his argument less powerful or wrong, yet for readers or researchers in the future, there is a need for a better introduction of the ideology. Because explaining a foreign ideology with such kind of words, without introducing the basic content to the readers, seems to require a lot more work by some of the readers who don't have enough background knowledge about that ideology. Indeed, it is difficult to cover all kinds of readers in all levels, but as an important part of cultural background, the Confucianism deserves more in the works. And the later scholars tend to skip this part too or just use very brief words to cover it, which to some extent stopped the discussion going deeper in the articles from scholars after William. Besides, overlooking the basic and original content of the ideology might be the reason that some scholars mistook certain idea of the ideology, which will be discussed

¹³ Ibid. 3

¹⁴ Ibid. 26, when explaining how important the past meant to ancient Chinese, the author only cited some words from another scholar as ‘the Confucian imperative insists that in encountering the ancients, we ourselves must be changed for we discover in the ancients not mere means but the embodiment of values.’

¹⁵ Ibid. 20

later.

Different from William, a much later scholar, Wei Shi, provided another book that largely worked on the cultural and historical background of imperial China, but the explanation is direct, simple and unadorned, even though not necessarily correct. His book “Intellectual Property in the Global Trading System: EU-China Perspective”¹⁶ argues that the problems of enforcement are not an actual outcome of Confucian philosophy and “to steal a book” is not an “elegant offence.”

This book demonstrates that counterfeiting and piracy are common and inevitable consequences of inadequate economic development. It goes on to state that they are a by-product of a unique set of socioeconomic crises that have their origin in the development of a dysfunctional institutional regime.

Wei Shi also has an article¹⁷ specially focused on the cultural aspect under the same topic. Generally speaking, he emphasised the ideology more than William, as he clearly pointed out the Confucianism and the Marxism and their content, and his interpretation was relatively easy to understand for readers who might not be familiar with those ideologies. He did not cite many regulations as William did, so his works shows the readers a broader background which covers what the society was operating or the general atmosphere back to ancient China, rather than how the government control the state or how the regulations restricted or not restricted certain behaviours.

Also, he is one of the scholars who compared China and its other Asian neighbours in a more detailed way. He examined the extent of which Japan and Korea have been influenced by the Confucianism and generally told a story of how these two nations developed their IPR system, which shows that they had some “copying” period as well.¹⁸ Moreover, he is almost the only one who mentioned the changing of people’s attitude to traditional values.

However, although the way Wei Shi expressed his theory is more reader-friendly, he did have several misunderstandings on both the cultural background and other scholars’ ideas.

¹⁶ Wei Shi, *Intellectual Property in the Global Trading System: EU-China Perspective* (Springer, London 2008)

¹⁷ See Wei Shi, ‘Cultural Perplexity in Intellectual Property: Is Stealing a Book an Elegant Offense?’ (2006) 32 N.C.J. Int’lL. & Com. Reg.

¹⁸ Wei Shi, ‘Cultural Perplexity in Intellectual Property: Is Stealing a Book an Elegant Offense?’ (2006) 32 N.C.J. Int’lL. & Com. Reg. 32, 43

First of all, it seems that he did not agree with William's opinions and denied the influence of the Confucianism. He pointed out that "it is difficult to comprehend the prevalent theft of intellectual property in China as an inevitable outcome of an ethic that advocates "honesty", unless of course the ethical concepts derived from Confucius have somehow been subverted. They believe that "to steal a book" is not an "elegant offence". Rather, it is, from a Confucian viewpoint, an act that is against the "nature order".¹⁹ Here the misunderstanding is that the Confucianism does advocate honesty and not to steal. That means if someone steals a real book, then according to the Confucianism it is wrong, but the problem is that whether ancient Chinese considered the idea in the book as a kind of property. If they did, then there would be the concept of IPR. However, here we are trying to proof whether there was the concept of IPR, we cannot use this question as a condition, for it is logically wrong.

Secondly, in my opinion, William named his book as "to steal a book is an elegant offence" does not mean to support the idea that stealing ideas was right. His intent might be to argue that based on his study, this was exactly what ancient Chinese thought and there should not, at least back then, be right or wrong, as it was just the way it was. Therefore, if Wei Shi tried to debate with this idea, then he should prove that there was protection for IPR. However, he just argued the trade mark protection in ancient time, which has already been discussed by William. He listed many history records about how the ancient Chinese government restricted copying or printing certain works²⁰, some of which were cited from an article by Allison & Lin²¹. As many scholars have argued, these restrictions were only for controlling people's mind and keeping the society's order and harmony.²² Even in Allison & Lin's article, there were words clearly indicating similar opinions. "First, Chinese Leaders wished to control the beliefs and ideas of the populace, especially the literate portion of the populace, in order to preserve conformity and socio-political stability. Second, they wished to maintain the accuracy and orthodoxy of these works, which were vital to Chinese moral, social, and legal structures."²³ After the listing, Wei Shi claimed that "the historical record dealing with intellectual property in China

¹⁹ Wei Shi, *Intellectual Property in the Global Trading System: EU-China Perspective* (Springer, London 2008) 115

²⁰ Wei Shi, 'Cultural Perplexity in Intellectual Property: Is Stealing a Book an Elegant Offense?' (2006) 32 N.C.J. Int'l L. & Com. Reg. 8.

²¹ John R. Allison and Lianlian Lin, 'The Evolution of Chinese Attitudes toward Property Rights Invention and Discovery' (1999) 20 U. PA. J. INT'L ECON. L. 23

²² Donghan Wu, 'Guan Yu Zhong Guo Zhu Zuo Quan Fa Guan Nian de Li Shi Si Kao' (1995) FSYJ. See also Lihong Cui, 'Xianqin Confucianism Culture And The Intellectual Property Law' (2002) 15 JYU

²³ John R. Allison and Lianlian Lin, 'The Evolution of Chinese Attitudes toward Property Rights Invention and Discovery' (1999) 20 U. PA. J. INT'L ECON. L. 743

appeared very early.”²⁴ Here again, he automatically assumed that there were such things as intellectual property. Despite of the question that whether there was the idea of IPR in ancient China, at least he should have proved that ancient Chinese treated ideas as property and at the same time this was private right before he jumped to that conclusion. So this debate seems too weak to stand.

Moreover, Wei Shi claims that Confucianism does not reject personal rights, but affords protection in a different way. He cited from Allison & Lin that it emphasised on “personal development, in contrast to personal gain, helped create a culture in which the individual was viewed as quite important, but primarily so because of his or her contribution to society.”²⁵ I don’t think Allison & Lin’s idea was wrong at all, because it actually means that the final goal of all the self-developments was about the society. Yet Wei Shi saw it as a sign of the belief in private rights. Personally, I think “personal rights” has a different concept from “personal development”, at least in this case they have different goals: personal rights should be for oneself, while personal development here is for the society. Wei Shi seemed to overlook the potential idea in the cited sentence that individuals were in subordinate position, rather than the opposite.

Despite of such misunderstanding, although Wei Shi did mention the changes in people’s attitudes to traditional values, he failed to explain the reasons of the changing and the results in IPR protection led by such changing. He just claimed that Cultural Revolution damaged dominating position of the Confucianism and from then on till now, attitudes towards traditional Confucian values tend to fall into two attitudinal categories based on age, education and experience.²⁶ It is so obvious that there are more reasons contributing to such changing, such as international communications. And then it would be better to analyse how such changes that would influence our study of IPR protection. It is truly not easy to identify a dominating ideology since the world is becoming a village and people from different nations constantly share thoughts due to various and convenient contact methods. In this case, it is better to face the complex and the difficulty than cover it with farfetched explanations or ignore such specialty.

What’s more, Wei Shi told stories about Japan and Korea’s development to support his “stage theory”, which claims that copying, to some extent, is a necessary stage of

²⁴ Wei Shi, ‘Cultural Perplexity in Intellectual Property: Is Stealing a Book an Elegant Offense?’ (2006) 32 N.C.J. Int’lL. & Com. Reg. 8

²⁵ Ibid. 9

²⁶ Ibid. 10

economic development. This is a reasonable argument, but the stories could be used to prove more. For example, Japan and China share similar cultural background as they were both dominated by the Confucianism in ancient times, but after the World War One, they walked on different paths. That is because after the war Japan had a chance to recover and to rebuild the country, While China went through civil war right after and then revolutions. There was no break for the country to develop in any aspects. Here is a good new point: history—here it means history events or social situation-- itself can play a role in the development of IPR in China. However, this has never been discussed yet, and will be part of the potential contribution of my study.

Although it is not easy to identify how significant the ideology is to today's IPR protection, it is still worth considering its role in ancient times. This is because, if we can prove that there was no IPR protection or the concept of IPR, then that means IPR in China has a shorter period than other countries; and it is understandable that a shorter history have a less mature system, as one should not expect a very young tree to get ripe fruits.

As to other scholars who tried to discuss the cultural influence, they barely dig deep enough.²⁷ Chinese scholars to some extent seem to treat the cultural influence as a common sense. Although topics about intellectual property protection and culture influence on it are very popular these days and there are many articles on those topics, the scholars seem never to be patient enough to explain what the culture which they were talking about, the Confucianism in this case, really is. They do give some definitions, but the introduction could be very short and then they jump into their logic to explain the relations between the culture and intellectual property. For now, I only find one Chinese article by Lihong Cui²⁸ that gave a relatively proper introduction of the content of Confucianism. Chinese Scholars grow up in such culture and after certain education and research they just recognised it. They see and feel it everyday, even though the culture has changed or the influence has been reduced somehow. This could be an advantage for Chinese scholars, as such naturally understanding might work even better than a lot of readings by foreign scholars.

²⁷ Except the example given below, see also Benjamin J. Bates & Tao Liu, 'A Cultural Approach to DRM Implementation in China.'(eds) (Westminster Paper in Communication and Culture, University of Westminster, London 2010; Frank Lin, 'Piracy in China: Identifying The Problem and Implementing Solutions.' (2005) 14 Currents Int'l Trade L.J.; Tie Shahe & Hui Su, 'Zhong Mei Zhu Zuo Quan Fa Zhi Shi de Cha Yi Ji Tan Yuan.' (2001) 3 Zhongnan UNIV. TECHNOL;

²⁸ Lihong Cui, 'Xianqin Confucianism Culture And The Intellectual Property Law' (2002) 15 JYU

As for foreign scholars, they usually pay more attention to the trades or the cases between countries or organisations and treaties rather than really trying to look into the culture, or even though they tried to discuss it, the words are usually short to some extent and most of the time they just simply repeat other ideas. Perhaps that is because they are not that familiar with the Confucianism of China, especially in ancient China.

For example, in a fairly long article, there is a paragraph seems trying to point out the importance of the culture. However, it turns out that the author just used one sentence to complete the mission, like “Confucianism, and later on Communism, did not ratify the idea of providing property-like protection to products of the individual intellect.”²⁹ In another article which is not short, the author used one paragraph to claim what the Confucianism embraces³⁰, and later gave out only a short paragraph which contained only four sentences to claim that the Communists had the similar function with the Confucianism, even mentioned the Marxist-Leninist tradition as well.³¹

Some scholars even have serious misunderstanding of the very basic ideology that they are arguing with. In an article, the author said Li, as the balancer of interests for the harmony of society, introduced the notion of equality.³² This idea refers to another scholar. Firstly, Li, as a core element in the Confucianism, refers to rank, so it actually is opposite to equality. Secondly, the original article of the reference did not imply such conclusion. The author might think that such explanation could make sense, but it is actually wrong from the very beginning and such mistake is caused by the lack of considering and understanding the original ideology.

2. An Introduction to Confucianism

The current state of research from a cultural perspective towards IPR protection in China is that some scholars believe that China’s cultural background, especially Confucianism, encouraged people to share their ideas and to give up their private rights in order to pursue greater profits for the group, from which individuals could get benefits in different

²⁹ Dalila Hoover, ‘Coercion Will Not Protect Trademark Owners in China, But an Understanding of China’s Culture will: a Lesson the United States Has to Learn.’ (2011) 15 Marq. Intell. Prop. L. Rev. 328

³⁰ Ryan P. Johnson, ‘Steal This Note: Proactive Intellectual Property Protection In The People’s Republic of China’ (2005) 38 CLR 595

³¹ Ibid. 597

³² Brent T. Yonehara, ‘Enter the Dragon: China’s WTO Accession, Film Privacy and Enforcement of Copyright Law’ (2002) 12 LCA 75

aspects in return. On the other hand, some scholars claim that Confucianism was supposed to support IPR protection since it advocated honesty. If readers who do not have enough knowledge about Confucianism's values read both theories together, they might be confused because each of them sounds reasonable. The reader then might ask what Confucianism actually is about and why it was that influential. Most of the current articles only a few sentences were used in most of the articles, or the theories were explained directly in very abstract terms. This may be because certain scholars thought that interpreting Confucianism's values was unnecessary or a simple introduction would be enough and analysing the relationship between culture and IPR or how to solve the problems existing in modern society are more important. Since the argument is about Confucianism, the content of Confucianism should be clarified at first, at least for a better understanding of the readers, especial for those who do not have the basic knowledge of Confucianism.

Moreover, in the two opposite opinions above some researchers seem have some misunderstandings toward Confucianism, or perhaps they need a broader or deeper study into Confucianism. As mentioned in the introduction, Wei Shi Claims that relating China's IPR protection problems to Confucianism is "confusing and misleading", just because Confucianism values "honesty and loyalty" which should be against "counterfeiting and piracy". He seems overlooks several points about this argument. First of all, when Confucianism's values are linked with IPR protection, it is mainly used to analyse whether there was IPR or IPR protection in ancient China, through which we might understand that probably the short history of IPR concept in this country might cause difficulties to completely accept intellectual property laws and to build up a mature protection system. It does not mean that Confucianism stops people from complying with the IPR law nowadays. At least this is not what Alford meant. Therefore, in order to provide a basic but relatively thorough introduction about Confucianism and cultural background of ancient China and to correct the misconception of the core values of Confucianism, some interpretations about Confucianism is necessary.

Confucianism was named after its founder, Confucius. However, Confucius is not the name of a person in Chinese, but a family name "Kong" followed by an ancient title "FuZi" which means teacher or master. Therefore, Confucius actually means Master Kong. Master Kong's personal name is Qiu. He was born in 551 B.C. during the Warring States Period, in the state of Lu which was around Shandong Province in the present China. His ancestors were from the nobility of the Shang Dynasty which was replaced by the Zhou Dynasty. Due to the political unrest, Confucius' family lost its nobility position

before he was born. According to the earliest Chinese historical records, *Shih Chi*, in Chapter forty seven, Confucius' family was poor in his childhood, but he was able to work in the government of the state of Lu and reached to a high position when he was fifty years' old. However, thereafter he was forced to resign and leave his country. Over the following thirteen years, Confucius travelled through various states and expected to realise his dream of political and social reform, but never succeeded. He went back to his homeland in the end died three years later in 479 B.C.³³

Confucius was considered as the first and the most influential educator in ancient China, even though the saying says that he has three thousand students seems over exaggerated. He believed that students should study "the Six Classics", including Shi(the Book of Odes), Shu(the Book of History), Li(the Book of Rituals), Yue(the Book of Music), Yi (the Book of Changes) and Chunqiu (the Book of Spring and Autumn). Although there are always arguments about whether Confucius wrote or edited these books, if neither, one thing is certain that Confucius treated "the Six Classics"very seriously and advocated the traditions behind them. As to the most famous work of Confucianism, *The Analects of Confucius*, which will be quoted later in this thesis, was not written by himself neither, but a collection of his words and deeds that were recorded by his students.

Although Confucius did not write any of those books which are famous because of his fame, his students recorded his words and deeds, and therefore his philosophical thoughts could be spread and left to us to learn today. According to *The Analects*, Confucian thoughts mainly include the following aspects:

a. The Rectification of Names

In fact, Confucius does not only provide interpretations to the classics as he believed, but also actually has his own ideas of the relationships between individuals and the society, the heaven and other people.

About the society, he believed that what a society needs most in order to be on the right track was the rectification of names. That is to say every objective thing in the world should be connected with the meaning of their names or titles. In the chapter *Zi Lu*³⁴ in

³³ Youlan Feng, *A short history of Chinese Philosophy* (Peking University Press, Beijing 1985) 35

³⁴ Zilu is Confucius' students. Because the *Analects of Confucius* is a book recording words and deeds of Confucius, so this chapter is a record of the dialogue between Confucius and Zilu, which named by the name of Confucius' student

The Analects, Confucius' student Zi Lu asked him, "The emperor in the state Wei asked you to manage state affairs, what would you do first?" Confucius answered, "It must be to rectify the names." In another chapter *Yan Yuan*³⁵, once the king Qi Jing Gong asked Confucius for political advices, Confucius said, "Let the ruler be ruler, the minister be minister, the father be father, the son be son."³⁶ In other words, things in each category have a common name which has a certain meaning. This name on title has its essence and should be matched by the reality. The essence of an emperor is the one an ideal emperor should have. If an emperor followed this principle, then he would have both the title and the essence; if an emperor did not have the essence he should have, he would not deserve his title, even though he was the emperor in front of his people. In social relationships, each name includes certain social responsibilities and duties. Every person in the society, such as the king, the minister, the father and the son, has his or her title, therefore he/she must perform his/her obligations and duties.

This can be extended to an emphasis on rank. The title not only stands for one's obligations, but also indicates his or her class, level and position. Because people should perform their obligations and do what their titles tell them to, they should therefore keep themselves in their class, respecting the upper classes and taking care of the lower ones. By that analogy, the citizens should respect and follow the king, namely the state. Therefore, everybody should maintain the best of the society, even sacrifice themselves. In return, individuals will benefit from the harmony of the society. Some researchers claim that it "introduced the notion of equality,"³⁷ which is totally a misunderstanding. As a political tool in multiple dynasties throughout the imperial China, it is impossible that the Confucianism has advocated equality.

b. Human-heartedness

Human-heartedness is the core of Confucius' social views, and the essence of human-heartedness is "love" or "loving others". Confucius believes that everyone in the society should take certain responsibilities and responsibilities should be taken with love. A father should raise his son with love; a son should respect his father with love. Similarly, a king should manage his ministers and citizens with love and everyone in the country should obey and worship the king with love in return. It could be considered that every

³⁵ Yan Yuan is also Confucius' student.

³⁶ Analects, XII, II

³⁷ Brent T. Yonehara, 'Enter the Dragon: China's WTO Accession, Film Privacy and Enforcement of Copyright Law' (2002) 12 LCA 63. See also, Yiping Yang, 'The 1990 Copyright Law of the People's Republic of China' (1993) 11 UCLA PAC. BASIN L.J. 260, 261

relationship should be based on love in order to maintain a harmonious society. Some scholars believe that in Chinese history, Confucianism was the guiding ideology of legislation and judiciary and also the standard of daily behaviour. In people's minds, the conflicts should be stopped peacefully in order to pursue harmony. In the reality, legally binding copyrights contracts were replaced by gentleman's agreements, while the infringements to IPR were dealt with the principle of "pursuing harmony and hoping for no litigations".³⁸ Similarly, western scholars seem to hold the same thought: "More often than not, Chinese companies elect to resolve the dispute in a private setting to preserve relationships and save face, following past custom."³⁹ Although such argument is still debatable because of the lacking of more detailed evidence, the theory is relatively understandable and seems reasonable to a certain degree.

c. Righteousness

Righteousness, in Confucius' thoughts, means the situation that things ought to be. The aim or the reason of doing something ought to be the action itself. If someone's behaviour conforms to the moral law but with an unmoral aim, then his/her behaviour is not righteous.⁴⁰ In Confucianism, such behaviours are called "Li" which means "profits" and should be despised by decent men. Confucius said: 'the superior man comprehends Yi, the small man comprehends Li.'⁴¹ This is also one of the reasons why some of ancient Chinese did not mind others to spread their ideas and did not mention the profits. It is certainly difficult to tell whether they really care about the profits or not, but the moral code is very clear here. With such moral code, emphasising profits becomes not that easy.

It is obvious to see that Confucius or Confucianism put a high value on morality, which means that it has contempt for deceiving and advocated honesty. This perhaps is the reason why Wei Shi thought Confucianism essentially supported IPR protection, considering IPR infringement could be seen as stealing which is certainly against honesty. If ancient Chinese were aware that ideas could be a sort of property like other solid objects which should be protected and the infringer could be considered as a thief's stealing other people's money, then Wei Shi's theory might be right. However, the precondition of this argument is that there's no such concept as intellectual property and

³⁸ Handong Wu, 'History Thought about the Chinese Copyright Law Concept' (1995) 3 SFYJ 49

³⁹ Dalila Hoover, 'Coercion Will Not Protect Trademark Owners in China, but an Understanding of China's Culture will: a Lesson the United States Has to Learn.' (2011) 15 Marq. Intell. Prop. L. Rev. 325

⁴⁰ Youlan Feng, *A short history of Chinese Philosophy* (Peking University Press, Beijing 1985) 37

⁴¹ Analects IV 16

therefore no intellectual property protection in ancient China, although this is another question that need to be discussed. Therefore, if Wei Shi would like to make his argument more reasonable, he should prove the existence of IPR protection in ancient China, which unfortunately was not found in his works.

Confucianism did not always stay the same throughout thousands of years in Chinese history. Confucius' students and followers in every dynasty had their own understandings of Confucius' thoughts and expanded Confucianism to a so called Neo-Confucianism⁴² which started from Song Dynasty. However, the core concept stayed the same as introduced above. Moreover, the status of Confucianism in Chinese history varied from dynasty to dynasty as well. There were some other schools of thoughts, such as the Legalism, and the leaders might have preferences to the ideological tools to rule their countries. After the Chinese feudal society was overturned, and during the Culture Revolution, Confucianism and the feudal ethical codes were even targeted and severely attacked. Nonetheless, it did dominate most of the dynasties throughout Chinese ancient history ever since Han Dynasty. Even nowadays some parts of Confucianism are highly promoted again, such as the views of “harmony”, “honesty” and the idea of “ruling the country by virtue”. Therefore, although Confucianism was not dominating in Chinese history all the time, it is the most influential and has the most long-lasting significance to Chinese history and society. That is why when scholars discuss the cultural aspect in IPR protection in ancient China, Confucianism was a word they mentioned frequently.

3. The awareness of IPR, the concept of IPR and IPR protection in ancient China

It seems strange that China, the birth land of the four great inventions—compass, gunpowder, paper-making and movable-type printing, did not breed an IPR regime. It has been discussed for some time but still deserves more, because it seems that most of the authors whose works are about this topic hardly argue with other opposite opinions, but merely mention the ideas they agree with. Such situation will prohibit the topic from a deeper research and a more correct result as well. Some scholars, such as Chengsi Zheng, claims that China did have the concept of IPR in ancient time as the printing technology

⁴² It was started by brothers Cheng Hao(1032-1085) and Cheng Yi(1033-1108) and then was developed by Zhu Xi(1130-1200). In short, their argument was mainly about the idealism in western sense.

development facilitated the emergence of copyright.⁴³ Unfortunately, he did not provide more systematic demonstrations. Other scholars who stand on the same side with Zheng try to support this idea by listing history records of prohibiting “pirates” or “forbidding using certain marks” as evidences of copyright and trademark protection. However, these records are not enough to provide a whole picture of an extensive protection which could form a nation-wide legal system.

Therefore, to determine whether ancient China had a concept of IPR and IPR protection, one question should be answered: to what extent can China be considered as “having IPR protection”?

It seems that some scholars tend to draw the line between “no sample at all” and “more than one samples”, because they merely show some examples which are like IPR protection from today’s perspective. Such opinion might be too superficial to estimate the existence of a legal regime. In this case, in the author’s point of view, at least four questions should be answered. First of all, were the tangible and intangible intellectual products considered as property widely in ancient China? In other words, did the awareness generally exist in Chinese society during its ancient history? Secondly, was there any right associated with the intellectual products being recognised? Thirdly, was there any extensive or official protection being carried out? Or was any legal punishment applied to the infringement by the government? Finally, was the aim or the reason of the seeming protection is to protect the “right owner” that we call today?

In fact, ancient China did have the idea of plagiarism. In the classic “Li· Qu Li” which was written in the fourth or fifth century B.C., there were words persuading people not to take others’ words as one’s own. It pointed out such behaviour as an unhealthy phenomenon and could be seen as having the equal meaning of the word “plagiarism” nowadays. In the second century B.C., Cai Yong wrote in his memorial to the throne that some of the officers stole others’ existing words. He defined such behaviour as stealing for the first time. The word “plagiarism” officially emerged in Tang Dynasty when Liu Zongyuan wrote in his book, ‘... many people stole others’ words... there were plagiarism in many families, such as Meng and Guan.’ It is thus clear that in Tang Dynasty, the phenomenon of plagiarising predecessors’ works was already quite serious and was condemned by current intellectuals. The first case in record happened in Wei and Jin

⁴³ Sicheng Zheng, ‘Discussion of Intellectual Property’ (2007) 12 BLP 29

Dynasty⁴⁴. *Shi Shuo Xin Yu*⁴⁵ and *The Book of Jin* both recorded that Guo Xiang stole the content of Xiang Xiu's book *Zhuang Zi Zhu*⁴⁶ and kept it as his own.⁴⁷ Some scholars suggest that from then on some history records began to reproach such behaviour directly and clearly.⁴⁸ At the same time, different kinds of literatures joined in to condemn plagiarism. It is easy to see the reveal of plagiarism cases in history books, and even the plagiarists' high social position could not cover the ugly truth.⁴⁹ However, according to the materials so far, it seems that the plagiarism which was acceptable for ancient scholars merely covered the behaviours of taking other's words but suggesting the author was himself. It did not receive the same reactions when reprinting happened, or at least the original intention was not necessarily for protecting the author's rights. This is actually a controversial argument which will be discussed further in this chapter. Furthermore, such contempt for plagiarism was limited to the moral dimension, instead of a practical legal sanction.

4. National Control of Certain Intellectual Products

There was national control for the spreading of intellectual products, yet such restriction was only a method taken by the ruling class in order to control more on citizens' minds. This opinion has almost become today's consensus.⁵⁰

In ancient China, most of the rulers felt threatened when citizens might be able to access to the knowledge which presented power and authority. Once the knowledge was no longer monopolised in the elite class' hands and thereafter lost its mystique, the authority would be doubted and the controlling would become unavoidable. According to literatures, such as *History of the Song Dynasty* and *Compiled Huiyao of the Song Dynasty*⁵¹, almost every emperor in Song Dynasty had issued imperial edicts to forbid engraving books without authorisation and governments and at each level they also set up departments of censorship for it. Yuan Dynasty initiated a system of censorship that books

⁴⁴ Wei and Jin Dynasties

⁴⁵ A New Account of the Tales of the World

⁴⁶ The interpretation of Zhuang Zi

⁴⁷ Although this case is controversial. Some scholar believes that Guo Xiang 'interpreted and expanded Xiang Xiu's work'. See Youlan Feng, A short history of Chinese Philosophy New Edition (People 's Publishing House, Beijing 1986) 128, 134

⁴⁸ Yufeng Li, *Qiangkouxia De Falv: Zhongguo Banquanshi Yanjiu* (Intellectual Property Publishing House, Beijing 2006) 47

⁴⁹ See Yi Yuan, 'History of the Plagiarism in Ancient China'(1992) 2 Copyrights 32,33

⁵⁰ Both Alford and Wei Shi agreed on this idea. There were also many other articles expressed the similar opinion, for example, Allison& Lin, Yufeng Li, etc.

⁵¹ Edited by Xu Song in Qing Dynasty, it is a collection of memorials to the throne and imperial edicts.

must be reviewed before the engraving and printing, in comparison, an open policy in the Ming Dynasty when history books or even civic novels all could be published and spread almost freely. However, in the Qing Dynasty, the literary inquisition put carving, printing and literatures under a stricter surveillance.

In terms of the contents, the forbidden literatures include Firstly, words against classics; Secondly, laws and decree for pardon issued by the nation; thirdly, other classics apart from those of the Confucianism, Taoism and Buddhism, literatures about astronomy, prophecy and heresy; fourthly, printing materials for scholars to pursuit an official position; finally, forged official announcements.⁵²

5. An Important Period—the Song Dynasty

When tracing the time line of the history of IPR in ancient China back to the very early time, one point-in-time appeared quite frequently among materials, the Song Dynasty. Song Dynasty⁵³ is a proper starting point for the analysis as it is a very important period in Chinese history in every aspect, especially in the arguments in regard to IPR protection. Due to the economic prosperity, people's consumption reached to a very high level. The wide spread of printing technology- although not as developed as machinery printing- provided a lower cost and wider range of publishing. Many scholars, therefore, claim that the records of protecting intellectual products during Song Dynasty were the sign of the earliest IPR protection system. There will be a better opportunity later to pursue it in more details later in this chapter.

After the long-term chaos at the end of Tang Dynasty⁵⁴, Song Dynasty was able to maintain a stable social situation for about three hundred years. Compared to Tang Dynasty, Song Dynasty had a continuous development in its economy, culture and technology. An expert of the history of Song Dynasty, Guangming Deng, says that the development of the culture in Song Dynasty reached to the peak of Chinese feudal history. It not only surpassed the previous dynasty, but also left the following one, Yuan, far behind.⁵⁵

⁵² Sheng Zhao, 'Song Dai de Yin Shua Jin Ling' (1987) 4 HBSFDXXB 15

⁵³ 960-1279 C.E.

⁵⁴ 618-970 C.E.

⁵⁵ Guangming Deng, *Deng Guangming Xue Shu Lun Zhu Zi Xuan Ji* (Capital Normal University Press, Beijing 1994) 194

In Song Dynasty, agriculture, which was the pillar of feudal society, was significantly more developed than that in Tang Dynasty. At the end of Northern Song Dynasty⁵⁶, the population reached to over one hundred million.⁵⁷ The developed commercial economy and increased amount of currency in circulation gave the cultural consumption a push. Parts of the cultural consumption took place in entertainment venues, such as watching dramas or relaxing in tea houses. All these sorts of consumptions stimulated the blossom of Song Poems.⁵⁸ In addition, reading became a more affordable entertaining method for general public, thanks to the broadly used printing technology. Reading was no longer the privilege of the educated individuals or the rich.⁵⁹ Even women, cowboys or woodmen could read the classics and quote sages' words.⁵⁹ Su Shi and Huang Tingjian's poems became very popular, and some carve workers made a living by carving and printing their books.

Apart from the cultural consumptions mentioned above, during Northern Song Dynasty, there were even poems markets in some night markets: buyers named the title and rhyme and the writers would write poems on requests. It was a customised one-off deal, and the trade terms were determined by both parties, so there was no regulation needed. During that time, most of the creators of the intellectual products had other main careers for living, so their intellectual products were mainly an intellectual activity for honour. What they preferred was not the direct economic benefits, but the effects or other benefits caused by its spreading.⁶⁰

Since the demand for these intellectual products grew gradually, editing, printing and selling those products could be very profitable. Printing a high- quality book required elaborate editing, hard wood material and hiring carve workers. All of these meant a large amount of intelligence and money. If the book sold well, some other people would save the editing and just copy the book by merely carving the templates. From today's view, this is certainly called copyright infringement. However, the printing technology was not that developed and the pirating behaviour would not save much cost comparing to the common publishing. Therefore, it would be merely a less possible assumption to say that

⁵⁶ 1127-1279 C.E.

⁵⁷ Bingdi He, *Ming Chu Yi Jiang Ren Kou Ji Qi Xiang Guan Wen Ti: 1368-1953* (Beijing San Lian Press, Beijing 2000) 202

⁵⁸ Shihai Zhang, 'Discussion of Culture Consumption and Intellectual Property Protection of Song Dynasty' (2011) 11 CPJ 60

⁵⁹ Qingli Li and Zhou Fan, 'Song Dai Jing Xue Zhu Zuo Diao Ban Yin Shua Lun Shu' (2005) 2 GZYX 94

⁶⁰ Shihai Zhang, 'Discussion of Culture Consumption and Intellectual Property Protection of Song Dynasty' (2011) 11 CPJ 60

there was prevailing piracy in Song Dynasty if no record could support such theory.

6. Historical Records of Seeming IPR Protection

In Song Dynasty, some books (some writers used the word “many”, but no reference could be found to support that word.) had a page called Paiji, which recorded each book’s publisher, carve worker and the date of the publishing. As what Ye Dehui⁶¹ in Qing Dynasty had introduced in *Shu Lin Qing Hua*⁶² :

“When people in Song Dynasty were carving books, they usually carved certain ink mark and Paiji at the beginning and the end of the book, or after the preface or the table of content.”⁶³

The earliest dated decree about publishing in China was the memorial to the throne by Sichuan official Feng Su in 830 A.D. (in the Tang Dynasty) for prohibiting carving calendars in civil society. In 932 A.D. (in the Later Tang Dynasty⁶⁴), suggested by prime ministers Feng Dao and Li Yu, the government ordered Tian Min to revise *Nine Classics* which refers to nine Confucian Classics. The aim of the revision was to prevent the misses and mistakes that might exist in the old version. According to *Yi Zao* by Luo Bi, before the Northern Song Dynasty’s emperor Shenzong succeeded to the throne, in order to protect the chief source of *Nine Classics*, the government gave orders that this book could not be engraved or printed without authorisation. If anyone wanted to print it, he/she had to apply to the Imperial College. In the Southern Song Dynasty, in a book *Dong Du Shi Lue* written by Wang Cheng in Meishan, Sichuan province, there was a Paiji, saying that, “(this book) is published by Sheren Cheng in Meishan, who has applied to the government and has been approved. No reprinting allowed.”⁶⁵ Some scholars considered that such claim has almost no difference from “all rights reserved” nowadays.⁶⁶ Sheren Cheng in Meishan was one of the most famous book carvers during that time, and this is so far the earliest copyright related record in ancient China. What it protected was the printer or the publisher rather than the author. In 1238 A.D. (in the Southern Song

⁶¹ Dehui Ye, official in Qing Dynasty, also a famous book collector and publisher.

⁶² Dehui Ye, *Shu Lin Qing Hua* (Liao Ning Education Press, Liaoning 1998)

⁶³ Baorong Zhou, ‘Intellectual Property Protection in Song Dynasty’ (1994) 1 BJZY 72,73

⁶⁴ 923-936

⁶⁵ Baorong Zhou, ‘Intellectual Property Protection in Song Dynasty’ (1994) 1 BJZY 72,73

⁶⁶ Shihai Zheng, ‘The Culture of Consumption in Song Dynasty and IPR Protection’(2011) 11 China Publishing Journal 59,61

Dynasty), local governments of Fujian, Zhejiang and Suzhou provinces issued two announcements about several books edited and printed by Zhu Mu, such as *Fang Yu Sheng Lan*, *Si Liu Bao Yuan* and *Shi Wen Lei Ju*. The announcements said, 'The suit filed by Wu Ji, the servant of Taifu⁶⁷ Zhu, says: our officer's father edited *Shi Wen Lei Ju*, *Fang Yu Sheng Lan* and *Si Liu Miao Yu*, and the officer edited *Zhu Zi Si Shu Fu Lu*. These books were submitted to the emperor, and also published in the society. They are the products of our lifetime hard working and cannot be matched by plagiarists... Recently there are some greedy people in the book market who are not able to provide their own ideas but only reprint others' words. I am afraid that they might change the tiles or abridge the words, which would mislead scholars and could be very harmful... We applied for an announcement to forbid reprinting books mentioned above.' Twenty-eight years later, when the second edition of *Fang Yu Sheng Lan* was issued, there was another announcement, saying, 'The suit filed by Wu Ji, the servant of Taifu Zhu, says: our officer carved two books called *Fang Yu Sheng Lan* and *Si Liu Bao Yuan*. They are both edited by our officer and are the results of his hard work for years. Today we spend a large amount of money on carving these books. I am afraid that some greedy people might reprint them immediately by changing tiles or abridging the contents once the books are published. It would waste our efforts and money and could be very harmful..... We applied for controlling and stopping the reprinting..... If such situation appears, please allow us to bring a suit and chase the plagiarists and destroy the carving to punish them.....' and then the announcement concluded that "if there are such plagiarists, the family of Taifu Zhu are allowed to suit them and destroy the carving materials."

Chinese IPR expert Sicheng Zheng analyse an old literature and believe that it was an evidence of IPR protection in Song Dynasty. *Cong Gui Mao Shi Ji Jie*" by Duan Changwu had an announcement about "forbidding reprinting" registered in the Imperial College said:

' My uncle who has passed away recorded Mao's⁶⁸ poems...He contributed his whole life to this book. If other publishers reprint it for profits, the structure and the original words and meanings might be changed...Today we prepared a licence from Liangzheng and Fujian Zhuanyun Department⁶⁹... Any individual who violated this rule will be found

⁶⁷ Tai Fu - Ancient Chinese Officials, who assists Monarch and involved in affairs of state, in charge of the country's military and political power

⁶⁸ Not Zedong Mao

⁶⁹ Liangzheng and Fujian are names of places, and Zhuanyun Department was in charge of transportation and relevant financial administration.

guilty and the printing board will be destroyed.”⁷⁰

Another book in the Southern Song Dynasty, *Gu Jin Yun Hui Ju Yao* which was edited by Xiong Zhong based on Huang Gongshao’s book called *Gu Jin Yun Hui*. It has a Paiji which says, ‘...(I) proofread the book several times and left no mistake. I would like to share it with scholars all over the world. However, this is a personal work which is different from those in the book stores. I am afraid that some greedy people might change the tile or abridge the words to save a little cost therefore mislead scholars. I have applied for controlling such situation. Hope scholars who collect this book can provide some advices or reviews.’⁷¹ In the preface of *Dao Yuan Yi Qi* by Cao Shiheng in Ming Dynasty there were words like: “if there is any greedy person, who reprints this book, I will file a lawsuit.”⁷² Similarly, in the Ming Dynasty, in the front of *Tang Shi Lei Yuan*, it says, “this carving belongs to Chen’s Office, and reprinting will be held in account.” The Paiji of *Yue Lu Yin* says, “This carving belongs to Jingchang House, no reprinting allowed. It is published by Li’s Office... reprinting will be held in account and punished even in thousands of miles.” *Pian Zhi Bie Ji* said, “the gentry like us are talented enough to write a book or rich enough to repair and publish books, so we definitely do not plagiarise. Crafty persons who steal our names will be held them in account and punished.” At the end of the Ming Dynasty, ‘Huang Ming Jing Shi Wen Bian’ said, ‘this carving belongs to our office, reprinting will be held in account and punished even in thousands of miles.’ In the Qing Dynasty, in the front of “Jing Hua Yuan” by Li Ruzheng there are words as, ‘newly printed in the first year of Daoguang reign’⁷³, reprinting will be held in account.’

All the description about the fascinating prosperity in literatures and printing development in Song Dynasty and the historical records of the efforts taken by the printers as well, are frequently utilised by researchers as evidence to prove that there were actually IPR protection in ancient China. It indeed appears convincing at first, but if one digs into some of the details and background, it might not seem so.

First of all, was there a huge economic benefit of reprinting businesses? Although movable-type printing was first invented in China, it did not contribute to the emergence of copyright as much as that in western countries. The evolution of the movable-type

⁷⁰ Sicheng Zheng, ‘Discussion of Intellectual Property’ (2007) 12 BLP 11

⁷¹ Yufeng Li, *Qiangkouxia De Falv: Zhongguo Banquanshi Yanjiu* (Intellectual Property Publishing House, Beijing 2006) 50

⁷² Yufeng Li, *Qiangkouxia De Falv: Zhongguo Banquanshi Yanjiu* (Intellectual Property Publishing House, Beijing 2006) 51

⁷³ 1821--1850

printing material from clay to metal took hundreds of years. The movable-type printing in ancient China had never been able to get rid of the manual mode. Modern machinery printing technology was introduced to China from western countries.⁷⁴ Manual printing belongs to a different production mode from machinery printing. It is doubtful to say such production mode could bring forth publishers, workers and authors which are the three independent economic entities today. Therefore, using “printing technology” as an evidence to prove the existence of copyright in ancient China is not convincing enough.

Another question about those records is that the intention or the aim of publishing those books. In ancient China, many scholars wrote books not for financial interests but to share knowledge or spread their ideas, and what such records reflected might be that the protection was more to the thoughts, rather than to the “property”.⁷⁵ During that period, printing out one’s work usually needed supports from his/her family and friends and it was more for public good which was totally opposite to today’s profit-seeking publishing. It was after the translation became popular that the protection started to place extra emphasis on more profitable works. Because of the development of schools and the prevalence of text books, the audience was gradually growing, and that made the copyright protection imperative.⁷⁶ For example, in the *Paiji* of *Gu Jin Yun Hui Ju Yao* as one of the records above, there were words like “I would like to share it with scholars all over the world.” Moreover, in those *Paiji*, when the publisher explained why they prohibited reprinting, they usually expressed the similar fear that changing the title or abridging the words would lead to misunderstanding which would bring trouble to scholars. Although sometimes they mentioned that they spent a lot of time on the books and showed their worries about “greedy people”, it does not necessarily mean that they were afraid that “greedy people” might steal their money and waste their hard work. It sounds reasonable because now the idea of IPR protection has been deeply rooted in our mind and when we automatically consider those records, it happens to make sense. However, scholars could see those words from another perspective, it could be another story. Together with last theory, there could be a possibility that publishers or carvers spent a large amount of money and energy on their books in order to share the knowledge and thoughts, but those inferior products by some greedy people might contain mistakes or be not completed therefore misleading scholars. In that case, their aim of publishing this book could not be realised just because of a little money earned through poor

⁷⁴ China Encyclopedia (2009) Vol.10 397

⁷⁵ Baolin Tao, *Lun Zhu Zuo Quan Chu Ban Fa Ji Yi Bian Ding Ban Xing* (The Commercial Press, Beijing 1929) 19

⁷⁶ Baolin Tao, *Lun Zhu Zuo Quan Chu Ban Fa Ji Yi Bian Ding Ban Xing* (The Commercial Press, Beijing 1929) 19

reprinting by those greedy people.

It also could be thought over from another perspective. The basic standpoint of Chinese traditional culture can be covered by a word: Yi, which has been introduced above. This actually signifies the denial of “individuals”. To be specific, “its emphasis on personal development, in contrast to personal gain, helped create a culture in which the individual was viewed as quite important, but primarily so because of his or her contribution to society.”⁷⁷ It can be said that the whole morality of ancient China was built on the foundation of this philosophy. Indeed, it could not eliminate the selfish desires in people’s heart, but it, at a minimum, put “personal desires” on the position of “being unethical”. The spirit of “personal desires are unethical” permeated into every system throughout Chinese history and effectively limited individual activities or personal relationships to the lowest level.⁷⁸ Therefore, it would be reasonable to assume that when the books were reprinted, the original printer might usually care more about the integrity of the work or the quality of the printing, instead of their material interests.

Thirdly, how widely could the seeming protection covered? All those records which seem as the evidences of the protection to copyrights in ancient China were cited by many scholars in their articles. Words like “no reprinting allowed” are indeed quite similar to what we use in claiming our copyrights nowadays. It is believed that the fast development of printing technology and commerce can boost the publishing and thereafter bring the requirements for copyright protection, therefore the existence of a IPR protection system, or at least copyright protection, seems reasonable, real and inevitable. However, few scholars have paid attention to the details which do not look like as important as those key words mentioned above. Yet these details might be able to change the nature of these records, or at least question the result based on them.

First of all, most of the researchers focus on the tough tone in the claims in the front of those books, while the announcements which declared the disapproval of reprinting were issued by the government. However, the publisher, which sometimes was also the author or editor, was left over. Take the Meishan Sheren Cheng as an example, Sheren is an ancient Chinese official title. Generally, it refers to a hanger-on of an aristocrat and it is also used to call the children of the elite since Song and Yuan Dynasty. Therefore, Sheren

⁷⁷ William P. Alford, *To Steal a Book Is an Elegant Offense: Intellectual Property Law in Chinese Civilisation* (SUP, Redwood 1995) 10. Cited by Brian Barron, ‘Chinese Patent Legislation in Cultural and Historical Perspective’ (1991) 6 *Intell. Prop. J.* 316

⁷⁸ Zhiping Liang, *Li Fa Wen Hua* (San Lian Press, Beijing 1998) 419

Cheng was not only a famous carver, but also had a higher social position or at least had more financial resources. Similarly, in the example about books written by Taifu Zhu, an official department even published an announcement, which showed certain attention to his case. However, this Taifu Zhu was not an ordinary person. His name is Zhu Zhu, the son of Zhu Mu. Zhu Mu and Zhu Zhu were relatives of Zhu Xi, who is a significant representative of Confucianism in Chinese history and had a high position in the government in Song Dynasty. Zhu Zhu and his father were also officials as Deans of the College of Arts at that time.⁷⁹ In another case mentioned above, the editor of *Gu Jin Yun Hui Ju Yao*, Xiong Zhong, did not have a very position, but he worked for the author of the book, Huang Gongshao, who worked for the government as the leader of the archives.⁸⁰

Another great example is Zhu Xi. As a very famous figure in Chinese history, he was a dignitary official of the government, an accomplished scholar and also a giant merchant. His grandfather was a rich businessman in carving books. By his influence, Zhu Xi ran business of printing as well and in even larger scale. One of his books, *Lun Meng Jing Yi*, was reprinted by others and he decided to stop that unfortunate situation. He wrote to a friend, Lv Zuqian, who was a local official, for help, asking him to control the reprinting of his book. His descendant followed his example and always guarded their works afterwards.

In the examples above, publishers' social positions provide a possibility that those solemn statements or even the attention drew by the government might be limited for the upper class rather than for citizens at the bottom of the society. As for commercial publishers, it was not easy to apply to the state for protection. It might request certain close relationship between the publishers and the governments. After they expressed their needs, even if the applications were approved, what they obtained was only individual and limited protection which could not be extended to a larger scope.⁸¹ In Song Dynasty, there was no law or regulation about copyright protection. If a publisher himself did not have enough power, the extent to which the protection to his rights could be realised would be questioned. About the behaviour that publishers asked for forbidding others from reprinting their books, Ye Dehui said, 'It can be seen that during that time, one or two private carvers requested the government to control reprinting. This was not written in the

⁷⁹ Min Shu, Vol. 98 Ying Jiu Zhi

⁸⁰ Fujian Sheng Qing Zi Liao Ku, <<http://www.fjsq.gov.cn/showtext.asp?ToBook=3151&index=3305>>

⁸¹ Jianpeng Deng, 'Song Dai Ban Quan Wen Ti- Jian Ping Zheng Cheng Si yu An Shou Lian Zhi Zheng' (2005) 1 HFP 27

law and not everybody needed to obey it. If someone did have enough strength and broad relationships, then he might be able to achieve his goal.⁸² Some scholars believe that due to the underdevelopment of Chinese feudal legal system, the right claims of “no reprinting allowed” of publishers were largely meaningless decorations to books. Their opinions about fair use and plagiarism were only a sort of moral words without legal sense in the absence of an effective copyright protection system.⁸³ In fact, the nature of the question is that the governments never considered copyright as a property right of publishers or authors. There is no difference between expecting a concept of copyright or even intellectual property right in a society lacking the consciousness of right and a dream.

For the four questions listed previously, the answers are now clearer. First of all, based on the records, one cannot get the conclusion that intellectual products were considered as property widely in ancient China. Take copyrights as an example, authors had not paid that much attention as had printers whose intellectual contribution largely referred to editing. Although their editing was in fact what was infringed by reprinting and some of them did request for a privilege to stop the infringing actions, their intension was not necessarily to protect their economic interests, and such privileges were not granted widely. Secondly, there was no concept of right in ancient China, because “Confucian thought does not embrace the norm that ideas belong to the person who created them, but rather holds that they belong to society as a whole.”⁸⁴ However, there were solid records about the antithetical opinion to stealing others’ words and claiming oneself was the author. Moreover, to be fair, although only printers with a high position could obtain a privilege, it is possible that some of them took the advantage of their social positions to prevent their businesses from competitors, after all in some cases, for instance, Zhu Xi, printing did bring them a fortune. Therefore, what one should admit is that the sprout of the awareness of IPR already existed in ancient China, yet this did not create the proper environment to grow into a widely accepted concept of IPR afterwards. Thirdly, the official regulations were “predominantly designed to ensure state control of ideas and prevent public co-option of dynastic symbols, rather than to protect individual creativity and innovation.”⁸⁵ The official announcements that emerged later were granted only as a privilege rather than a common protection, and there were few records, if any, about the

⁸² Dehui Ye, *Fan Ban You Jin Shi Yu Song Ren, Zhong Guo Ban Quan Shi Yan Jiu Wen Xian* (China Fang Zheng Press, Beijing 1999) 8

⁸³ Handong Wu, *Zhu Zuo Quan He Li Shi Yong Zhi Du Yan Jiu* (China University of Political Science and Law Press, Beijing 1996) 23

⁸⁴ Richard E. Vaughan, ‘Defining Terms in the Intellectual Property Protection Debate: Are the North and South Arguing Past Each Other When We Say “Property?” A Lockean, Confucian, and Islamic Comparison’ (1996) 2 ILSA J. INT’L & COMPL. 307,344. See also, Ryan P. Johnson, ‘Steal This Note: Proactive Intellectual Property Protection In The People’s Republic of China’ (2005) 38 CLR 596

⁸⁵ *Id.* at 595

situation of the enforcement of those announcements in reality. Fourthly, as what has been analysed, the intention of the seeming protection to protect the “right owner” might not necessarily protect their own economic interests. Therefore, there were traces of the awareness of IPR, but they did not manage to develop into a common concept. However, this brings up another question: why could not such sprout of the IPR awareness grow into a tree of proper IPR protection?

7. Why the sprout of IPR did not develop?

In fact, the formation of IPR protection system is very completed. In addition to the social productivity, in this case, which mainly refers to the printing technology, the social request is also an aspect to think over. In other words, such a legal system should be needed by at least one class which must be able to speak for themselves and have some impact on the society.⁸⁶ Then two groups of people in ancient China should be looked into: one group contains intellectuals or scholars who created intellectual products, and the other one contains businessmen who usually should connect intellectual products with their economic benefits.

a. the Keju exam and Shi

i). Shi

The gentry, called “Shi” in Chinese in ancient China, founded the main part of what refers to “author group” and was the main force in the creation process of ancient Chinese art. However, two Confucian thoughts for education, to a large extent, prohibited Shi from the privatisation of their works. One is “officialdom being the natural outlet for good scholars”, and the other one is “to believe in and love ancient things”.

According to the usage of the word “Shi” in ancient literatures, it might only refer to middle-lower administrator in each department. In *Mencius*⁸⁷, Shi was the lowest group in nobility class. At the end of the Spring and Autumn Periods, due to fundamental changes in Chinese feudal system, this class got the chance to extend and rise, and its rising indicated the growing up of the intellectual class. Shi was the keeper of Confucianism. As

⁸⁶ William P. Alford, *To Steal a Book Is an Elegant Offense: Intellectual Property Law in Chinese Civilisation* (SUP, Redwood 1995) 10

⁸⁷ Mencius

a class, it came with a spirit of idealism. In *The Analects*, it says:

“A superior man should pursuit Tao rather than food and clothes.”

It requires each intellectual to be able to pursuit an almost religious heart to concern the whole society beyond the interests of individuals and small groups.⁸⁸ This special character of Shi which is quite different from western intellectuals, to some extent might be based on a conviction from remote ages that “the God and ancestors are the source of knowledge and power”.⁸⁹

After the Warring State Period, Shi began to involve in political discussion. Mencius says: “Shi entering politics is just like farmers engaging in farming”.⁹⁰ Since Qin Dynasty⁹¹, a centralised bureaucracy had been built up and it required a great number of intellectuals to ensure the effective operation of the regime. Therefore, Keju System (it can be also translated as “the civil-service examination system” or “imperial examination”) emerged in Sui Dynasty⁹² as the times required, after some other official selection methods, such as Cha Ju.⁹³

From Sui to Qing Dynasty, Keju system experienced great Changes. At the beginning, the examination mainly required an essay about current political life of the state.⁹⁴ Later in Tang Dynasty, “poems’ was added to the exam. Till Ming Dynasty⁹⁵ the exam brought in the eight-part essay or stereotyped writing which was based on The Four Books (The Great Learning, The Doctrine of the Mean, The Confucian Analects and The Works of Mencius) and The Five Classics (The Book of Songs, The Book of History, The Book of Changes, The Book of Rites and The Spring and Autumn Annals). Candidates could only interpret and explain those books and classics. They were not allowed to give their own opinions, and even the form of the essay was strictly set. Everything taught in the school was for this examination. For instance, schools in Qing Dynasty only taught eight-part essay, and the government even edited a book called *Qin Ding Si Shu Wen (Regius Four Books Essays)* as a sample and the only thing that candidates needed is to memorise it

⁸⁸ Hofstadte R. *Anti-intellectualism in American Life* (Vintage Books, New York 1963) 27,29

⁸⁹ Yufeng Li, *Qiangkouxia De Falv: Zhongguo Banquanshi Yanjiu* (Intellectual Property Publishing House, Beijing 2006) 65

⁹⁰ Mencius: Teng Wen Gong Xia

⁹¹ 221B.C.---207 B.C.

⁹² 581-618

⁹³ Cha Ju means local officials chose talents and recommend them to upper classes.

⁹⁴ Yongsheng Shi, ‘Jian Xi Sui Tang, Liang Song, Ming Qing Ke Ju Zhi’ (2011) 9 XZK 201

⁹⁵ 1368--1644

mechanically.⁹⁶

On the one hand, as a relatively sound education and examination system, Keju allowed people from all classes to have an opportunity to become an official and have a higher social position. This conformed to a Confucian thought that “to make no social distinctions in education”.⁹⁷ Thanks to this expansion of the range of candidates, Keju, during certain period, did provide a number of talents for Chinese government and contribute to the stability and development during that time.

Furthermore, since Keju was an official selection system which tests Confucian knowledge and ideas, Confucianism became the core content of education in both official and private schools. Only by preparing for the exam in accordance with Confucian values stipulated by the ruling class could the candidates obtain fames and positions. Therefore, Shi immersed themselves in Confucian classics for that fatal examination. Studying Confucianism became a social phenomenon among Chinese intellectuals and Confucian criteria of values were broadly accepted and popularised in the society. For over thousand years, Keju justified the fact that Chinese intellectuals put a high value on Confucian knowledge and the education and custom that based on Confucianism.

On the other hand, Keju examination covered three main aspects: First of all, candidates had to be able to memorise The Four Books and The Five Classics which are about four or five hundred thousand words. Secondly, candidates should be proficient in history, especially political history, so that they could bring it into Ce Lun (the discourse on politics) which was an important part of content in Keju. The third aspect was poems. From these three aspects, it could be seen that Keju put a extremely high value on social science, yet natural science, such as physics or chemistry, was considered as “diabolic tricks and wicked craft” and was not treated seriously.⁹⁸ Therefore, Chinese intellectuals were in a situation that “what they learnt was not what they used, while what they used was not what they learnt.”⁹⁹ They did not care about any new knowledge or technology thereby became short-sighted and narrow minded. This can be seen as a reason of why Chinese science and technology unfortunately fell behind during recent hundreds of years.

Keju system, to some extent, provided a method for the ruling class to control mind,

⁹⁶ Li Wu, ‘Ke Ju Zhi Dui Zhong Guo Gu Dai Jiao Yu De Ying Xiang’ (2005) 26 JSUNHSS 5

⁹⁷ The Analects: Wei Ling Gong

⁹⁸ Hongliang Wang and Jianli Duan, ‘Gu Dai Ke Ju Zhi Dui Xian Xing Gao Kao Zhi Du Gai Ge De Qi Shi’ (2010) 26 JSTC 112

⁹⁹ Lirui Mao, Ancient Chinese History of Education (People’s Education Press, Beijing 1985) 258

because of its praise for Confucianism. In the end, it was gradually bounded in the eight-part essay style. From then on, the regime became simpler and the mind control became tighter. Therefore, Shi were tied to the state apparatus. Some scholar divide ancient Chinese intellectuals into two categories: those who tried to serve the rulers to realise their virtuous ideals and those who lived in seclusion and kept grumbling. Although there was such a difference between them, their eyes were always on politics and officialdom. Therefore, traditionally speaking, the fundamental issue of Chinese intellectuals was their dependence upon the power and politics.¹⁰⁰

b. Business and Businessmen

Since the emergence and development of IPR protection system was tightly connected with the merchants as an independent class,¹⁰¹ it would be helpful to explore the social position of ancient Chinese merchants.

In ancient China, merchants sold others' or their own products, which kept cities producing and reproducing. However, being an agriculture-oriented society and a centralised bureaucratic state, ancient China was always actively hostile to commerce. In their eyes, commercial treatment would make individuals greedy and therefore break the idea of order in this empire. They openly announced that commercial interests must be subordinate to the political interests of the nation. In ancient China, all citizens were divided into four social strata. From the highest to the bottom, they were: gentry or scholars (Shi), Farmers, workers and businessmen.¹⁰² A philosophic compilation in the third century B.C. called *Mister Lv's Spring and Autumn Annals* expressed the contempt to commerce as well by comparing the agricultural and commercial life styles. It suggested that farmers are honest, easily ordered about, naive, selfless, and won't run away when the state is in difficulty; on the contrary, merchants are malevolent, hard to control, crafty, selfish, and would run away when the state comes across trouble, because their properties are movable which would be easy to carry away.¹⁰³

Moreover, as introduced above, Confucius said, 'the superior man comprehends Yi, the small man comprehends Li (interests)'. Since ancient China has been an agriculture-

¹⁰⁰ Xiaomang Deng, *Dang Dai Zhi Shi Fen Zi de Shen Fen Yi Shi* (Shu Wu, Beijing 2004) 8

¹⁰¹ Yufeng Li, *Qiangkouxia De Falv: Zhongguo Banquanshi Yanjiu* (Intellectual Property Publishing House, Beijing 2006)

¹⁰² This saying originated from a book *Chun Qiu Gu Liang Zhuan* written by Guan Zhong who was the prime minister in Qi State in the Spring and Autumn Period.

¹⁰³ This book was managed by Lv Buwei who was the prime minister in Qin Dynasty. It covers different ideologies at that time.

oriented nation, agriculture is the largest benefit for the state, which made supporting agriculture the largest Yi. On the contrary, dealing business was for personal interests therefore harmful to the state, and the restriction of business would be considered as despising Li.¹⁰⁴ Especially at the beginning of Qin and Han Dynasty, the state took many measures to restrict businessmen. The state kept the most profitable business under its control, and only the government had the right to trade certain products, such as salt, tea, iron, cooper and so on. It also collected much more taxes from merchants. Politically speaking, businessmen could not become an official in early times. Even till Ming and Qing Dynasty, only after several generations could the descendants of merchants participate in Keju exam.

Although since Qin Dynasty, China had built up a politically premature centralised bureaucratic system in order to carry out a planned economy which could allow the politicians to determine everything from a bird's eye perspective. However, due to the lack of a medium level department as a junction between the upper and lower departments, commerce was able to survive from the administrative and political pressures and had a chance to develop throughout the history.

As what Mangabeira Unger says when he explains the nature of the law of imperial China, ancient Chinese merchants had neither the motives nor the opportunities to protect their interests or develop their laws. Therefore they could not become a "third estate"¹⁰⁵ At the same time, even though some outstanding merchants could influence the bureaucracy occasionally, those were only private and illegal activities.¹⁰⁶ More importantly, the knowledge that was required by commercial operations and the epidemic of novels and dramas, which were closely connected with the rise of the businessmen class during the Ming and Qing Dynasty, both contained popularised Confucian ethic thoughts. Till then, merchants and the Confucianism began to have a connection with each other and Confucian businessmen appeared. In fact, a majority of successful businessmen were Shi, and to be a Confucian businessman became some merchants' goal. As Bingli discovers in researching the salt dealers in Qing Dynasty, even though some merchants earned millions of taels of silver, but they still tended to spend their money on an official position in the government rather than further investment. Actually, becoming an official through business was quite common among wealthy businessmen and their

¹⁰⁴ *Shi Ji: Ping Zhun Shu* was written by Sima Qian in 1233

¹⁰⁵ Roberto Mangabeira Unger, *Law in Modern Society, towards A Criticism of Social Theory* (The Free Press, New York 1997) 74

¹⁰⁶ Renyu Huang, *Fang Kuan Li Shi De Yan Jie* (China Social Science Press, Beijing 1998) 277

descendants.¹⁰⁷ Because of the prosperity of commerce and the passion of merchants for political career, Chinese businessmen gathered large amount of fortune and most of the business executives had a position in the government. They traded salt and tea which were monopolised by the state, and opened pawnshops and produced and issued currency. High-ranking officials as Yan Song¹⁰⁸ and He Shen¹⁰⁹ are good examples. These businessmen did not invest their assets in industries, but massively bought in lands and lent money at usury.¹¹⁰

In Song Dynasty, even till the end of Ming Dynasty, the commerce in China had developed to a relatively high level. Commodity exchange became unprecedentedly prosperous and merchants gradually achieved a more favourable position. However, why did not publishers join together and push the state to enact a copyright law or trademark law to protect their own interests if they did have such needs as what have been mentioned above? It might be explained by the conservative personality of the agriculture-oriented society in ancient China.¹¹¹ Such characteristic determines that the society valued inside stability while feared outside attacks; it promoted the reserve of civil officials while criticised the dominant of military officials; it supported the development of agriculture while restrained the prosperity in commerce. All of these, to some extent, determined the dependency of the commerce and merchants in ancient China, although the commodity economy was in an excellent situation during that time. In fact, in imperial period, the Jiangnan area of China had appeared significant achievements in many fields, such as literature, music, drama, calligraphy and painting. Some cities in that area were not only the living centres of men of letters, but also the core area of book collection and publishing.¹¹² Even so, the independence of the business which supported this area ultimately held back the development of private law.

8. Conclusion

¹⁰⁷ Bingdi He, *The Ladder of Success in Imperial China* (Columbia University Press, New York 1962) 69

¹⁰⁸ Song Yan (1480-1567), famous chancellor of Ming Dynasty, dominated the state for 20 years, weeded out any dissenting officials.

¹⁰⁹ Shen He (1750-1799), famous chancellor of Qing Dynasty, Businessman, corruption and grabbing heavily more than the sum of the Qing government 15 years' revenue

¹¹⁰ Shi Qiu, 'Zhong Nong Yi Shang Si Xiang He Zheng Ce De Yan Bian Ji Dui Zhong Guo Li Shi Fa Zhan De Ying Xiang' (1993) 1 FMR 58

¹¹¹ See more about the agriculture-oriented society in China. Yuren Huang, *Chinese Great History* (San Lian Press, Beijing 1997) 29

¹¹² Yufeng Li, *Qiangkouxia De Falv: Zhongguo Banquanshi Yanjiu* (Intellectual Property Publishing House, Beijing 2006)

In ancient China, apart from the control by the government driven by political requirements, there were also examples in which individuals endeavour to protect their works. Of course such situations seem not very much relevant to cultural control.¹¹³ However, they differed widely from the copyright protection in the modern sense. Firstly, ancient China's protection was mostly provided for publishers or carvers rather than authors, while one of the essential features of modern copyright system is the protection to authors, instead of "privileges" given to publishers. Yet those records of *Paiji* and prohibitions were at most a sort of privilege granting and did not mean that of copyright protection which is authors-centred in modern environment.

Secondly, this type of protection was limited, non-continuous and might not receive any response from institutions. By checking the background of the records of "rights claim", many of this kind of special permissions issued by the government were given because of the printers' status. There were few, if any, examples of granting such privileges to common publishers, and there was also no record of how the government dealt with reprinting once it was found. That means the range and the enforcement of this so called protection are both doubtful.

However, because some historical literatures show the contempt to stealing words and claiming as one's own, one cannot deny the existence of a budding awareness of IPR in ancient China. Unfortunately, this awareness was only constrained to a spiritual field but was never involved with economic content. There are several reasons for this:

First of all, the legal concepts of individual rights did not provide the environment to develop properly. In Chinese traditions which were largely influenced by Confucianism, comparing to the rights of individuals, the state's interests were placed above all else. China did not have that sort of individual-based property concept which shows no difference in statues in the Western world. In terms of the relationship between the rights and the obligations, the latter was the one attached importance to. As a scholar, Wu Handong, believes, such view of rights has a huge historical inertia nowadays: the society as a whole still has a relatively weak awareness of intellectual property rights and the rights owners do not always know what the content of their rights are exactly.¹¹⁴

Secondly, due to the influence of Confucianism, when ancient Chinese scholars wrote books, their aim was to express their opinions and to establish their own school of

¹¹³ Jian Hou, 'China-The Earliest Country who Protect Intellectual Property' (1999) 1 XTSEFYX 35

¹¹⁴ Handong Wu, 'History Thought about the Chinese Copyright Law Concept' (1995) 3 SFYJ 31

thoughts. They were shamed of talking about interests, i.e. Li. Their works were supposed to educate citizens and help the society, or to express their great ambitions or penetrating judgments.¹¹⁵ The Commentary of Zuo said, 'The most important thing is morality, and then merits, and then thought.' Kong Yingda interpreted this sentence as, 'Thought means to express the outstanding and meaningful thoughts and make people spread them.' There were also expressions as, 'Articles are significant to the state and will last forever. Lives will end eventually, and happiness and sadness are only about themselves. Both of them will reach to their ends, which differs from the endlessness of articles.'¹¹⁶ Therefore, for ancient Chinese intellectuals, establishing one's own school of thoughts became the goal to pursue and the motive to write.

Thirdly, the commodity and property attributes of intellectual works did not acquire the understanding which they deserved. From the perspective of Chinese traditional culture, the creation of intellectual products was only a process of self-improvement through self-cultivation, family harmony, country management and world peace. At the same time, the expression of one's own idea was considered to be originated from the past and ancestors. Those works which could contribute to the development of society and the state should be interpreted and spread by wise men in the future but not be kept by one's own. Therefore, the thought that "inheriting sage's thoughts and cultivating the later generation's puzzlement was the priority of benefiting the society and could have positive impact"¹¹⁷ was seen as a moral excellence. Influenced by such mentality, many people did still have the awareness of the commercialisation of knowledge, and did not realise the property values of intellectual products.

Finally, the Song Dynasty was known as the meticulousness of its laws, but there was no content relevant to copyrights protection, let alone IPR protection. Also, there were few words about any actions the government took to punish the reprinting behaviours after they issued the announcement and granted privileges to certain publishers. On the contrary, since the society advocated literatures and reprinting overflow, to some extent, helped it spread, "the legal environment (about this issue) were quite loose, therefore official books were not prohibited from reprinting."¹¹⁸ In a famous novel written by Li Boyuan in Later Qing Dynasty, *Exposure of the Official World*, there was a story about copyright infringement. Some carving stores were severely bothered by reprinting and

¹¹⁵ Yuanfang Song and Baijian Li, *Chinese publishing history* (China Publishing Press, Beijing 1991)

¹¹⁶ *Dian Lun: Lunwen*, by Cao Pi in Wei Dynasty.

¹¹⁷ Zhidong Zhang, *Shu Mu Wen Da* in Qing Dynasty.

¹¹⁸ Kefei Ye, 'Zhong Guo Gu Dai de Piao Qie yu Wei Quan: Yi Zhuang Yin Piao Qie Yin Fa de Mou Sha An' <http://www.thepaper.cn/newsDetail_forward_1284598> accessed 21 December 2014

turned to officials, hoping they could help him stop the infringement. What the official replied was: we stop people from being evil, but how can we stop people from pursuing good things? It is thus clear that in officials' eyes, reprinting was necessarily a bad thing and did not pay attention to copyrights.

Indeed, from the beginning when the state controlled the publishing of certain books to later when the problem of reprinting was noticed, there was a visible and significant change. Although we cannot determine that such change meant the forming of the concept of copyrights, let alone the copyrights protection, it still could be considered as the emergence of requirement for the copyrights or even IPR protection.¹¹⁹ As some scholar said, perhaps it was just by benefitting from the official control over the spreading of unbearable books that some authors or carvers cleverly or accidentally obtained the authorisation from the government and could prohibit reprinting form themselves.¹²⁰

Chapter Three Difficult Initiation (the end of imperial China—the foundation of PRC)

The imperial China did not have a concept of IPR or IPR protection until the western merchants and armed forced brought this new idea. Although the regulations about IPR were finally established in China after endless negotiations, IPR and its protection were not totally accepted and the development of this new legal system came across many difficulties due to the unstable social situations and change of regimes. This part of history was rarely mentioned by scholars, perhaps because the chaotic events make it difficult to comb the time line and find out the trace of the development of IPR. Indeed, the improvement of China's IPR system during this period cannot be seen as impressive. However, it is this slow progress that can show us more clearly what stopped China's IPR system from developing and might have significance to today's research.

In this chapter, before it goes into the detailed history, the time line of Chinese history from the end of imperial dynasty to the Reform and Opening-up of the People's Republic of China (PRC) will be briefly introduced so that readers can have a general knowledge of the historical background. Then the following part of this chapter will go through the

¹¹⁹ Maolin Liu, *Economic Analysis of Intellectual Property Law* (Law Press, Beijing 1996)

¹²⁰ Yufeng Li, *Qiangkouxia De Falv: Zhongguo Banquanshi Yanjiu* (Intellectual Property Publishing House, Beijing 2006) 56

negotiations, incidents and thoughts regarding to IPR protection throughout the time from the end of imperial China to the foundation of PRC. In this chapter, one can see that apart from the lack of ideological basis, China's leaders and scholars were also concerned about the negative influences caused by transplanting a strict IPR system. They were afraid that such a system would make it very difficult for Chinese citizens to access to advanced western knowledge and technologies. The frequent changes of political powers and their guiding ideologies failed to provide a proper environment for IPR to develop.

1. Brief Introduction to the History Background

Although the social situation in China back then were very chaotic, such chaos as a whole actually make the analysis easier. In other words, the long term of dark history left little chance for China to develop herself, and it is this period that might be able to explain why China's intellectual property system, or even the whole economy, was left far behind by other countries.

The dominating influence caused by the Confucianism lasted till the 19th century when western countries broke the closed door of the oriental world. In 1840, the Opium War broke out between Britain and China. From then on, China entered a new period. The invading of western economy and technology promoted the Capitalism factors in China. Except for the new relation of production, what came along with the war was the new ideology. Many western works were translated and brought into China, such as Hexley's *Evolution and Ethics*, Montesquieu's *The Spirit of the Laws* and Adam Smith's *The Wealth of Nations* etc. Those works covered society, economy, finance, politics and other areas. In terms of legal thoughts, Young John Allen,¹²¹ an American missionary, was a representative figure in proposing copyright system. He went to China in 1859 and firstly worked as a teacher and translator. Afterwards he founded a magazine named *Wan Guo Gong Bao* (*A Review of the Times*) and became the editor. He put comments on the general situations of copyrights protection in western countries. In one of his translation works, *Ban Quan Tong Li*, he said that in western countries once there was a new technique invented or a new book published, the inventor could get a paper to confirm the patent, and the right obtained by the author was called copyright.¹²² He also argued against the blind criticism to copyrights protection. In his opinion, the author provided ideas and writing and the printer provided the cost, and under the cooperation a book could be

¹²¹ Young John Allen, 1836-1907. .

¹²² Donghan Wu, 'Guan Yu Zhong Guo Zhu Zuo Quan Fa Guan Nian de Li Shi Si Kao' (1995) 3 FSYJ 45, 47

provided to the society so that the whole society could benefit from it.¹²³ He encouraged people to respect copyrights and was against reprinting for profits. He allowed his works to be used or reprinted properly, but people should give references.¹²⁴ With the introduction of western legal culture, Chinese writers and publishers began to be aware of copyrights. Yan Fu, an enlightenment thinker and translator, loudly supported copyright system. In a letter to a friend, he said that western countries hated monopoly but they treated copyrights and patents very seriously in order to encourage innovations.¹²⁵ Those enlightenment thinkers as Yan Fu provided the significant theoretical preparation for the system. Because of their efforts and the pressure imposed by western governments, *The Copyright Code of Great Qing Dynasty* was issued in 1910. It was seen as the first intellectual property law in China. Although the Code was not enforced due to the Xinhai Revolution¹²⁶ in the next year, it absorbed advanced western culture and had tremendous impact on legal thoughts and legislation in China afterwards.

What should cause some attention here is the meaning of the Xinhai Revolution. First of all, it overthrew the imperial court of Qing Dynasty and put a full stop for China's absolute monarchy which had lasted for thousands of years. Secondly, the Republic of China was built up through this revolution and issued temporary provisional constitution which can be seen as the first law with the nature of the constitution of the bourgeois republic in China's history and provided more democratic rights to people. Moreover, Xinhai Revolution stimulated and enlightened the advanced members and made them aware that they needed some other new ways to save their nation.¹²⁷ It was led by a group of people who had gone abroad and received western education. Therefore, the revolution is actually a result of the new ideology, which should have an impact on China's economy, politics as well as the culture, or people's mind. However, Xinhai Revolution ended up with the compromise to the old force and failed to fundamentally change the semi-colonial and semi-feudal situation in China. It was not able to light the society up, but it broke the darkness, and provided the chance for the Restoration and the development of Marxism afterwards.

In 1913, Yuan Shih-kai¹²⁸ became the official present of China and dismissed the

¹²³ Ibid.

¹²⁴ Ibid.

¹²⁵ Ibid.

¹²⁶ Xinhai Revolution, was a bourgeois-democratic revolution, aiming to overthrow the autocratic rule of the Qing Dynasty, and tried to obtain national independence, democracy and prosperity.

¹²⁷ --, Compulsory Subject History Text Book (Daxiang Press, Beijing, 2009)30

¹²⁸ Shikai Yuan, 1859- 1916, a famous politician and militarist. During Xinhai Revolution, he pushed the

Nationalist Party early in the next year. Later in the autumn, Japanese army invaded into Shandong Province where they took the dominating position from Germany. In the whole following year China was between the hammer and the anvil. A group of fighters were trying to protect the nation from the outsiders, while Yuan Shih-kai, in order to coordinate with the restoration of politics, worshiped the Confucianism again and legalised old morals and customs by utilising political resources. Meanwhile, Duxiu Chen¹²⁹ founded a magazine *Youth Magazine* and published some articles to propagate Marxism Philosophy, particularly the democracy and science. This is the trigger of the New Culture Movement.

Although from 1912 to 1919 the national capitalism in China experienced a spring for its development, it seems that the Marxism had propagated its ideology more broadly. The victory of the October Revolution in Russia in 1917 extremely encouraged the Marxism's spreading in China. Tons of articles propagating the Marxism were published and the Chinese Communist Party was officially built up in 1921. From then on, in short, there were basically wars through out of the nation for decades: firstly against Japanese invaders, then the national civil war. Finally, in 1949, the People's Republic of China was established.

This period of history is so chaotic that it was hardly possible for people to care about their intellectual rights. For ordinary citizens, life was on the edge and living is the most important thing. The government is so unstable that even if there were regulations about their intellectual products, the enforcement would be a problem. Besides, there were a variety of ideologies which hold different opinions on private rights, but none of them was a fully developed ideology. Even when the nation was finally established and the Marxism to some extent became the leading ideology, the similar parts shared by the Marxism and the Confucianism, such as put the bigger group's benefit before individual's¹³⁰, still remained. Even the differences of these ideologies were not thoroughly removed due to their long history and their fitness to the present society.

However, after the establishment of the nation, the whole situation was still not stable. It took some time to recover from the constant wars. At the same time, since China still relied on agriculture, the land reform was considered necessary and it did not complete until 1952. The reform thoroughly abolished the feudalism which had been dominating

King of Qing Dynasty to abdicate and became the present. Then he claimed he was the King of the nation and tried to bring back the monarchy, but eventually failed after 83 days. See also Ibid.

¹²⁹ Duxiu Chen, 1879- 1942, one of the founders of the Chinese Communist Party.

¹³⁰ William P. Alford, *To Steal A Book Is An Elegant Offense: Intellectual Property Law In Chinese Civilisation* (SUP, Redwood 1995) 56-57

China for over two thousand years.

From 1953 to 1956, Chinese government undertook three great reconstructions to achieve the socialist industrialisation by transforming agriculture, manufacture and capitalist industry and commerce into socialist type. The fulfilment of these three great reconstructions confirmed that the basic system of socialism was officially set up in China.¹³¹

Nevertheless, instead of keeping the development in the right track, there was a new huge wave of political movement coming over. First of all, the government led a rectification movement against the bureaucratism, sectarianism and subjectivism. Yet some of the Right attacked the Communist Party and its socialist system, so the government started a nation-wide anti-rightist movement which was extremely magnified and caused a serious left-leaning mistake. The whole nation was blindly pursuing high-speed production, ignoring the law of economic development, and the slogans and goals were so unrealistic. The whole nation was sinking in a dream that the communism society could be realised very soon and they would in a Utopia where everyone could acquire plenty of products and food. People provided almost everything to the country for its production. For example, they even melt their pots to support the steel-making industry. It would be hard to imagine someone claiming his property rights, not mention the intellectual property rights. This 'great leap forward' did not change the behindhand economy in China. On the contrary, it caused a serious nation-wide economic difficulty and a huge famine in which over two millions of people died.¹³²

In the spring of 1961, the government began to adjust its economy and tried to redevelop the production. However, this recovery did not last long. In 1966, the Great Cultural Revolution started.

From 1966 to 1976, this was a miserable and sensitive decade. The Chinese Leader Mao exaggerated the potential problem in the Party and thought the capitalism might be restoring. Manipulated by the 'Gang of Four'¹³³, Mao decided to take drastic measures and encouraged people to discover the 'hidden ' capitalism supporters openly and thoroughly. The whole movement expanded to everything that did not exactly comply with the principles of the Communist Party. If people or their relatives had anything to do

¹³¹ Hanguo Zhu and Shili Ma(eds), *Pu Tong Gao Zhong Ke Cheng Biao Zhun Shi Yan Jiao Ke Shu* (People's Publishing House, Beijing, 2008) 54

¹³² *Ibid.* 55.

¹³³ The 'Gang of Four', including Hongwen Wang, Chunqiao Zhang, Qing Jiang, Wenyuan Yao. They gathered together and became a political group, and tried to usurp the Party and state power.

with landowners or capitalists, they would be seen guilty, even though they were out of contact with them; some articles or poetries that had been written for years or decades were twisted into reactionary works against the present government or leaders. People were obsessed with this enormous political movement and pointed at each other to show their loyalty and ideological consciousness. A large number of politicians and scholars were misunderstood or framed during this period. As the movement became increasingly fierce, the Red Guards¹³⁴, who were a special group of people in this movement, firstly made an attack on the Four Olds: old thoughts, old culture, old habits and old customs. Then their actions deteriorated into searching houses, beating people and smashing properties.¹³⁵

The Confucianism then became one of the targets again because it was thought the remaining of the feudalism. Many brilliant books and records were burnt. Numerous historical and cultural relics were destroyed and many scholars, democratic personages and leaders had to endure criticism and struggle. By that time, the state power was extremely centralised to Mao and also benefited the ‘Gang of Four’.

After Mao passed away, the ‘Gang of Four’ hurried up to usurp the state power and the rage among people accumulated and eventually outburst like a volcano. The government with new leaders finally realised that it was time to remove the group to protect the nation and arrested the ‘Gang of Four’, which marked the end of the the Great Cultural Revolution.

During this revolution, a large amount of people, including national leaders, domestic parties’ representatives, celebrities in all fields and ordinary citizens were framed and persecuted. Departments in the Party, governments and organisations were paralysed or in unstable conditions for ten years. Legal and administrative departments were not able to work properly in such environment.

Moreover, during the long-term social turmoil, national economy development was very slow and unbalanced, national income lost five hundred billion Yuan. People’s living standard even decreased in many aspects. Since 1970s, the international situation had been further relaxed in general and many countries’ economy was at a take-off stage.

¹³⁴ The Red Guards, a special group during the revolution. Most of them were young students. They did not belong to the army but a mass organisation. It was the main force that destroyed the departments and caused social turmoil.

¹³⁵ --, A Brief History of Communist Party of China. Available at <http://news.xinhuanet.com/ziliao/2004-10/17/content_2099867.htm> accessed 10 December 2013

However, due to the Great Cultural Revolution, China failed to reduce the gap between developed countries and , instead, the gap became larger.

Since this revolution started from the culture area, the damages in China's education, science and culture were particularly serious. Numbers of scholars were persecuted, schools were shut down and many scientific research organisations were closed. According to the population census in 1982, the number of illiteracies and half-illiteracies in the whole country was 230 million, which formed approximately a quarter of the national population at that time. Therefore, the movement hindered the improvement of cultural quality of the entire nation and China's modernisation efforts.

Fortunately, the nightmare eventually ended and after two year, in 1978, the new leader, Xiaoping Deng, launched the policy of reformation and opening, and started to really communicate with the outside world. The copyright system in China began with the establishment of diplomatic relation between China and the US. In the Sino-U.S. Trade Agreement¹³⁶ which was signed in July 1979, the content about mutual protection to each other's intellectual property rights, including copyrights, was put into the official regulations. In May 1979, relevant department started to draft the copyright law.¹³⁷

Therefore, from such a long and miserable history one could see that it was almost impossible for China to pay attention to the intellectual property rights when individuals' more fundamental rights, such as the right to subsistence, were not guaranteed. However, during that period, other countries were going through some boost in different aspects, even though they might share the same cultural back ground. This gap, in any way, were so large and the chaos lasted so long that China was not able to change this situation very soon. Although the development in intellectual property rights protection in China has been rather rapid, the conflicts and complains in global trades have shown us that its improvement is still not enough.

¹³⁶ The Sino-U.S. Trade Agreement (China-the USA) (signed 7 July 1979, entered into force 1 February 1980)

¹³⁷ Lingrui Chen, 'Analysis to the development of China's Intellectual Property System From China's Copyright Legal System' (2011) 11 CFER 58

2. The Emerge of Intellectual Property Law in China

a. The Sino-Western Trade Contacts

Although it was commonly believed that it was the war that broke the door of imperial China, there were already trade contacts between China and western countries. Lord McCartney's leading his British diplomatic crops to China in 1713 was of real significance in Chinese trading history. When it came to the gift of the British King, Qianlong, the emperor of China at that time, said "our country has vast territory and hard-working officials, and treasures here are cherished but not expensive. Considering your King's good faith, we will accept and preserve your tribute. Actually, our country is far-famed, and it is regarded as the 'heavenly kingdom'. As you can see, we have already had everything, and thus you don't have to send us any gift." This text is considered as the evidence of China's isolation, self-sufficient and arrogance. Recently, a historian has attempted to analyse the communication between China and Western society facilitated by Lord Macartney from symbols, etiquette etc. He suggested that what emperor Qianlong refused was the crankiness shown by British manufactured products and gifts rather than the trade with the Britain.¹³⁸

In Fei Zhengqing's view, "the Lord McCartney's Event" and even the later conflict between China and Britain could be regarded as a sort of conflict between different cultures or between tradition and rationality. According to Fei, for the lack of challenges from other nations and the internal self-motivation in the late Qing Dynasty, the tributary system of China cannot be totally replaced by clear sovereignty and normal tax system. Actually, there is no diplomacy in line with the western concept under this kind of tributary system. On the contrary, "diplomacy" is always related to "trade"¹³⁹. The phenomenon in which all the initial trades were mostly conducted after McCartney's return to Britain is the strongest evidence of such connection.

The British intended to set up a Sino-Britain trade relationship by treaties and thus to control the political intervention in trades and to keep business under rules.¹⁴⁰ To this, the Qing government did not give a clear reply, because they were not sure what was the intention when Lord McCartney's mission proposed to establish a normative trade relationship. In fact, Qianlong and even the whole empire of China never simply regarded trade s as value-exchanging and value-using activities. Instead, they paid more attention

¹³⁸ Yawei He, *Huai Rou Yuan Ren: Ma Ga Er Ni Shi Hua de Zhong Ying Li Yi Chong Tu* (China's Social and Tech. Press, Beijing 2002) 192

¹³⁹ Jhon K. Fairbank. *China's World Order: The Tradition of Chinese Foreign Relations* (Harvard University Press, Harvard 1968) 77.

¹⁴⁰ This is the requirement of a legal state. See Antonin Scalia, 'The Rule of Law as a Law of Rules' (1989) 56 UCR

to “social and political implications of commercial activities”. In their opinion, trades could result in greed and disintegrate the sense of order in a country. Therefore, their policies suggested that all commercial benefits should always be in compliance with the political interests of the whole nation. Such completely different attitudes toward trades had largely influenced these two countries’ fundamental standpoint in the discussion of whether China should establish an IPR legal system or not.

The population in China had at least doubled in the 18th century and this general trend lasted to 1850. The increased population could only be supplied by the domestic trades that involved all grain-producing areas. Whatever measures the government took to control business, its pursuit of social stability, and the resulting populating growth had encouraged the commercial prosperity in return. In 1699, the British built a trading station in Guangzhou and in the following 60 years, Sino-Britain trade gradually became more institutional. At that time, the Qing government created Canton Trade System and its subordinate “Trading Station system” and “the Tariff System”. The former system, created in the 59th year of emperor Kangxi’s regime (in 1720) and comprised of merchants, was specialised in delimiting market price for sponsors and principals running import and export trade and at the same time, it also monopolised all foreign trades. Furthermore, the “Trading Station System” also made a regulation that all foreign merchants should not stay and live in Guangzhou once they had bought what they wanted and they should prepare for shipment immediately.

After the emperor Qianlong, situation had changed quietly. Since 1744, the Qing government got down to allowing foreign merchants to live in designated locations (always referred to Canton and Macao) within the partial scheduled time and empowering those foreign officers a certain degree of autonomy. At meanwhile, the government also expected to regulate foreign merchants’ behaviours in accord with their own standards. For instance, in Chinese tradition, the leader of a team was supposed to be responsible for all the team members.¹⁴¹ But both western government and foreign merchants were not satisfied with the Chinese standards. They believed in that the law in the empire of China was considered to be arbitrary, cruel and impartial, and therefore it should not be applied to those foreigners who committed crimes outside Canton and Macao.¹⁴² Due to the abolishment of the East Indian Company’s monopoly on Sino-British free trade, which was encouraged by the supporters of free trade and was carried out by the king of British,

¹⁴¹ William P. Alford, *To Steal A Book Is An Elegant Offense: Intellectual Property Law In Chinese Civilisation* (SUP, Redwood 1995) 142

¹⁴² Based on one recent research, a significant factor that led to the Opium War is the Jurisdiction. See Yigong Su, ‘Confliction Origin between Opium War and Modern China-Western Culture’, originated from Sheng Zhang, *Proceedings of Chinese Law Modernisation* (China University of Political Science, Beijing 2002) 50, 120

trades had been unlimited in Canton, and the official organisation which was made up of Canton Hong merchants and was appointed by the Qing government to do foreign trade had no longer monopolised the Sino-British trades, especially the opium trades. This was because that those Hong merchants failed to pay back their debts and thus the monopoly companies had to give way to competitive private businesses. Under such circumstances, the function concerning the control right to British businessmen was exercised by a certain official, who refuses to accept the order of the Hong merchants.¹⁴³ After that, China could no longer continue maintaining the advantage of surplus in growing trades.

b. The emergence of Sino-Western Intellectual Property Right (IPR) issue

After the Opium War, the IPR issue had not been reflected in the Sino-British and even Sino-Western relationships in a decade. Until the last half of the 19th century, western economic factors started to expand in China, which led to the abuse of name and trademark of foreign enterprises. This kind of abuse was firstly resulted in many actions taken by Chinese businessmen, such as the avoidance of inland tax which was not bared by foreign merchants, or the unjustifiable employment of foreign enterprises' name in order to practice throughout the country.¹⁴⁴ In today's legal perspective, such issues certainly belongs to the scope of Trade Name Right, but they still had a long distance to the IPR Right which traditionally consists of Trademark Right, Patent, Copyright, etc. However, there was a fact that cannot be ignored——Chinese merchants started to pay attention to the value of intangible assets.¹⁴⁵ The *British Merchant vs. Opium Processor in Shantou* was a case that embodied the modern Property Rights for it lied in the processor's use of the merchant's trademark when selling opium. Apart from the expansion of Sino-British trades, the emergence of IPR issue also had two institutional backgrounds: on the one hand, the international protection of IPR Rights became increasingly institutionalised, which can be proved by the *Paris Convention* signed at Paris in 1883 and the *Berne Convention* at Geneva in 1866. This kind of institutionalisation provided a landing standard for foreign merchants to promote the IPR protection in China. On the other hand, after 20-year trades, negotiations and crackdowns, the tributary system had transited to a treaty system in the late Qing Dynasty¹⁴⁶, and it offered an institutional guarantee for the practice of IPR in China.¹⁴⁷

¹⁴³ Zhengqing Fei, China: *Tradition and Reform* (Jiangsu People's Press, Jiangsu 1996) 277

¹⁴⁴ Yenping Hao, *The Commercial Revolution in Nineteenth-Century China: The Rise of Sino-Western Mercantile Capitalism* (University of California Press, California 1986)263

¹⁴⁵ In 1884, a British company brought a law suit against a Chinese company claiming that it carried on an improper business with its brand.

¹⁴⁶ Zhengqing Fei, China: *Tradition and Reform* (Jiangsu People's Press, Jiangsu 1996)153

¹⁴⁷ Although the records at that time did not regard the war as a tragedy, but it was this war that started a

Frankly speaking, from the 19th century, the protection of IPR was insufficient or it was still in the stage of administrative protection. Although the Law of Qing had stipulated some punishment to those business agents setting injustice product prices, seeking excessive profits through unreasonable measures or providing sham products, it cannot be used to solve trademark cases.

During the Hundred Days Reform Movement in 1898, the Qing government tried to tighten the control over the publishing industry, advanced technology and inventions imports by putting out decrees. However, some foreign merchants considered those laws meaningless, and sometimes they were not entitled the right to share some administrative protection measures like Chinese Hong merchants. For example, Chinese merchants could take all kinds of measures to persuade local officials to help them safeguard their business reputation, but foreign merchants could not. Moreover, their own intellectual laws could not be applied to them even in the concession because it might be regarded as a kind of invasion to the royal power of China. When it came to this, foreign officials had to take the possible consequences into account. Actually, even after the Opium War, the Qing government was not in a completely passive situation in the exchange of China and western countries.¹⁴⁸ If so, we can easily find the cause of such phenomenon that foreign merchants still could not apply their current domestic IPR system in China, even though they enjoyed extraterritoriality and the one-sided Consular Jurisdiction here.¹⁴⁹

For all kinds of reasons, foreign merchants had to seek assistance from the representatives of their own country. As a matter of fact, since the 19th century, consular officers began to register domestic trademarks and deliver them to customs bureaucracy of Qing. However, due to the lack of effective law-enforcement power, especially in Shanghai and some areas beyond other main treaty ports, and the disorder caused by the Boxer Rebellion broking out in 1900, these measures were proved ineffective.¹⁵⁰

c. The Copyright Negotiation between China and Western Countries

Because of the limitations of measures, such as protecting copyright through administrative notices issued by local officials, and the sharply increased translations, publishers were not content with spontaneous individual protection. Instead, they started to depend on government and even negotiated among countries to make copyright protection more institutionalised which was a kind of convenience under the treaty

treaty system with which western forces provided legality for the break of the system of imperial China. .

¹⁴⁸ Yufeng Li, *Qiangkouxia De Falv: Zhongguo Banquanshi Yanjiu* (Intellectual Property Publishing House, Beijing 2006)85

¹⁴⁹ Ibid.

¹⁵⁰ Ibid.

system.

The Boxer Protocol, signed by the Eight-Nation Alliance and the Qing Government after putting down the Boxer Rebellion, offered legality for foreign publishers and even foreign governments urged the Qing Government to institutionalise the copyright protection. The Alliance hoped to establish a favourable environment for international business, for the existence of inland tax, the absence of laws in mining industry and partnership enterprises and related IPR law hindered their access to the large Chinese market. In the meantime, foreign governments announced that if Qing government made a compromise, they would agree with the customs bureaucracy to reset the tariff; if the legislation and law enforcement were guaranteed, they would even be willing to give up their extraterritoriality. This promise aroused Qing's interest and it also complied with *The Boxer Protocol*. Threatened by armies and weapons, the Qing government had to negotiate with Britain, America, Japan, etc. The protocol covered a lot of issues including increasing import tax and decreasing Likin¹⁵¹, trading ports, mineral, diplomatic system, and the employment of the customs bureaucracy. During the negotiation, what confused the Chinese negotiators most was that the big powers showed enormous interest and passion to IPR protection. Among all the negotiations, the Sino-Britain negotiation started first and covered trademarks, but America and Japan showed the greatest eager to copyright. In the negotiation meeting, Sheng Xuanhuai, the Chinese representative, thought that the translation of article 30-32 regarding trademark and copyright was not so clear and it would be better to be set aside. At the 4th and 5th meeting on September 24 and 27, 1902, the two sides had a fierce discussion on copyright protection. Chinese representatives strongly objected to copyright protection because it would put books further out of reach for the poor, while the American representatives declared that if this issue could not be settled properly, they would not sign the protocol.

Obviously, the negotiation between the two parties was actually a contest in which the two countries used their power resources respectively to solve China's problem at a Chinese negotiating table. The knowledge resources used by China included the market of Chinese legal products, folk belief in copyright law, folk views about whether copyright should be protected—it reflected people's requirement for modernisation and its deeper meaning was that if this kind of requirement was violated, even if their rights were written in the treaty, they would not earn respect in practice. Relatively, the knowledge recourse used by American was the scientific understanding of copyrights—actually, it was a new thing for China—and its hidden content was that when it came to the issues of whether, how and the extent to protect copyright, two parties should follow America's

¹⁵¹ Likin, a kind of business tax of ancient China, which levied by water and land transport checkpoint

position in the Sino-America negotiation because America had a mature copyright law system and numerous experiences in operation. Apparently, in this contest, both parties monopolised their familiar knowledge respectively and never let the rival get the dominant position. The article 3-6 in the revised protocol in September 1902 recorded respective attitudes of the two parties. At the very beginning, Sheng Xuanhuai, the Chinese representative, thought that the translation was not clear enough and proposed to discuss later. Then, Sheng proposed his view that copyright protection would make the poor unable to afford books any more, thus this kind of protection should be objected. Even when the copyright protection had been confirmed, Sheng still tried to limit the protection in a narrow range. For instance, about the length of copyright protection, American representatives thought 14 years was appropriate while Chinese representatives insisted on 5 years. What's more, China required the America to clarify the range of copyright protection——this kind of protection was only for books that written for Chinese readers, not for all books, and it did not forbid translating the American books into Chinese. On the contrary, American representatives believed that the Qing Government should protect copyrights in accordance with American Copyright Law. At the first stage of the negotiation, for the strong pressure from the big powers, it was unrealistic for the Qing government to refuse copyright protection and at the same time, for American government, it was impossible to insist on its domestic standards because of the opposition from Chinese people and some officials. On this occasion, a balance was reached in the end: protecting copyright, but the period of protection should be 10 years and the range should cover “all books specially those written for Chinese”.

d. The debate for copyright protection between the public and the government

America and Japan required that China should put copyright terms in the drafting treaty, which not only arose fierce debate, but also attracted much attention in China. To the core issue that whether China should protect copyright or not, Qing officials and folk scholars expounded their different views and standpoints, and thus the first debate for copyright protection in Chinese history appeared.

Among the officials, Zhang Baixi strongly opposed establishing bilateral alliance to protecting copyright between China and Japan. He suggested that even though copyright protection was a general rule in many nations, it wasn't suitable for China to protect foreign books at that time. Only when the reform and revolution became successful, with more advanced civilisation and more developed education, could copyright protection be put into effect. If China protected foreign books' copyright at that time, scholars could not

translate them freely and as time passed, the population who read foreign books would become smaller and smaller. This situation actually went against the original will of western nations¹⁵². In fact, when discussing copyright matters with American representatives, Chinese representatives consented to the previous claim and believed that copyright protection would increase the price of books and make those people who lived in poverty could not afford them. Undoubtedly, Zhang had already recognised that a country's degree of rights protection must be conformity with its economic development level. Not only did he pay attention to the legislation, but he also focused on the enforcement. However, representatives from both sides must try their best to solve this problem so that the negotiation could go on smoothly and at the same time, they also realised that rejecting copyright protection completely was certainly impossible. Therefore, what the Chinese representatives could do was to restrict the protection within a smaller scope. But on the other hand, Zhang's opposition to copyright protection on the grounds of the revitalisation of the national graduation and the expansion of people's wisdom reflected a typical Chinese thinking. In their opinion, law should be changed in line with the change of a nation's functions and targets, and it was a method that could help them govern the nation and realise its long-term goals, not a balancer that protected people's individual rights by limiting state interference in individuals' life.

In contrast, Yan Fu, a theorist who once studied in Britain and proposed the idea of political reform later, was a faithful supporter of copyright protection. He advocated giving foreign books equal protection through legislation. When the imperial University of Peking ordered official presses of all provinces to print textbooks by themselves and in order to respond to the call, many private translations were printed for selling in Shanghai, Nanyang and any other regions in China in 1902, Yan Fu was very angry and asked the government to enact related laws to protect those books. According to Yan, "there is a concept of copyright in academia and each country has make laws to protect it. Why this phenomenon happened? They have to do so! They are also clear that when a new book appears, people use it, print it and sell it. It is really good for popularisation of education." "However, if a country did not have relevant laws to protect copyrights, no new books would come out in the end. Even those with less wisdom can see that it can do harm to national education." On the specific contents, Yan Fu put forward to the following notions:

Firstly, literature creation takes a lot of brainpower and coordination. Many writers have to spend 20 to 30 years to finish great works. The works and the writers' effort need to be

¹⁵² See Lin Zhou and Mingshan Li, *Research of Chinese Literature Rights* (China Fang Zheng Press, Beijing 1999)

respected and protected. As far as Yan Fu was concerned, copyright was a compensation for writers. Some scholars believed that Yan Fu's such thoughts came from the labour value theory in one of his translation work, *The Wealth of Nations* written by Adam Smith. It means that the value of the goods was determined by the production of its labour and commodities exchange was the exchange of labour in.¹⁵³

Secondly, the protection of copyright can promote the education and the foreign books translation. Yan Fu had opposite views compared with those objectors of copyright protection. According to the objectors, if foreigners' books were protected, the price of books would rise and the poor would not be able to afford them, and thus they would not learn more knowledge.¹⁵⁴ However, in Yan Fu's opinion, "if we protect the copyright, the academic circle which full of wise and hardworking scholars would achieve a lot in ten years and it can be expected that we will reach the level of the western academic circle in twenty years."¹⁵⁵ Yan Fu once studied in western country and got inspiration from it. He pointed that, "Foreigners hate monopoly but they are prudent on copyright and patent. If they did not protect the copyrights and patent, the writers and inventors could not be rewarded and the country would lose more. As a result, if we don't protect the copyrights, the number of books published will decrease, and that is harmful to the education. Without copyright, businessmen may get the profits but the benefits of writers will be injured. As a result, less and less writers will be willing to spend time in writing."¹⁵⁶

Thirdly, Yan Fu advocated implementing royalty system. He referred to royalty system many times in the letter written to Yuanji Zhang.¹⁵⁷ He also mentioned remuneration based on the number of books sold out in the letter to Yuanji Zhang in February 1902. He pointed out that protecting the economic rights could arise their enthusiasm in writing and translating. Remuneration could also improve the utility of the books, meet the need of the society and expand the readers. The meaning of the royalty system proposed by Yan Fu was that it aimed to protect the works by legislation. From today's perspective, even related international organisations regard copyright as a human right and the goal of individual pursuit. However, Yan Fu did not understand copyright in this way. he concentrates on the production processes of intellectual products. He thought copyright was a kind of mental compensation for writers. The Chinese academics could be inspired by the protection of copyright and reach the level of the western academics. Also he believed that copyright could educate people, and help our country prosper. In fact, many

¹⁵³ Qing Wang, 'Intellectual Protection in Modern China' (1992) 6 SWYSG

¹⁵⁴ Lin Zhou and Mingshan Li, *Research of Chinese Literature Rights* (China Fang Zheng Press, Beijing 1999)

¹⁵⁵ Ibid.

¹⁵⁶ Ibid.

¹⁵⁷ See Mingshan Li, 'Yanfu-Advocator of Copyright in Early Modern China' (1992) 2 ZZQ

intellectuals discussed and practiced to promote country prosper within the framework of traditional Chinese thought. Holding on the status of a great culture nation while learning from western countries, was the original intention of learning from the west during that period.

The right consciousness was being formed gradually under the legal spirit influence since 1905 when many intellectuals, such as Shen Jiaben, studied abroad. Although the main aim of Qing Dynasty to promulgate copyright law was not to give rights to the public, it was true that the introduction of the law stabilised the society. The copyright law of Qing consulted the law of America, Hungary, Germany and Belgium. The promulgation and implementation of this law drew a lot of attention around the world, and foreign governments once wrote letters to Chinese ambassadors to translate the copyright law of Qing Dynasty into German or French.

e. Learning from the West

The controversy of the copyright legislation and the negotiation on the protection of copyright between China and the western power always concentrates on the theme of the modernisation and construction.

Since 1840, some Chinese intellectuals started to realise that China was facing a new situation they never met before. Self-improvement had become the new theme of Qing Dynasty when the governing of Qing was weaker and weaker. Wo Ren and Wang Jiabi¹⁵⁸ thought the basic way of self-improvement was to protect Confucianism and the core of founding a country was to gain the heart and respect of its people. Concentrating on improving techniques was right, but it was not the core of the country. Qing Government should teach people to follow feudal ethical code but not to search for power. Yet Zeng Guofan, Zuo Zongtang, Li Hongzhang, Zhang Zhidong¹⁵⁹ followed the thoughts of Wei Yuan that China should learn from the west, especially how they improved their economy and their advanced techniques, to reach its own prosperity and defeated the invaders. At that time, The debate point between people who advocated to learn from the west and the conservatives was not whether China should be improve itself, but whether we should learn from the west during the process of self-improvement. This debate decided whether China was walking into modern times or staying in the middle ages.¹⁶⁰ In fact, during the process of self-improvement of Qing Dynasty, there was debate whether China should learn from the west and how to do that. After solving the first

¹⁵⁸ Famous intellectuals in Qing Dynasty

¹⁵⁹ These four were all ministers in Qing Dynasty.

¹⁶⁰ Renbo Wang, *Constitutionalism and Modern China* (The Law Press, Beijing 1997) 530

question, the second question appeared again. Sometimes, these two questions could not be solved separately but should be thought as a whole. If China hoped to be prosperous, the first problem need to be solved was the reconstruction of sovereignty which was the process for China to step to modernisation. During the negotiation between China and United States, China's representatives objected to the protection of copy because the protection of copy of books would raise the price of books. The result of the rising price was contrary to the hope of the west to entering the China's market. The reason of being favour of the protection of copyrights was that without the protection, the historical and geography books from western countries would not come to China, in that case Chinese would have no chance to learn about the world and China could hardly get to modernisation.

Obviously, the aim of the reform was to improve itself instead of learning the western legal spirit. As a result, before *Elements of International Law* translated by Ding Weiliang was published, no Chinese had studied the general principals of western law. Although Qing Dynasty started to revise the law on a large scale, the aim of this revision was to stabilise the people and to maintain the power of the emperor internally and "protect the nation" by signing unequal treaty. After signing the Boxer Protocol, the western power required to resign business contracts and promised to give up Chinese extraterritoriality. This proposal aroused Qing Dynasty's interests for extraterritoriality was an important part of national sovereignty. The fifteenth stipulation of business treaty between China and United States said that the Chinese government hoped to revise Chinese law to be consistent with the law of the western power; the government of United States was willing to help Chinese government. If the Chinese law and the legal procedures were thorough enough after being revised according to the requirement of the western power, the western power would give up the extraterritoriality. There were similar contents in the business treaty between China and Britain or China and Japan. Although the representatives of China made their utmost efforts to fight for China's point of view, they had to make a concession when the western powers threatened not to give up Chinese extraterritoriality. For example, on the 38th meetings between China and the United States, the representatives of the United States thought that the US would consider giving up Chinese extraterritoriality only if China promised to protect patent.¹⁶¹

The reform of late Qing dynasty was at a systemic level. After 1901, the conservatives headed by Empress Dowager Cixi continued to conduct radical reform because they had nowhere else to go. The siege of the International Legations showed the failure of the exclusion policy. The potential threat from rebellion of the people pushed the Qing

¹⁶¹ Chinese Modern Economic History Information Series Edition Board, *Commercial Treaty Negotiations after Boxer Protocol Implemented* (China Book Press, Beijing 1994) 195

Dynasty to take constructive measures to save itself.¹⁶² On August 20th, 1901, Qing government announced that the reason of reform and self-improvement was “nation’s survival” and “the people’s livelihood”. For this endangered nation, since it could not confront with the western power in military force, it had to reform itself so that the western powers could give up the Chinese extraterritoriality. As China didn’t have a sound legal system, the Qing government believed that they could go to modernisation only if they conducted to reform the legal system.

This is exactly where lies China’s tragedy. The Qing Dynasty used Copyright Law as a tool, which deviated from the original aim of the law. In Britain, the Copyright Law was the outcome of the change of modern society. The law was gradually improved with the strengthening of individual rights consciousness and the improvement of the economy. The protection of the copy promoted the improvement of works. In my opinion, the protection of the copy not only protected the right of writers but also promoted the spread of works. At that time, the Copyright Law concentrated on the spread of the works and was not qualified to protect the rights of the writers. As a result, there was dilemma of law making and law abiding. In fact, after China making the Copyright Law, the piracy was still serious. Although America and Japan compelled China to accept this unfamiliar thing, they might not be the winners. In fact, when the western powers used their forces, they didn’t think thoroughly about the object that would be influenced by their forces. In other words, although they knew about the object, they didn’t want to follow the rules of using such power.¹⁶³ Indeed, the western power practiced the protection of the copyright, but they ignored the environment the practice applied in, which had a great influence on the application of the copyright law. A proper environment would provide an institutional guarantee for the practice of the law.¹⁶⁴ In fact, for the enforcement of law, the western power lost their control on China.

It is questionable to apply a western copyright law in China where there was no right tradition and people had little individual conscience.¹⁶⁵ The Copyright Law was introduced during the modernisation of China with anxiety for utilitarian purposes, but it left the problem of self-conscience to the later generations. There was a long way to build up a IPR system in China. Whether Chinese intellectuals advocated or objected to the protection of copyright, their reasons were of non-western, Chinese characteristic. It transformed the right with its own meaning into a tool in order to realise modernisation,

¹⁶² Zhengqing Fei, *China: Tradition and Reform* (Jiangsu People’s Press, Jiangsu 1996) 740

¹⁶³ At that moment, western forces only got knowledge about China from a few missionaries. See Yufeng Li, *Qiangkouxia De Falv: Zhongguo Banquanshi Yanjiu* (Intellectual Property Publishing House, Beijing 2006)

¹⁶⁴ See Zhiping Liang, *Rule of Law in China: System, Speech and Practice* (China University of Political Science Press, Beijing 2002)

¹⁶⁵ Li Su, *Sending the Law to Countryside* (China University of Political Science Press, Beijing 2000) 285

which lost the copyright's own value.

3. Advance toward Modernisation

Two Codes

The Copyright Code of Great Qing Dynasty, which is famous as the first copyright law of China, was born at the end of the Qing dynasty when all political views were associated with the concept of “reform”, opening a new era in the history of IPR. Although it was ill-fated and came to an end after one-year implementation, its structure, power allocation and relief pattern, limitations of rights and even the idea of private rights reflected by the law had a profound impact on later history.

The Xinhai Revolution in 1911, a democratic revolution led by Sun Yat-sen, overthrew the Qing dynasty but failed to establish a new order-structure. There are two reasons for its failure in keeping internal unity: on the one hand, its general leaders seldom contact with each province so that they could not acquire the growing revolutionary forces there to form a tightly integrated union,¹⁶⁶ on the other hand, it was faced with all kinds of political groups including the constitutionalists, the old bureaucrats, etc., whose highest goal was to support Yuan Shih-kai back into political arena.¹⁶⁷ At the same time, for the fiscal difficulties and the interference from Russia and Japan, the revolutionists gave up in the end. They were afraid of the continuous disruption and the comprehensive intervention from foreign countries caused by warfare. Meanwhile, they expected the recognition from the western nations. All of these have made contributions to dampening down the revolutionists' determination to be united. As a result, the provisional senate established in Nanjing on 28th January 1912, and Yuan Shih-kai was elected as the temporary president on February 15th.

On 8th March 1912, Yuan sent his oath to the Senate, read, “I will try my best to promote the republic spirit, wipe out tyranny, abide by the regulations and to respect people's will.” It was on that day that *the Provisional Constitution of the Republic of China* passed unanimously, and two days later, Yuan took the post of the temporary president. On 11th March 1912, Sun Yat-sen, who would officially resign as president on 1st April, announced the provisional constitution through *the Provisional Government Gazette No.35*. The formal education Yuan had accepted —always referred to Confucianism— made himself to be arbitrary, self-oriented in his leadership and it also caused his insufficient support for the constitutional republic. However, since the late Qing dynasty, reform and constitutionalism had become the most significant method to unite people for

¹⁶⁶ Zhengqing Fei, *Cambridge History of Republic of China* (China Social Science Press, Beijing 1993) 235

¹⁶⁷ Kan Li, *Modern History of China* (Zhonghua Press, Beijing 1994) 393

political groups. Therefore, though Yuan regarded “abide by constitution” as a strategy, a tactic or a skill, he still affirmed its positive role. The most important purpose of *the Provisional Constitution of the Republic of China* might not be the restriction on Yuan, but people’s acceptance of the constitutionalism and the individualism broadly spread by itself. More importantly, for individuals, the provisional constitution not only specified the nature of regime of the Republic of China, the organising principle and its validity and modification procedure, but also cleared people’s rights and obligations. The article 5 of *the Provisional Constitution of the Republic of China* said, “All people in the Republic of China, unless required by law, have freedom of speech, writings, impromptu assembly, association and faith.” The article 6 said, “ People can use their right to keep their property and to do business according to their freedom.” These two articles have laid a solid foundation for the later copyright law.

What caught Yuan’s sight most were local autonomy and the separation of power, but the private rights were admitted as well. In September 1912, the Department of Interior released a notice, which indicated that works registration must be respectively implemented in accordance to the previous Copyright Law of Qing Dynasty. The notice declared, “ Registering and licensing works is of great importance to people’s private rights. After consulting the copyright law of Qing, we find it has no incompatible articles, which are not in line with the polity of the Republic of China, and thus it still has the force. We release this notice to notify all of you that works needing registration and works which have submitted but need to be paid for shall be respectively acted according to the Copyright Law of Qing Dynasty.” This notice had led all the copyright disputes to *The Copyright Code of Great Qing Dynasty*, by 7th November 1915. However, the political reforms at that time focused more on legislation, not on the real “reform” itself because reformers had no energy to train judges to acquire more knowledge of IPR. What’s more, they had never delivered any theoretical basis to people in the public education. The institutional reform went through under the background of fiscal difficulties and the civil political confrontation, as a result, the gradual perfection of legislation and the prevalence of piracy existed simultaneously at that time. Several kinds of textbooks for the pupils, which were published by the Shanghai Commercial Press, such as Chinese textbooks, Mathematic textbooks, etc., were pirated throughout the whole nation. Involving more than 30 publishing houses and bookstores, the large amount of lawsuit cost forced the Shanghai Commercial Press (SCP) to turn to the Department of the Interior. In 1913, the Department of the Interior released a notification to give warning to such behaviour. It put, “Once the works are registered and certified, if the copyright were damaged, the beneficiary can bring it to the court. The offender will be punished to compensate for the loss or to pay the fine according to the law.” At the same time, SCP was stuck in a

copyright dispute. In February 1911, an American press sued SCP to the Shanghai Mixed Court (SMC) for SCP pirated *the European History*, which was published by the American press. Undoubtedly, SCP did pirate the book, the focus of the debate was whether this kind of behaviour could be regarded as infringement; if so, whether the SCP should be responsible for it. The Copyright Code of Great Qing Dynasty did not take foreign works into consideration. More importantly, when it came to outland litigations, the common sense then was that if opponents had special terms with China, they could adopt the special terms; otherwise, the Copyright Law of Qing Dynasty should not be applied to foreigners.¹⁶⁸ So, SCP finally adopted the article 11 of *the Renewed Treaty of Commerce and Navigation between America and China* and suggested that *the European History* was not “specially for Chinese” and therefore could not enjoy copyrights in China. Of course, SCP won the suit at last.

The most typical example was about Xu Zhenya, a novelist. Xu began to publish his romantic love novel *the Death of Yuli* continuously on *the Civil Rights Newspaper* from 1912. However, he found that the Civil Rights Press affiliated with *the Civil Rights Newspaper* republished his novel and acquired numerous profits. In order to obtain a share of the profits, Xu negotiated with the press but did not reach an agreement. Accordingly, Xu sued it to the court and won the suit. But it was not the whole story; the reality was that Xu found his book being pirated more seriously after the case. In order to fight against the pirates, Xu chose to either send his book to others for free or sold them at cost. More sorrowfully, even after he set up his own press, Xu still could not protect his work effectively. Someone estimated that the circulations of Xu’s following several works were more than one million, but only tens of thousands of them were sold by Xu himself.¹⁶⁹

Since many American books could not get enough protection and the piracy was too prevalent in China, America required establishing bilateral-copyright protection relationship in June 1913 and this requirement aroused the opposition of some publishers. The document drawn up by the Shanghai Publisher’ Association (SPA) and submitted to the Department of Education, the Foreign Ministry and the Department of Industry and Commerce respectively reflected the common view in the press industry.¹⁷⁰ In this document, SPA argued that the aim of the copyright alliance was to protect people’ share rights on the copyright and it must be established on the basis of similar civilisation level, otherwise the education, industry and commerce in backward countries would come

¹⁶⁸ See Ri Qin, *Interpretation of Copyrights Law* (The Commercial Press, Shanghai 1912).

¹⁶⁹ Link P. *Mandarin Dishes and Butterflies: Popular Fiction in Early Twentieth-Century Chinese Cities* (University of California Press, 1981) 53

¹⁷⁰ Yufeng Li, *Qiangkouxia De Falv: Zhongguo Banquanshi Yanjiu* (Intellectual Property Publishing House, Beijing 2006)121

to a stagnation. After analysing the situation, this document listed several objections: Firstly, more and more people who could read foreign books and thus the demand for foreign works increased sharply. In order to benefit the academia, the publishers in China chose to translate and pirate foreign works and sold them at relatively low prices. If China joined in the alliance, the piracy would be prohibited and the Academia would not be able to afford the expensive foreign works. As a result the cultural development would be hampered. Secondly, after joining the alliance, Chinese publishers would have to wait for at least 10 years after the publication of foreign books if they wanted to translate them freely. However, the competition in the academia became increasingly fierce, if the new foreign works could not be translated within 10 years, apart from a few people who could read original works, most Chinese might not be able to obtain new knowledge immediately. And this could do harm to education development. Thirdly, for the spillovers of domestic interests caused by the increased foreign products in the Chinese market and expanded by the lack of imitation skills, China had suffered a great loss. And in their opinion, translating and printing foreign books were the only effective way to compensate for the loss. If the alliance was established, the translation and printing to those foreign books would be prohibited and thus the commerce and industry in China would suffer greater loss. Fourthly, only a few Chinese works were sold outside China, so China could not enjoy the benefit brought by the copyright protection. Joining in the alliance could only bring China obligations, not rights. This not only broke the international average principle, but also hampered education and commercial development in China. What's more, other country might adopt this principle and finally, all the foreign works could not be translated in China. Fifthly, America had not taken part in *the Berne Convention Organisation* because it had less works than the European countries. Actually, all nations enjoyed freedom to decide whether to join in the alliance or not, America's behaviour was unreasonable.

This paper was published at the beginning of the 20th century and it had a general idea about the gap between Chinese civilisation and western civilisation. At that time, western learning and modernisation played the dominant role and only in the name of western learning, all kinds of debate could be reasonable. The fact that SPA mixed the bilateral protection treaties and the universal conventions and differentiated Chinese works and foreign works had shown the universal attitude of people with IPR knowledge. Although there was *The Copyright Code of Great Qing Dynasty*, but they found that it could not be used to foreign works and they also recognised that China would be in passive position in the bilateral-protection. All of these could reflect the patriotism and the nationalism the Chinese owned at that time. Therefore, for them, the harm to foreign works' copyright was not a kind of harm to property rights, but the requirement of developing education

and civilisation. The SAP was smart because although it had taken its commercial interests into consideration that was regarded as the nature of a businessman, it employed the concept of “modernisation” to cover them. In fact, according to the requirement of modernisation, works must be separated into two groups and one of them, which were good to modernisation, must be given protection though it was the bestsellers that suffered a lot regardless of whether it is conducive to the development of Chinese civilisation.

In spite of the cooperation from the Ministry of Justice and the Department of Education, people still showed little respect to the others’ copyright. Of course, although Yuan Shih-kai was busy in fighting for the throne, he promulgated *the Copyright Law of Beiyang Government*. However, it does not mean that Yuan had realised his promise made on the day he took the position of the temporary president for this law was enacted under the pressure from America and Japan. But it had nothing to do with the contest between the Republican Party and him.

The Copyright Law of Beiyang Government was enacted on 7th November 1915, and it can be regarded as the duplication of *The Copyright Code of Great Qing Dynasty* in 1910. Both *the Copyright Law of Beiyang Government* and *The Copyright Code of Great Qing Dynasty* were influenced by the Japanese copyright law in 1899. This phenomenon can be attributed to Qing’s basic attitude toward constitutionalism. In 1905, five important officials set out to investigate the political systems of other countries and finally they reached an agreement that constitutionalism was good for a nation’s development, but the constitutionalism differed from country to country. During the preparation process, the Qing Government wanted to be stronger through constitutionalism on the one hand and protect the power of the emperor on the other which reflected that they did not understand the nature of constitutionalism. As the Empress Dowager Cixi had pointed out, only when it was really harmless to the emperor’s power, could the constitutionalism be carried into effect.¹⁷¹ The officials suggested that political decentralisation in America and France might not be able to leave room for the existence of emperor while the contemporary parliamentary system in Britain permitted the existence of emperor without real power. Compared to the previous two, only the system in Japan allowed the emperor standing in the centre of power and thus it could be applied to China. Moreover, China and Japan shared a similar culture and Japan did manage to rank the strong countries in a short time and set an example to China. At the same time, Japan were willing to “give guidance to China” to facilitate the assimilation of this two countries. For Japan practiced centralism in the name of Constitutionalism and it had close political connection with China, the “Japanese Mode” appealed to the Qing government.

¹⁷¹ Xumi Chen, *Article Collections of Song Jiaoren*(Zhonghua Press, Beijing 1981) 16.

More than half of the articles in *the Copyright Law of Beiyang Government* and *The Copyright Code of Great Qing Dynasty* were extracted directly from the Japanese copyright law in 1899, and the terms of protection of personality and property in these two laws were prolonged to 30 years after the death of the author. And they permitted the inheritance and the transformation of copyright, and for those who injured the copyright, they must shoulder criminal and civil liability.

All the related provisions were the same to the Japanese copyright law. However, there were still some differences between *the Copyright Law of Beiyang Government*, *The Copyright Code of Great Qing Dynasty* and the Japanese copyright Law. For instance, the article 28 of Japanese copyright law permitted to give protection to foreign works while the Chinese law did not have a similar article. And according to the explanation at that time, Chinese law promised to protect the copyright of people in America, Britain and Japan who had signed commercial treaties with China, while they were invalid to other people.¹⁷² If the explanation was considered reasonable, western countries had not reached their goal in spite of urging China to enact copyright Laws. Actually, even American works and Japanese works could not get the effective protection. On 22nd April 1919, the American Chamber of Commerce (ACC) sent a letter to the Shanghai General Chamber of Commerce (SCC) to ask several publishers to stop reprinting American textbooks but failed. Then the dispute between G. & C. Merriam and the SCP had shown the Laws' unavailability for the foreign works. The G. & C. Merriam invested a lot to publish the bilingual edition of Webster to sell in the Chinese market.¹⁷³ However, before the publication, G. & C. Merriam found that the SCP had already released the book. On 21st June 1923, Chris, the attorney sued the SCP to the Mixed Court for it had infringed its trademarks and copyright. The SCP invited Li Ming, Ding Rong and Luo Jie as its defence lawyers. In the court, they argued that, "G. & C. Merriam accuses SCP of damaging their copyright, but they never pose any evidence to certify that they had obtained copyright in China. For this matter, *the Sino- America Treaty* signed in 1903 listed all the publications which enjoy copyright in China. It indicates that only those specially for Chinese education should have copyright here." "And unfortunately, the Webster has not been included in the list. Since when the book is put into publication, it is not specially for Chinese at first and in addition, its sales in American are much more than those in China, G. & C. Merriam's accusation is not be supported neither by the Law nor by the facts." The SCP also took the conflict concerning a book "*the European History*" happened 12 years ago as a precedent, thus the court ruled that the Webster did enjoy no copyright in China and the SCP won the case. The ultimate result of the case was that the

¹⁷² See Ri Qin, *Interpretation of Copyrights Law* (The Commercial Press, Shanghai 1912).

¹⁷³ Jinglu Zhang, *History Records of Publishing in Modern China* (Zhonghua Press, Beijing 1954) 335

Webster could be issued continuously in China.

The Dream of Being Prosperous and Strong

No matter whether people insisted on reform or revolution, the ultimate dream of the Chinese was to seek prosperity and power from the 1860s. After discussion, they realised that they must follow the western modes if they wanted to pursue the development of Chinese civilisation. Actually, in the eyes of Chinese people, there was no apparent difference between modernisation and westernisation except that the previous one might reflect the patriotic enthusiasm hidden in the heart of the whole nation. So, “the barbarian” were not regarded as backward in culture any more, but were respected as “the western” instead. With the established stereotype of learning from the western, Chinese naturally began to translate and pirate western books, which could help China step into the civilisation community.

Just like the situation before the downfall of Qing Dynasty, the western countries kept taking great pains to stop the piracy of foreign books in China caused by the pursuit of western learning. In order to achieve their goal, the member countries who had already joined in the international copyright-protection alliances made every effort to persuade China to take part in as well, or they would put pressure on related publishers and government institutions through applying the spirit of fairness and justice in western laws. The reasons for opposing China to join in alliances were the same to those in the late Qing Dynasty: firstly, once joining in these alliances, China could not reprint advanced publications any more, but only translate them into Chinese. This would set obstacles for the development of civilisation and the prosperity of education.¹⁷⁴ Secondly, the precedents in America had shown that it was not a wise choice to join in alliances while the works in a nation was not sufficient, the industry and commercial not advanced and the general strength not competitive comparing to the foreign nations.¹⁷⁵ However, the western contemporaries argued that if China took part in this alliance, it would enjoy a higher reputations and a better credit on the moral level.¹⁷⁶ Different from the late Qing Dynasty, many folk supporters who were in favour of joining in alliances appeared in the debate. According to them, joining in the alliances and putting the treaty into effect were two different things. Joining in alliances did not mean restriction because it did have something to do with the approval system. If it was necessary, China could give government approval according to the reservation clause in the agreement to ensure its

¹⁷⁴ Shanghai News, 1920-12-8. Cited by Yufeng Li, *Qiangkouxia De Falv: Zhongguo Banquanshi Yanjiu* (Intellectual Property Publishing House, Beijing 2006)128

¹⁷⁵ Ibid

¹⁷⁶ Ibid.

autonomy, otherwise it could break away from alliances following the procedure agreed in contracts when there were any disadvantages.¹⁷⁷

The Efforts by the Nationalist Party

On 12th April 1927, the Nationalist Party divorced with the Communist Party after the Northern Expedition and in the following one month, thousands of communists were slaughtered. On 18th April, the Nanjing National Government was born in blood. At that time, although there were two national governments and three headquarters asking for leadership, it was Chiang Kai-shek who won the battle and acquired the leading power at last. Whether the debate, concerning Chiang Kai-shek's pursuit of individual interests and national interests through violence, was right or wrong, after being admitted by Britain and America, the Nationalist Party started to rectify and reform the political environment and legal environment of China so as to end the instability in China and attracting western countries never to give up the extraterritoriality.¹⁷⁸ During the first years in office, the Nationalist Party did take great pains to strive for its aim of constructing a modern government.¹⁷⁹ Sun Yat-sen interpreted his "Three People's Principles —nationalism, democracy and people's livelihood of the people, by the people and for the people" which was put forward by President Lincoln and tried to establish a proper formal legal system. After the establishment of the Nanjing National Government, the nominal central government leading the whole country founded. Meanwhile, many legal advisers who had received western education went down to set up a unified legal-system. The original legal construction took the specified codes as its main task and gradually, the Six Law System had shaped, regarding the Constitution, the Civil Law, the Criminal Law, the Civil Procedure Law, the Criminal Procedure Law and the Administrative Law as its core.¹⁸⁰ Soon after Nanjing National government gained the political power, it made the copyright law (1928), which was thought the key of building new legal system.¹⁸¹ This law followed the content of copyright law of Beiyang Government and the legal-making mode of civil law country such as Germany and Japan. The copyright law didn't have stipulations on foreigners' works but the enforcement regulation had specific explanations. The enforcement regulation stipulated that government provided 10 years protection for the foreigners' works on two conditions. Firstly, the country of the foreign writers who were protected by the Chinese government should provide the same protection for Chinese

¹⁷⁷ Ibid.

¹⁷⁸ Zhengqing Fei, *Cambridge History of Republic of China* (China Social Science Press, Beijing 1993) 152

¹⁷⁹ Ibid.

¹⁸⁰ Jinfan Zhang, *Legal History of China* (Law Press, Beijing 2001)612

¹⁸¹ William P. Alford, *To Steal A Book Is An Elegant Offense: Intellectual Property Law In Chinese Civilisation* (SUP, Redwood 1995) 50

writers. Secondly, the foreign works must be written only for Chinese. What's more, all foreign works didn't have right of translation.

After that, Nanjing National Government promulgated IPR law referring to protection of trademark and patent in 1930 and 1932 and issued at least 17 stipulations on copyright between 1928 to 1937. All of these showed that Nanjing National Government had done a lot of work in the modernisation of IRR. However, some people think that the situation of law-abiding was not improved much during the reign of Nanjing National Government. In 1969, David Kaser did research on the situation of the piracy of books in Taiwan to which Copyright Law of 1928 was applied. He concluded that the protection of literature drew little attention and people rarely lodged a complaint. He could hardly find the examples.

This conclusion may be unfair. The explanations on copyright law by Supreme Court and local court demonstrated the awareness of the protection of literatures. In fact, it was sceptical that American scholars looked at this issue with a prejudiced viewpoint. American scholars focused on American books pirated in China. They used American copyright law to judge the situation in China, while Chinese officers thought domestic law should be applied to disputes over copyright in China. Actually, the Chinese copyright law provided imperfect protection for foreign books, especially on the translation right. The rights of American law harmed in China was mostly translation right. As a result, the common behaviours complying with the legal requirement were regarded as piracy by American scholars. During the 22 years under the ruling of the Nationalist Party, there were rarely disputes of foreign copyright. On the one hand, this situation resulted from the disappointment of foreign writers and businessmen. On the other hand, during the 22 years, China cancelled the extraterritoriality and achieved totally legal independence. After the First World War, consular jurisdiction enjoyed by Japan was cancelled. After 1917 when the Russian Revolution broke out, Russia gave up consular jurisdiction in China. After gaining the acceptance of the western powers, the Nationalist Party announced to cancel the consular jurisdiction of all countries in April 1924. On December 9th 1941, China declared war on Japan and opposed the aggression of Germany and Italy. "All the treaties, agreements and contracts between China and Japan are abolished" written in the declaration of war to Japan. "All the treaty, agreement and contract between China and Japan are abolished" written in the declaration of war to Germany and Italy.¹⁸² In January 1943, Britain and United States cancelled all the privileges in China except from the privilege in Hong Kong owned by Britain. Gradually, China gained the total legal independence. As a result, the basis to judge infringement was Chinese copyright law. However, this law was obviously lack of protection of foreign books. It was accepted

¹⁸² Xiaoyi Qin, *Collection of Important History Records—During the Anti-Japanese War* (Central Relic Press, Taipei 1981) 207-208

that conscience of copyright had not formed among Chinese.

Within the Nationalist Party, the cruel and bleeding fight for leadership had never stopped. In 1927, the fight revived with fierce battle. Chiang Kai-shek had to face armed conflicts among different provinces. After three civil wars, Chiang Kai-shek became the Supreme Leader of Nationalist Party in 1932. However, at the stage of consolidating political power, Japan aggressed China. Chiang Kai-shek attached great importance to army due to internal and external problems of the country. In fact, the army was the most important part in the Chiang Kai-shek's power. Chiang Kai-shek's had the power over administrative system and he used his power regardless of the formal commander system. "Where Chiang Kai-shek goes is where the real power of the government is." Helian, an officer in administration department, recalled. As a result, the government lost its dynamic. Although Legislatures drafted out new laws and the constitution, all the legal activities had little relations with the reality of the politics. Because administrative departments could not afford different expenditure and had no right to conduct their decisions, all of them followed the profits of Chiang Kai-shek and his army. In the end, the administrative departments had never played their roles.

Although all the codes were written on the paper, the modern political mode that Chiang Kai-shek hoped to construct were destined to depart from the legislation and the legislation had to service for the construction of the modern political mode. What's more, Chiang Kai-shek could not continue the process of modernisation due to the civil and international wars for the construction need a relatively peaceful environment. The old saying said it was necessary to use draconian laws to government unstable country. However, the law to protect individual rights was not required to be strict. It is wrong to deny that the law didn't protect the copyright of literature. It is also unwise to overstate its effect. As far as IPR law is concerned, it didn't achieve its goal because it set up a legal framework, which didn't exist in China, or Chinese had not had the conscience to protect copyrights. As a result, the legal framework could not survive and develop. What's more, although China had 479 courts, most of them were unprofessional. "The codes were good as a whole, but they were not put into practice. The reason for this was the court could not access to disputes, the unqualified judge and the administrative interference.

The Attitude of the Communist Party

After the cooperation between the two parties in the Northern Expedition, Chiang Kai-shek was aware of the threat from the Communist Party.¹⁸³ In order to protect the purity of the Nationalist Party, Chiang Kai-shek started to eliminate communists since April 1927.

¹⁸³ On January, 1921, 1/3 of the representatives of Nationalist Party were also Communist.

The Communist Party failed because of its lack of army. They concluded that they must go into countryside and conscript militiamen to seize power. They must found revolution base, which can provide food, people and medical treatment for their army.¹⁸⁴ It was the strategy of using the rural areas to encircle the cities and the idea of attaching much to the rural areas that influent the relationship between the Communist Party and intellectuals greatly and the orientation of the future Chinese IPR law.

The reason for the failure of Nationalist Party in the civil war is that it ignored the poverty in rural areas during the process of modernisation. Farmers were unsatisfied with the Nationalist Party. The Communist Party changed this affection into revolution power. In other words, farmers were inspired to join into the fight with Nationalist Party. The dependence of the Communist Party on farmers had a great influence on intellectuals since the foundation of revolution base.

In the 1920s, Mao Zedong published two important articles which indicated the development direction of Chinese revolution.¹⁸⁵ Although intellectuals played the core role in constructing the country, the farmers were the revolutionary pioneers in the process of seizing political power.¹⁸⁶ Part of the intellectuals belonged to petty bourgeois which need ed to be united.¹⁸⁷ In order to win the revolution and reinforce the base of revolution, the Communist Party must solve the problem of lands for revolutionary pioneers, the farmers, as soon as possible. As to the friend of revolution, the intellectuals, their problems could be dealt with later.

In 1931, the first conference of the Communist Party passed the constitution of Chinese Soviet Republic. This constitution included 17 stipulations which announced that the political power of Chinese Soviet Republic belonged to workers, farmers, red fighters and all the toiling masses. It didn't mention the intellectuals' position or any specific measures to protect intellectuals.

In 1931, the aggression of Japan didn't wake Chiang Kai-shek. He still suppressed the Communist Party. In order to guarantee the supply of the army, the Communist Party conducted economic strategy as well as carried out the revolution.¹⁸⁸ This economic construction was not for expanding the army but breaking the suppression from the Nationalist Party¹⁸⁹ and to meet the basic need of the public. As a result, the individual creation was not attached much attention. The Nanjing National Government as a nation-

¹⁸⁴ See Mao Zedong, Selected Articles of Mao (People's Press, Beijing, 1991)

¹⁸⁵ These two articles refer to *The Analysis of All Classes in China* and *Report of the Farmer Revolution in Hunan Province*.

¹⁸⁶ See Mao Zedong, Selected Articles of Mao (People's Press, Beijing, 1991)

¹⁸⁷ Ibid.

¹⁸⁸ Ibid.

¹⁸⁹ Ibid.

wide government, was controlling most of the main cities. Most intellectuals lived in the Nationalist Party controlled areas. Minority intellectuals worked in soviet area and they mostly were inspired by revolutionary zeal. Those intellectuals rarely required to protect private interests. As a result, there were little articles and speeches referring to intellectuals and the Soviet government didn't make any law to protect the intellectuals. Some scholar once said that "the Communist Party regarded knowledge and creation as a servant to achieve its political goal." Although this judgment is extreme, if we analyse it objectively, it indeed shows that the Communist Party hoped intellectuals to play an important role in reconstruct China referring to the Soviet mode. Similar to former Soviet Union, the Communist Party encouraged the writers to follow its purpose to change the soul of people. Mao Zedong had systematic elaboration on it. In May 1942, Mao pointed out that if we wanted to achieve the victory of the people's liberation, we must be equipped with the army and culture. Literature and art must become a part of the revolution and should be used as the a powerful weapon to resist the enemy and unite people.¹⁹⁰ However, the Communist Party had certain revolution vigilance to these intellectuals. In 1930s, the Communist Party incited intellectuals, especially writers to service for the revolution for the first time in Shanghai. From 1920s to 1930s, most of the famous writers lived in Shanghai and they represented the advanced culture patterns. Because Chiang Kai-shek suppressed their inspiration of independence, most of them joined the League of Left-Wing Writers founded by the Communist Party and Lu Xun.¹⁹¹ The League of Left-Wing Writers set up a network of friendship and communication, which provided a cultural conscience and showed different political and artistic ideas. In 1935, Zhou Yang, a representative of the Communist Party, who worked in Shanghai had a conflict with the League of Left-Wing Writers. He was ordered to found the united front, but he dismissed the League without the permission of its founder, Lu Xun and found another writer's association. Lu Xun worried about the revolutionary spirit in this new writer's association, so he and his partners, Hu Feng and Feng Xuefeng, found the Organisation of Chinese Literary and Art Workers, and used a more revolutionary slogan "Popular literature of national revolution". Then, both sides debated on whether Hu Feng, the follower of Lu Xun, was against with the Communist Party. We can see that the Communist Party's ambivalent attitude towards the intellectuals.¹⁹² Since 1937, the Nationalist Party treated students and publishers who held different ideas with a tough arm, which resulted in estrangement between the Nationalist Party and the intellectuals. In contrast, Yan'an was a place filled with sunshine, happiness and harmony.

¹⁹⁰ Ibid.

¹⁹¹ Lu Xun, famous writer at that moment.

¹⁹² Zhengqing Fei, *Cambridge History of PRC* (Chinese Social Science Press, Beijing 1998) 233

The publishing of *Xi Xing Man Ji* written by Snow promoted a large number of intellectuals to go to the north to search for democracy and freedom.¹⁹³ When intellectuals poured into Yan'an, the local officers were worried about the purity of the revolutionary army. In 1939, Mao Zedong drafted a document for the central government to solve the problem of the intellectuals.¹⁹⁴ In his opinion, the Communist Party must absorb a lot of intellectuals to organise the public so that we could form great power to resist enemy and win the revolution. At the same time, the party also needed to distinguish the loyalty of intellectuals and resist the disloyal intellectual. The Communist Party should educate loyal intellectuals and guide them to overcome their disadvantages gradually and become more revolutionary. The intellectuals would be closer to the local people, closer to the old party cadres and closer to the party members who were workers and peasants.

In February 1942, Mao Zedong criticised the bureaucracy. Some intellectuals used this chance to criticise the privilege and elitism, which developed rapidly in Yan'an. A large number of intellectuals debated on this topic. At the same time, they thought free thoughts were the base and premise of literature creation and revolution. In this aspect, Wang Shiwei went ahead of others. He provided theorems on boundary between literature and politics. In his opinion, the main responsibility of government officers was to improve social system, while the main responsibility of the artists was to convert hearts.¹⁹⁵ The idea that art and politics should be separated and creation should be free was attacked by Chen Boda, which led to a conflict between westernising intellectuals and intellectuals of Nationalism.¹⁹⁶ At last, Mao Zedong delivered a speech about this conflict. He pointed that all cultural and literary art belonged to specific a class and political line. Absolute art or supra-class art, art equal with politic or independent art do not actually exist. Art should follow the politics. At the same time, art had a great influence on politics. Artist and art should fulfil the tasks given by the party at any time. Another speech issued by Chen Yun had similar ideas. An artist should firstly regard himself as a communist not an art worker. The Communist Party hoped that all art workers enhanced their party spirit and gave up bad habit through learning, criticism and self-criticism.

It is a useful idea to united art and politics as a front. The communist required literature and art following the politics of the public. During the anti-Japanese war period, this united front could unite all the powers which were in favour of the war. During the period of the third civil war, this united front could guarantee the party's absolute leadership, the control of mind and the conduct of disciplines. Without the united front of art and politics,

¹⁹³ See Edgar Snow, *Red Star Over China* (Army and Culture Press, Beijing 2002)

¹⁹⁴ See Mao Zedong, *Selected Articles of Mao* (People's Press, Beijing, 1991)

¹⁹⁵ Yufeng Li, *Qiangkouxia De Falv: Zhongguo Banquanshi Yanjiu* (Intellectual Property Publishing House, Beijing 2006) 143

¹⁹⁶ Zhengqing Fei, *Cambridge History of PRC* (Chinese Social Science Press, Beijing 1998) 237

no war could achieve the victory. When the Communist Party inspired free intellectuals living in Nationalist Party-controlled areas to criticise the Nationalist Party government, the Chinese Communist Party found potential schismatics in its own party. As a result, Mao Zedong proposed that the Communist Party should help, educate and change the mind of the intellectuals so that they could serve for the people and politics. Meanwhile, it was necessary to pay attention to intellectuals' speeches and views for the stabilisation of the party. No matter how we see this problem today, it was inevitable that the relationship between the Communist Party and part of intellectuals was strained. The communist party searched for the victory of revolution while the intellectuals required freedom. It can be said that the conflict between the party and the intellectuals was the conflict between two different ideas.

Since all should obey to the revolution, the party could not indulge intellectuals or protect the intellectual property for the accumulation of fortune would weaken their revolutionary enthusiasm.¹⁹⁷ Inspiring independence of intellectuals would affect the stabilisation of revolutionary army. As far as Mao Zedong was concerned, it was doubtful whether the literature works had any creation. "The literature works are reflections of social lives. The art of revolution are the outcome of revolutionary writers lives. People's lives are the resources of literature creation. People's life is the most vivid, abundant and basic thing. At this point, it outshines all the literature and art and is the only inexhaustible source for literature creation....The literature and art in the past were the outcome of what ancients and foreigners saw or experienced at that time and at that location."¹⁹⁸

With the victory of three wars, the focus of the Communist Party's work changed from the rural areas to cities. The revolutionary task changed from agrarian revolution and class struggle to economic construction.¹⁹⁹ Economic construction means the development of related laws. Laws that people needed could protect the public and suppress the landlord, comprador and bureaucrat bourgeoisie. So the Communist Party must abolish all reactionary law of the Nationalist Party.²⁰⁰ The main task for the Communist Party was to build a new legal framework after ruin the old legal system. Although the party had gathered some experiences in the revolutionary base, the builders of new China paid their attention to former Soviet for "the Communist Party of the Soviet Union is the best teacher for us."²⁰¹

The policy "towards Soviet Union" was the result of class struggle, the affection of nationalism and cultural tradition. The former Soviet Union mode guided the Chinese

¹⁹⁷ See Mao Zedong, Selected Articles of Mao (People's Press, Beijing, 1991)

¹⁹⁸ Ibid.

¹⁹⁹ Ibid.

²⁰⁰ Ibid.

²⁰¹ Ibid.

Communist Party to achieve victory and conformed to the idea of Chinese people. There are many differences between the Marxism-Leninism and the Confucianism. The ultimate goal of Marxism-Leninism is to construct a society of the proletariat and achieve the realisation of communism. The Confucianism insisted the necessary of rank order.²⁰² However, both of them are in favour of protecting the whole interests of the society and the unity of thinking. For intellectuals, the Communist Party should treat them with justice so that they can cooperate in the country construction. What's more, the intellectuals should also be limited in specific framework to maintain the political system. In the field of intellectual property, former Soviet Union mode was more suitable for China comparing to imperialist country mode, which was accepted by the Nationalist Party. The reason is that the value base of the former Soviet Union mode reflected the attitude of Chinese traditional culture towards intellectuals. They all followed the same moral belief that individual intellectual property belonged to all members of society. Indeed, the idea raised by Max that the creation reflects social essence had a totally different the intellectual foundation from the traditional idea of the Confucianism. However, they both believed that intellectual activities were not personal activities fundamentally. As a result, they both did not explain the principles of individual intellectual rights. Since economic construction needed intellectuals, although their intellectual transform should not be neglected, the Communist Party should give them fair payment and proper rights so that they could cooperate during the period of construction. Although individual rights were not the goal, the party still needed to give intellectuals corresponding rights. China was founded under the influence of this ideology and the concept of intellectual property protection developed amidst twists and turns at the beginning of New China.

Chapter Four Slow Development of IPR in New China (1949—1978)

After the foundation of the modern China, namely the People's Republic of China (PRC), the tough experience of this nation did not end. With all aspects needed to be rebuilt, the new country tried to explore its way out. Yet conflicts in the guiding ideology, politics and economic strategies threw the promising development for a new built state into chaos

²⁰² Tongzu Qu, *Chinese Laws and Society* (Zhonghua Press, Beijing 1981) 327

again, which certainly hindered the development of the IPR protection system. From then on, the IPR protection in China generally experienced three stages: the embryonic stage between 1949 to the Culture Revolution, the special period during the Revolution and the rapid development after the Reform and Opening-up period.

1. 1949-1966: The Embryonic Stage of IPR protection system.

After the PRC was founded, the presses and newspaper offices were all nationalised by the state and the Communist Party. In 1950, The First Session of the National Publishing Conference Resolution indicates:

“Publishing should respect the copyrights and publishing rights, and behaviours, such as reprinting, plagiarising and so on, are not allowed.”²⁰³ In terms of the authors’ rights, the resolution pointed out: “The remuneration should be negotiated with the authors under the principle which balances the interests of the authors, readers and publishers; in order to respect the authors’ rights, in principle the copyrights should not be bought out.”²⁰⁴

These words from over six decades ago contained a very similar spirit with that in modern copyright protection. Special authorisation of the central people's government issued ‘The Provisional Regulations to Ensure the Inventory and Patents’ in August, 1950. The basic principle of these provisional regulations was to encourage and protect innovations with certificates of innovations and patents²⁰⁵. Based on their own will, inventors can apply for invention rights and patent rights for their inventions; but the state can only issue a certification of invention but without the patent certification to following inventions: inventions about national defence; inventions about people’s welfare and can be quickly generalised; intentions that were completed in national unions; and intentions that were completed as non-gratuitous commissions. Although the regulations also defined the contents of invention rights and patent rights, they also clearly stipulated that the rights of implementation and disposition of the inventions belong to the state. This means IPRs were not actually considered as private rights which IPR primarily are in nature.

The issue about remuneration was brought up again in October, 1960 when the central

²⁰³ ‘The resolution about the improvement and development of the publishing of resolution’ see National Copyright Administration Office, *China’s Copyright Practical Encyclopaedia* (Liaoning Peoples’s Publishing House, Liaoning 1996) 28,31

²⁰⁴ Ibid.

²⁰⁵ According to the original words of the regulations, the invention right and the patent right seemed paratactic.

committee of the communist party of China approved The Request about abolishing the copyright royalty system and taking a thorough reform of the remuneration system by party groups of the Ministry of culture and the Chinese writers association.²⁰⁶ The basic idea of this reform was to abolish the copyright royalty system first, and at the same time brought in a wage system for the writers who totally relied on their remuneration for living, in which the remuneration was only to assist their life and encourage creations.²⁰⁷ Therefore, the remuneration became a one-time deal which was extremely simple and in fact replaced the copyrights.²⁰⁸ Since 1966, copyrights or remuneration system had no longer existed, except certain special individual cases. In various political movements, the legal nihilism was prevailing.²⁰⁹ The legal protection of not only the copyrights, but also the property rights and personal rights, faded slowly.²¹⁰ The copyright royalty system was abolished, which means professional writers would obtain salaries from the state and get one-time payment for their words and would not get paid if their works were reprinted. In 1963, the Regulations on Awards for Inventions started a system of certification for inventors. The state would provide certain material and/or moral encouragement for the inventors, but the inventions would belong to the state.²¹¹ The intellectual property was totally considered as national property.

However, this does not mean disputes with a nature of intellectual property did not exist at all. These disputes were only handled on the moral-ethical level. The infringers were seen as bad moral examples, instead of people who invaded the rights of others or broke the law. A sensational case in the early period of the new China might be a good example of this situation. Zhaowan Kang's case is a good example.²¹²

In early 1950s, programmes of encouraging intentions and rewarding model workers started from Anshan Iron and Steel Company.²¹³ During that time, the secretary of General Party branch in a small rolling mill, Zhaowen Kang, took the advice and invention of Changxin Han, a worker in the same mill, and reported with his name applying for

²⁰⁶ Ruisan Guo, 'A General introduction of the history of remuneration in China', <<http://bd.jnxx.gov.cn/index.php?m=content&c=index&a=show&catid=483&id=1251>> accessed 20 February 2015

²⁰⁷ Ibid

²⁰⁸ Ibid

²⁰⁹ Feng Gao, 'An introduction of intellectual property rights', <http://blog.sina.com.cn/s/blog_6286ed590101ff5a.html> accessed 20 February 2015

²¹⁰ Ibid

²¹¹ Ibid.

²¹² --, The Material assembly about the insurgent Zhaowen Kang's event, Committee of the communist party of China in Anshan Steel Company, published on April, 1955

²¹³ Ibid.

rewards, while suppressed and retaliated against Changxin Han. Han tried multiple times to report this situation to Anshan municipal Party committee, till the central discipline inspection organs finally acknowledged and solved this dispute. Although the way of cognisance and settlement was different from that in modern litigation judgment system, the warning effect was very good. Under the supervision of the Central Commission for Discipline Inspection, Kang was punished for what he had done and expelled from the Chinese Communist Party.²¹⁴

However, the interesting part was not about which party won in this dispute, but about the nature determined without the concept of IPR and relevant legal system. From today's view, this dispute should be an intellectual property case in which somebody's intellectual property right was infringed. Whereas at that time it was firstly seen as evildoers and wrongdoings, and the nature of Kang's behaviour was "seeking honour through fraud and deception."²¹⁵ The infringer, Zhaowen Kang, was designated as an 'anti party element'.²¹⁶ The intense political and moral character can be easily found in those words. The punishment and its warning and educating effects were almost as strong as the legal effects. Even the current biggest newspaper The People's Daily published an article to declare its attitude, which built up a momentum of "fighting against evildoers and wrongdoings" and 'combating bureaucratism and falsification.'²¹⁷

This kind of phenomenon has a direct relationship between the social system back then and level of productivity. Four main reasons have been concluded, namely, the effect of the planned economy; the lack of legal concepts; satisfaction of the conditions of existence and deviation of the system oriented.

The influence of the planned economy can be explained as: the local government and companies used to pay more attention to the importance of the production. Solving the problems of people's dining and housing, namely visible things, was the achievement in one's official career, while less attention had been paid to the invisible things and intangible rights. As to the lack of legal concept, it means the legal status of IPR in China, which cannot be independent of the civil law, had not come up. This had created huge obstacles for the education of the national intellectual property legal consciousness, caused by the national level's understanding. China had a long-term problem that has not been well solved, that is

²¹⁴ Ibid.

²¹⁵ Ibid.

²¹⁶ Ibid.

²¹⁷ Shi Wei, 'Jian Guo Chu Qi Dui Zhi Shi Chan Quan An de Chu Li', <<http://203sz.blog.163.com/blog/static/2638281200842745857554/>> accessed 30 January 2015

China's intellectuals and intellectuals' knowledge were not valuable. The government and the boss would appreciate one's skill when products being made out, while it was worthless and just a "mowing pleading" for them when the advice being given for greater development opportunities by the adjustment of their idea. Then the concept of consulting and consulting industry came into being, but the pay was relatively low. Chinese intellectuals still dare not stretch out their hand to ask for the wage they deserved. The saying in the feudal society that "A gentleman doesn't persuade his own benefits." had its continuous influence. Therefore, the situation as Deng Xiaoping layer stressed that "science and technology are the primary productive forces"²¹⁸ could not be really understood in the construction of the actual market. Thirdly, because of the low level of productivity, living in poverty and survival conditions of satisfaction, dining, clothing and housing was the priority. China's common saying used to describe the ideal life is "Two acres a cow, wife child hot bed." There is nothing that is better than this ideal life, which can be achieved by food and clothes. As to what the brands of the food and clothes, it did matter for them.

2. The strange phenomenon of intellectual property during the cultural revolution

What should be affirmed is that the IPR system has been established after the founding of new China. It also paid close attention to the protection of the interests of authors, but didn't issue a formal recognition and protection of copyright law. However, the ten years of "cultural revolution" pursued "lawlessness", making a lot of damage for the intellectual property system that was initially established. Due to the critical "reactionary academic authority", the newspapers kept on berating a variety of authoritarian style. No one dared to consider himself as the authority, and human relations were universal equality, breaking "the concept of private technology" completely. As long as it complied with the provisions of the secrecy and held a letter of introduction, all of the latest results would be presented unconditionally or without the slightest reservation, regardless of how much effort the research institutions spent to come up with the latest achievements. All private ideas were radical criticism in China at that time. A lot of help to consolidate the evaluation system of private ideas were destroyed, so people were able to report their own wage to the public unprecedentedly. In this way, as long as there was any breakthrough in the technology made by one national institute or one of the researchers, other relevant personnel or projects, sharing the latest technology achievements without cost, were no longer necessary to rework. Abolishing the private idea completely made it possible for the real "national technical collaboration". Deng Xiaoping summarised

²¹⁸ It was mentioned in one of Deng's speech in 1988.

the situation during this period as follow:

“In the socialist system, because of the fundamental interests of the people are the same, the majority of working people to become the master of the society, the masters of the country, the enthusiasm of the workers have long been suppressed like a volcano burst out, people's intelligence, talents have been brought into full play. The Communist Party leadership Chinese our people in Mao Zedong led by Chairman, rely through one's own efforts, work hard and perseveringly, in a short span of twenty years, make our country from a backward agricultural country developed into one of the world's six major industrial countries, but also a neither domestic nor foreign debt, the only industrial power. The socialist revolution has made our country greatly shortened with the developed capitalist countries in the economic development gap. Even though we have made some mistakes, but we still achieve the progress in the thirty years which never happened in the past thousands of years.”²¹⁹

It is this kind of situation that made China complete the technical research, namely “Two bombs and one satellite (atomic bombs, hydrogen bombs, artificial earth satellite)”. Its technical force at that time was far inferior to that of the Soviet union and the United States both in terms of quantity and technical equipment level. However, considering the period of moving from the atomic bomb to breaking through the barriers of hydrogen technology, China made it much shorter than that of the Soviet Union and the United States.

Similar situation also can be found in the case of Yuan longping's hybrid rice. In 1960 Yuan Longping learnt from some reports that hybrid Sorghum, maize, Sorghum seedless watermelon hybrid, hybrid corn, seedless watermelon and so on had been widely used in foreign production, and then began to carry out rice of sexual hybridisation experiment. In July, he found the specific rice plants in the internship farm of Anjiang agriculture school. In the spring of 1961, he put the seeds of Mutant to start-up test field, and the results proved that the outstanding plant discovered in 1960 was “Natural hybrid rice”. He was a teacher in spare time school for adults of Anjiang at that time, but in the face of the serious famine, Yuang Longping, engaged in rice male sterility test, was determined to beat hunger threatened with agricultural science and technology. From the beginning of 1964, he conducted the pioneering rice male sterility research in China, and found a special “natural male sterile plant” in an Anjiang agriculture school internships farm Dongting early indica rice fields on July 5. This is the first time in China to find the natural male sterile plant, bearing hundreds of seed of the first generation after artificial pollination. From 1964 to 1965, in the two years of rice

²¹⁹ A speech of Xiaoping Deng on the Party's theoretical work retreats 30 March 1979

flowering season, Yuan Longping and the scientific research team had a hybrid rice breeding test in the paddy field, found 6 natural male sterile plants and then gradually had rich knowledge on rice male sterility material after two years observation experiment. Based on the accumulation of scientific data, on February 28, 1966, he published the first paper *Male Infertility of Rice* in the journal *Chinese Science Bulletin*, which was issued under Chinese Academy of Sciences editorship, but he lost the opportunity to apply for a patent. Because anything that has been reported in any public media (scientific journals, conference, etc.) in any country cannot be used to apply for patent, they have lost the novelty. In March 1972, The State Science and Technology Commission listed hybrid rice as the key scientific research project. In 1972, Yuan Longping breeding has become the first one applied in the production of sterile lines ErJiu South no. 1 in China. In October, 1973, Yuan Longping published the paper *The Use of 'Wild Abortive' in the Process of the Breeding Three-line* in rice research conference in Suzhou, officially declared “three-line indica hybrid rice in China” has been supporting. In 1974, he bred strong advantage for China's first hybrid combinations “south optimal no. 2” with the result of 667 square meters having the production of 628 kilograms in the Anjiang agricultural school trial. In 1977, Yuan Longping published two important papers *Practice and Theory of the Hybrid rice Breeding* and *The Hybrid Rice Seed Production and the Key Technologies of High Yield*.²²⁰ In the newly elected academicians inauguration of academician, Mr. Heather Ronalde²²¹ said: Mr. Yuan Longping's invention of hybrid rice technology, made outstanding contribution to world food security, and solved the problem of 70 million people for dinner thanks to the increase of grain every year for the world.²²²

However, the processing of the great scientist's IPR was not imaginable in today's view. In 1979, the general manager of Circle Seed company, Will, marvelled at China's achievements of rice, consulted the official in Chinese ministry of agriculture who was the inventor of hybrid rice and was going to sign a contract with the inventor and apply for the patent right with a high price. The officials of Chinese Seed Company rightly said: The invention patent ownership belongs to China and the ministry of agriculture Seed Company is the only representative of the rights on behalf of the state. There was no need to find others if someone wants to discuss the hybrid rice technology transfer problem. In 1980, Circle Seed company paid \$200000 to Chinese Seed company, a high-sky price at that time as the first patent transfer fee, however, Yuan Longping got no penny. To coincide with the transfer of patent activity in 1980, Yuan Longping visited the United States as an expert for four months for technical guidance. After returning home, he was paid thousands of dollars a month, which was collected by the ministry of agriculture, and then received \$3 a day to go abroad as

²²⁰ Lin Zhao, *Morality and Society* (Shandong Education Press, Shandong 2014)

²²¹ Heather Ronalde was the world famous scientists, the chemistry prize winner, the president of American Academy of Sciences

²²² Lin Zhao, *Morality and Society* (Shandong Education Press, Shandong 2014)

subsidies.²²³ However, what Yuan Longping obtained was a multitude of honour and respect, which was the most precious for Chinese. He was regarded as “father of hybrid rice” at the age of 84 in 2014.²²⁴

Although the cases of IPR protection were very rare at that moment, the consciousness of IPR was indeed still rising. Wang Xuan is a typical example among awoken intellectuals. In the summer of 1976, Wang Xuan, after doing a lot of investigation and study, resolutely decided to adopt the mode of digital storage, skipped the Japanese popular optical mechanical two generation Phototypesetter, Cathode ray tube type three generation Phototypesetter popular in Europe and America, and directly developed the fourth generation of laser typesetting system abroad without any goods. He skilfully used mathematics knowledge and practical experience of software and hardware, and invented the high rate information compression technology of the high-resolution glyph (the compression ratio of 500:1) and high speed recovery method, considering the technical difficulties brought by more Chinese words, printed in more Chinese characters font and Precision Phototypesetting requiring a high resolution. He took the lead in designing for dedicated chip which could improve the glyph reconstruction speed, making the Chinese character glyph recovery rate had reached the leading level of the 700 characters per second, and used the control information for the first time in the world (or parameters) to describe the width of the strokes, such as the corner shape characteristics in order to make sure the strokes symmetry and consistent width with a smaller front size. This invention has become the foundation of Hua Guang and Fang Zheng laser typesetting system and won the European patent and 8 patents of China. Wang Xuan was the first European patent in China.

The domestic laser typesetting system was bought by the Japan's second largest magazine, Recruit Company, with \$4 million, and was used to publish a 1500 page weekly magazine with tens of thousands of colour photographs of cars. Compared with the previous use of the system in America, the production efficiency increased nearly 10 times, saving cost about 1 billion yen a year, which was considered to be Japan's most advanced system among the similar ones. The Beijing Daily said, “This is the first time a Chinese company exports in a large scale and sells products with independent IPR and its own brand of high-tech applications.” Then, the newspaper group edition system was being adopted by more than 20 newspapers in Japan. After that, Korean publishing systems was developed, and has been applied in South Korea.²²⁵

²²³ Lin Zhao, *Morality and Society* (Shandong Education Press, Shandong 2014)

²²⁴ Ministry of Agriculture, PRC <http://www.agri.gov.cn/> accessed 09 September 2014

²²⁵ ‘The Development of Hanzi Jiguang Zhaopai Technology and Study Progress of Wang Xuan’ <http://art.ce.cn/zhuanti/kjzt/wxysyc/shhzh/200602/15/t20060215_6096450.shtml> accessed 15 February 2006

3. Development in Other Areas in the Same Period

a. Taiwan

After the Chinese civil war, the Nationalist Party went back to Taiwan in the fall of 1949. At that time, the Nationalist Party did not continue to improve the legal framework of the IPR protection. On the contrary, for political purposes, they stepped up to limit people's mind to maintain political stability control in the first decade after back to Taiwan. The reason lied in the fact that they must maintain a kind of belief in purpose of recovering the mainland at some time in future.

Obviously, the freedom of speech was not allowed at that special period, otherwise it would shake the political determination of the soldiers. Correspondingly, the Taiwan local authorities strengthened the review of literary works to be published. That made the threshold consciously increased on copyright protection. To maintain running the review of the agency, the government required the registration fee which was 25 times higher than the cost of copyrighted books. Consequently, few works were registered at that time. As a matter of fact, in the first decade of Taiwan under rule of Nationalist Party, there was no more than six hundred kinds of books that got registered including no more than thirty species of foreign authors' works.²²⁶ However, later in 1959, books written by foreigners in Taiwan's Book Fair had more than two thousand species.²²⁷

The lengthy registration and review process delayed the registration of many works severely. As a result, such works could not gain well-completed protection. Although the Nationalist Party authorities believed that it was necessary to review the information that involving mainland or other related works at that period, foreign investors had no interest in such political actions. Lengthy time period on review led to a large number of foreign works being pirated in Taiwan, such as one of the most famous book-Webster's Dictionary.²²⁸ Thus, the profits on literary works flew into the pockets of those who illegally pirated rather than legal booksellers by means of a shift in political factor.

Western publishers behaved great wrath to the situation in Taiwan and urged their own governments to take diplomatic measures against Taiwan. For example, they questioned the qualifications of Taiwan participating in the scheme, in which the participator would

²²⁶ Defen He, 'A Comparative Study of the Copyright Protection in the United States and the Republic of China' 28 JSS

²²⁷ Kaser D, *Book Pirating in Taiwan* (University of Pennsylvania Press, Philadelphia 1969) 40

²²⁸ Yufeng Li, *Qiangkouxia De Falv: Zhongguo Banquanshi Yanjiu* (Intellectual Property Publishing House, Beijing 2006) 134

be offered a great amount of US dollar to meet their purchases demand of US publications and movies. They argued that only through such conditional measures could they persuade Taiwan local authorities to modify their immature IPR law to make it ruled by a unified global copyright treaty. Taiwan's local authorities were attempting to defend these pressures. They believed that these pirates were because of the students who eager to obtain the latest foreign information, especially for those students in science and engineering fields without abilities to afford the cost of payment for the expensive books.²²⁹ As relying on the United States in the economy, military and diplomacy, Taiwan's local authorities were also not able to completely resist US demands on the legal framework section. In 1959, in order to reduce the pressure from the American's side and protect the domestic publishing industry at the same time, the nationalists were reluctant to amend the IPR rules which had been newly established by Taiwan's local authorities. These amendments reduced the registration fee and made the provisions that enable foreigners to enjoy the same protection period as Chinese people. A year later, the government immediately announced that exporters who exported unauthorised copying of publications, audios or video products should be subject to be accused of smuggling crimes. In 1964, other amendments formulated of copyright law were made with the intention to terminate piracy of foreign works.²³⁰

In the last few years of 1960s and throughout the whole 1970s, in order to face the pressure imposed by the US, Taiwan authorities published a large number of IPR laws and decrees aiming at promoting and advocating the implementation of these laws. However, the situation had not changed so much, mainly because the victims were difficult to see such a meaningful result of their IPR protection under the existing burden of proof and infringement procedures required. As a result, in the mid-1970s, among more than 1400 publishers and printers in Taiwan, almost no one thought it was necessary to spent resources and energy on gaining the admission of copyright registration. A statistics in 1975 showed that they were lack of confidence in the law— registered works were no more than 1000 pieces, and only 35 publishers registered the copyright. Also in 1975, another fact can prove this conclusion was that only 9 cases of infringement of intellectual property rights appeared in the court of Taipei where usually dealt with economic cases. Finally, eight of them ended up with dropping the charge, while only one received the ruling. Without surprise, throughout the whole 1970s, pirated books, videos, tapes and computer softwares were popular with their own ways in the world's market including the

²²⁹ Defen He, *Copyright Proceedings* (San Min Press, Taiwan 1980) 29

²³⁰ William P. Alford, *To Steal A Book Is An Elegant Offense: Intellectual Property Law In Chinese Civilisation* (SUP, Redwood 1995)

United States, Europe, Africa, Middle East countries, as well as the mainland of China.²³¹

Recognising these illegal approaches were badly influencing the fast-growing trade deficit of the United States, the US government began to exert stronger pressure on Taiwan in the early 1980s, forcing Taiwan to reform the IPR law in the mid-1980s. However, these reforms did not solve all the problems, especially did not solve the important severe issues. What Taiwan authorities concerned most was to meet the requirements in compliance with the US' laws and to publicise the efforts made by the government by a large number of reports covered by media.

By the late 1980s, the US government had taken a tougher stance. In fact, the occurrence of IPR infringement in a foreign country was not a new problem. But during that period, the US companies adopted a strategy through identifying what damaged their economic profits and its remedy methods to achieve a success of IPR protection to the international trade. They believed that the IPR protection need put the priority as a mean to control the export to the US market from these countries. Eventually, these illegal channels such as counterfeiting and piracy would be stopped.

In May 1989, after Taiwan was identified as one region on the “priority watch list” in the “Special 301”, both of its two sides had been gone through “the most difficult trade negotiations” called by Americans. About a month's period, Taiwan and the United States reached a bilateral agreement regarding copyright protection. Taiwan authorities promised to provide more protection for Americans' copyright holders, including establishing an inspection and suspension system monitoring software export.

Two years later, however, the US was not satisfied with the approaches made by Taiwan's local authorities. In the reviewing report in 1992, the US Trade representatives listed Taiwan on the so called “priority watch list”. The reason was that prevalence and frequency infringement of Taiwan's cable television and videotapes, exports of pirated computer software and CD plus Taiwan did not seriously require the enforcement of related IPR laws. Facing the strong pressure given by US, Taiwan's local authorities had to compromise.

Subsequently, Taiwan conducted the largest revision of copyright law since 1928 (including the time before the civil war). Since Taiwan's government was not fully ratified

²³¹ Ibid.

to carry out the bilateral protection agreements in 1989, Taiwan was listed on the “Priority Watch List” in April 1993. Although people throughout the whole island of Taiwan were full of resentment about the US violated the so-called Taiwan “sovereignty “ and even some negotiators presented his resignation, Taiwan local authorities had to give in the United States’ trade remedies because of its negotiating position and the bargaining chips were quite fragile at that time. Therefore, in the following negotiations, Taiwan basically obeyed the requirements of the United States.

Obviously, it was the pressure from the United States that made Taiwan's local authorities to amend its IPR laws. If it was not the reason that Taiwan was afraid of losing the largest export market and the most important ally of the United State, the local authorities would not use the means in 1989 to amend its copyright law and other IPR laws. However, the foreign pressure alone could not explain the legal reforms. More importantly, the foreign pressure could not cultivate awareness of the importance of IPR, and therefore enact IPR laws and achieve the goal. After all, if the foreign pressure could the legal system in a country or a region, then why did Taiwan could resist the pressure from the US during the past several decades but only compromised when it already had a higher per capital foreign exchanges and a well-known status?

Some scholars believed that the answer to this question depended on the economy, politics, science and technology in Taiwan appeared in the last two decades, the influence of these reforms to the social and cultural in Taiwan as well.²³² Many aspects in Taiwan clearly called for IPR protection such as its booming economic growth, the increasing localised awareness of science and technology, more diverse political living conditions, the promotion of criminal law, and the pursuit of being an international region, etc. Taiwan had provided a good reason for its citizen to support the IPR protection at that time.²³³

In economy, keeping the form of great growth on the surface of low wages standard and low-technology exports in the first decades in Taiwan had not been accustomed to meet people's high quality demand of life any more. Local authorities and businesses industries in Taiwan realised that they must develop their own world-class technology if they want to compete with other countries in the coming years. Moreover, the greater protection of intellectual property rights was very important for their industrial upgrade. Meanwhile, in

²³² William P. Alford, *To Steal A Book Is An Elegant Offense: Intellectual Property Law In Chinese Civilisation* (SUP, Redwood 1995)

²³³ Ibid.

the past two decades, Taiwan government had transformed from a highly centralised single-party system to a multi-party democracy, which to some extent reduced long-standing relationship between censorship and copyright.

Over the years, the judicial system in Taiwan had been facing the plight that already existed before the PRC was founded—the lack of judiciary personnel with high-quality and independent status, the substantive law and procedural law that almost did not reflect the real situation and the court system could not remedy the infringed rights but became a stumbling block. Taiwan's judicial system began to change. Due to the impacts of industrialisation, internationalisation, and the traditional dispute resolution, Taiwan's courts has expanded the judicial force to a wider range including maintaining orders, resolving the dispute, the relief of power and the formation of rules.²³⁴ The following step is making great efforts to improve the status, quality and independence of the courts, of the public and lawyers and other related positions as well.

Although many problems still exist, but to some extent, the awareness of the importance of IPR has been improved. Obviously, if there was no such reform, Taiwan would remain the same situation as it happened before the PRC. At that time, there was a serious rupture between laws in the books and in society. Indeed, copyright law is not self-consistent. Instead, it formed a part of the rule of law. From the example of Taiwan, it can be seen that: cultivating the understanding of the structure by system innovation and reinforcing the improvement of law are equally indispensable.

b. Japan

The IPR protection has been carried out in Japan for over a century and the earliest protection can be traced back to 1885 when the patent system was set up. Then in 1888, “Designs Act” was carried out in Japan. In 1905, Japan followed the example of Germany and established a supplement of patent law named “Utility Model Law”. Subsequently, Japan has successively passed the “Designs Act”, “Trademark Law”, “Copyright Law” and “Unfair Competition Prevention Law”, etc.²³⁵

²³⁴ Li Su, *Sending Law to the Countryside* (China University of Political Science and Law Press, Beijing 2000) 176,196

²³⁵ Haimin Huang, ‘Enlightenment of Japanese Intellectual Property Protection for Chinese Evolution’ (2008) 6 QYJTD 163

By the end of the 18th century, due to the corruption and incompetent ruling, the Japanese government (Shogunate) had gone through a deeply hard time.²³⁶ The United States opened its door through the war and signed the “Treaty of Kanagawa”, the following economic and national crisis made the Japanese stand on a historical turning point. The Shogunate was thus collapsed. During the period at March to April in 1868, the Meiji government promulgated the “Five Oath”, which raised the new capitalism policy and carried out the “Meiji Restoration”.²³⁷ It also strengthened the communication with developed countries. The improvement of engineering was learned from Germany, and the civil service and social management system was imported from the United Kingdom. Consequently, Japan’s modernisation movement begun. It established a foundation of governing the country with the combination of science, industry, education as one of the basic principle in Japan.²³⁸ The economy rapidly recovered and was developed fast by taking many practical actions such as land reform, allocating private ownership of land, the introduction of advanced Western technology, great development of the modern capitalist industry and commerce, the construction of railways, a post office, telegraph, telephone, setting up factories, fostering to one enterprise by private owned, the development of foreign trade, etc.²³⁹

In 1885, Japan absorbed the experience of IPR law from France and the United States and then promulgated and implemented the “Monopoly Patents Ordinance” to lay the foundation of the modern patent system. Although the domestic economy was facing a serious overdraft due to the war and the financial crisis after the World War II, after Japan realised western countries’ neglect of IPR protection in the 1950s, it introduced large amount of products from the US and European countries while imitating their advanced technology.²⁴⁰ During that period of time, Japan was once given the nickname “thief” or “copy cat” in the world because of the scientific and technological achievements it acquired by stealing from developed countries.²⁴¹ However, after determining the main line on the economic growth, Japan aspired to become a “technological power”. While carrying out technological innovation on the basis of absorbed technology, Japan not only successfully achieved the chemistry industrialisation, but also steeply accelerated technological innovation and technological progress. As a result, Japan not only rapidly

²³⁶ Mengshan Qian, ‘Review of Founding of the Japan Intellectual Property’ (2003) 3 KJYFL 9

²³⁷ Ibid.

²³⁸ Ibid.

²³⁹ Ibid.

²⁴⁰ Shuchen Yang, ‘Analysis of Japanese Intellectual Property Strategy’ (2004) 2 RBWYJ 7,12

²⁴¹ Jianhui Ma and Dongying Ke, ‘Under Knowledge Economy, Japan Intellectual Property Protection and Reference to China’ (2002) 2 XDRBJJ 36,41

narrowed down the distance to western countries, but also became the leading country in manufacturing.²⁴²

In 1978, with joining the international “Patent Cooperation Treaty” (PCT), Japanese government formulated the “Special cases of International Application based on PCT”. In 1985, Japan enacted a series of positive industrial property laws, including patent law, utility model law, trademark law and so on.²⁴³ After the 1980s, the Japanese government proposed the national strategy in official documents that the science and technology were the foundation of the nation. On the basis of introducing advanced technology, it also focus on strengthening independent research and invention. Soon Japan established a dominant position on semiconductor technology and occupied half of the world's semiconductor production.

After 1990s, Japan’s manufacturing technology reached to a higher level. According to changes in the domestic economic situation and international environment, Japan switched its pattern to introducing and digesting western technology and focused on basic researches and original scientific and technological development, which made Japan the second largest economy after the United States, with the average economic growth rate of 2.75%.²⁴⁴

According to Japan’s emphasis attached on the IPR and the changes in its domestic economy and national strategy, we can see that Japan's development in IPR protection can be divided into the following two stages by the year of 1990.

Technology Introduction: Before and after World War II, the Japan’s economy was relatively lagged behind. In that period, it mainly relied on foreign direct investment to motivate the development of national economy.²⁴⁵ The technology development strategies can be divided into two parts: firstly, Japan focused on the application of technology strategy instead of the basic scientific research; secondly, it adopted the strategy of “introducing, digesting, absorbing and improving advanced technology”.²⁴⁶

²⁴² Id.

²⁴³ Haimin Huang, ‘Enlightenment of Japanese Intellectual Property Protection for Chinese Evolution’ (2008) 6 QYJTD

²⁴⁴ Ibid.

²⁴⁵ Zuofu Gan, ‘Status and Development of Intellectual Property in Japan’ (2000) 4 KJYFL 120,122

²⁴⁶ Jianhui Ma and Dongying Ke, ‘Under Knowledge Economy, Japan Intellectual Property Protection and Reference to China’ (2002) 2 XDRBJJ

From 1950 to 1970, Japan imported more than 30,000 advanced technologies through technology licensing transactions, and its imitation and innovation which added up to more than 100,000 pieces.²⁴⁷ While introducing a large number of European and American technologies, Japan was also aware of the importance of innovation and improved and updated what they had learnt continuously. The funding state investment increased annually on the technology transfer and innovation, which greatly promoted the innovative ability. As a result, the Japanese economy revived from the plight since World War II.

Meanwhile, a large number of foreign direct investments led to a overflow of technologies, while Japan protected the domestic enterprises whose ability was not adequate for independent innovation by collecting taxes and other policy strategies.²⁴⁸ Then, the IPR of multinational enterprises in Japan had not been well protected, and that offered convenience for the country as a latecomer to imitate relevant technique. Imitations and improvements in technology were characterised by Japan's IPR development in that period, which was the certain process for the most of latecomers experienced. Such technological imitation can effectively reduce the cost of knowledge. Besides, in the competition against multinational countries, Japanese enterprises can gain more local resources and policy advantages so that they can open the way out of economic development in Japan.

National strategy of technology: In the 1980s and 1990s, after the accumulation of abundant certain technologies, in order to strengthen independent development and researches on the underlying technologies on the basis of technologies introduced, Japan began to focus on the innovation of basic technologies rather than depending on simply copying and imitation. Research funding from the government from 1.532 trillion yen in 1971 soared to 5.8815 trillion yen in 1982, which exceeded Britain, France and the former Federal Republic of Germany, and tightly followed the United States. Huge investment in technology brought the incredible benefits to the Japanese.²⁴⁹ Japan not only got rid of the negative economic growth after World War II, but also started to revive its economy and remained the growth rate at 4%.²⁵⁰

Looking through the evolution of the IPR protection throughout a panel of relatively

²⁴⁷ Ibid.

²⁴⁸ Shuchen Yang, 'Analysis of Japanese Intellectual Property Strategy' (2004) 2 RBWTYJ 7

²⁴⁹ Zuofu Gan, 'Status and Development of Intellectual Property in Japan' (2000) 4 KJYFL 121

²⁵⁰ Ibid.

developed regions with a similar cultural background, no matter it is Taiwan or Japan, in the initial stages of economic development, they all started from the imitation of techniques and the improvement based on that. Comparing with the countries with advanced technologies, there was still a wide distance for them to catch up. During the improvement of their technologies, these countries gradually develop the country by technology in the initial stage, but still heavily relied on developed countries in order to catch up with the technically advanced countries with a combination of imitation and innovation. After completing the technology catching up and jumping into the world's advanced level of technology, the IPR strategy was carried out to protect the innovation technologies from being let out abroad.

In conclusion, in the process of economic development in developed countries, the construction of IPR protection system is taking the country's economic interests to the priority to formulate the strategic IPR protection policies. China should take a different strategy of IPR protection accompanied by different stages of economic development level, and apply a comparatively mild IPR protection in the early stage of economic development. With the improvement of the technical level, the significance of technology trade has risen obviously. While the trend of globalisation is increasingly obvious, IPR protection have been strengthened seriously. Based on the economic and political strength of developed countries, a unified international IPR protection system in favour of economic development of developed countries has been establishing globally. Therefore, China, as one of the biggest developing countries in the world, should formulate and enforce the IPR policies based on its own situation of economic development to, and western countries should review the cases in the past to understand the inevitable difficulties in the process of IPR in developing areas and renew their attitude towards China's IPR protection, thus building up a harmony cooperation and win-win situation.

Chapter Five The New Modern China

1. Developments in Modern China

a. 1978-2001 The Development Stage

Since the Reform and open-up in 1979, with the establishment of the people's congresses and their standing body, the socialist democracy and legal system construction of China

has entered a new stage. China's enormous economic and social progress, to a great extent, is the progress of knowledge. The development of the knowledge and the big adjustment on interests made the intellectual property protection had become a kind of endogenous demand. With the rapid development of domestic economy, culture, science and technology, as well as with the rest of the world economy, culture and the increasing of science and technology exchange, China further accelerated the process of the IPR legislation.

In July 1978, the central made a decision of “China should establish patent system”. According to this decision, the former national science and technology commission began to set up the patent system in China and make the patent law since March 1979. On March 12, 1984, the 4th meeting of the sixth session of the standing committee of the National People's Congress passed the “patent law of the People's Republic of China”. In terms of copyright, on April 12, 1986, the fourth meeting of the sixth session of the National People's Congress (hereinafter referred to as “NPC”) passed the “general principles of the civil law of the People's Republic of China”, which articulated clearly for the first time that “citizens and legal persons shall have copyright, and have signing, publishing, and getting payment rights in accordance with the law”. On September 7, 1990, the 15th meeting of the 7th NPC standing committee passed the “Copyright Law of the People's Republic of China”, which took effect on June 1, 1991.

During this period, a series of laws and regulations was issued and implemented one after one, namely “the detailed rules for the implementation of trademark law”, “the implementation details of the patent law”, “the implementation of the copyright ordinance” and “the recognition and administration of well-known trademarks provisions”, “the computer software protection ordinance”, “the regulations on customs protection of IPR”, “the new plant varieties protection ordinance” and “the layout design of integrated circuit protection ordinance”. In addition, China has attended and joined some international intellectual property organisations (“the Paris Convention”, “the Madrid Agreement” and “the Berne Convention” and “the World Copyright Convention”, “The Protection of Producers of Sound Recordings to Prevent Unauthorised Copying Sound Recordings Convention”, “the Patent Cooperation Treaty” etc.) At this point, the framework of the legal system of IPR in China have been fully established, which formed a complete intellectual property law system suited to China's national conditions and the international rules, established the system that is from central to local, from basic laws, regulations, IPR to the ministries regulations, local laws and regulations and made all kinds of normative documents that involved in all aspects of intellectual property content

and a system of protection of intellectual property law through legislation.

At the same time, the intellectual property administrative and judicial organs in China were also constantly improved, special intellectual property administrative institutions, such as intellectual property and copyright administration, responsible for management and enforcement of IPR, were set up in different levels of government agencies and the trademark was responsible for the management by the state trademark office and local administration for industry and commerce.²⁵¹ The relevant departments of the state council established a cross-sectoral and cross-regional law enforcement mechanism according to their division of functions, jointly investigated counterfeiting of infringement, perfected the customs protection of IPR of central filing system, completely supervised audio and video products wholesale, retail, lease, screening and other market segment, cracked down on piracy audio and video products, increased the supervision in the field of network and information transmission, strengthened the work of the administrative law enforcement organs and judicial organs to protect IPR, punished severely all kinds of infringement of intellectual property and intensified the judicial review of administrative decision of the executive branch.²⁵² All levels of administrative departments and judicial organs coordinated operations and continued to strengthen the protection of IPR, which had effectively guaranteed the stability of the market economic order and created a good legal environment and received effective administrative protection of IPR. The people's court established and perfected the intellectual property cases judicial organisation, improved the system of trial and had the serious enforcement. Intellectual property division was set up in the part of the court, creating a unique Chinese administrative and judicial protection of IPR “double-track” system, implying that intellectual property law enforcement system has been basically established.²⁵³

During this period, China also paid attention to popularise the legal system of IPR and improved the public's awareness of IPR. The consciousness of IPR in the whole society was developing step by step. Each department jointly held blockbuster and various forms of “The protection of intellectual property publicity week” activity all over the country before and after the “World Intellectual Property Day”, every year on April 26 since 2004. The series activities of “the year of intellectual property”, undertaken by the state intellectual property office last year, have achieved fruitful results. The cultural

²⁵¹ Lipu Tian, ‘Conference of IPR, and 30-year Reform and Opening’ (2008)
<<http://www.sipo.gov.cn/ztzl/zxhd/ggkf/>> accessed 25 December 2008

²⁵² Ibid.

²⁵³ Ibid.

philosophy of “Respect knowledge, advocating innovation, good faith compliance” has been widely accepted by the whole society. At the same time, the bureau also implemented a “millions of intellectual property talent project”, held a large number of special training courses on IPR. The whole society formed a good atmosphere of respect for and protection of IPR through the talent team construction, propaganda training, and the popularising law education activities.²⁵⁴ On April 1, 1985, the first day of the implementation of the patent law in China, the original Chinese Patent Office has received 3455 application for a patent from home and abroad, created the world known by the world intellectual property organisation patent new record, being honoured as “created the world patent new record” by the world intellectual property organisation.²⁵⁵ In 1979, China regained the national unified registration of trademarks. There were 26000 applications for trademark registration in China in 1980.²⁵⁶ Trademark registration applications have raised sharply after making trademark law in 1982. China's trademark registration filings reached more than 130,000 a year when it modified the trademark law for the first time in 1993.²⁵⁷

There were more than 270,000 trademark filings in China in 2001 which is the year of the biggest applications since the implementation of the trademark law.²⁵⁸ By the end of 2002, China's cumulative effective registered trademarks have reached more than 1.45 million over the years.²⁵⁹ According to the analysis, the number of annual trademark patent applications in China has become the biggest in the world for three consecutive years from the relevant statistics.²⁶⁰ The amount of the cumulative effective registered trademark in China is among the world top, keeping pace with trademark powers such as Japan and the United States. In 1999, the amount of annual trademark applications has ranked the first in the world for the first with more than 170,000. It is in this year that the amount of the cumulative effective registered trademark in China hit the one-million mark for the first time, up to 1.09 million. In 2000, the amount of the trademark registration applications and effective registrations reached more than 220,000 and nearly 160,000 respectively, both ranked the first in the world for the first time in the history of trademark in China.²⁶¹

²⁵⁴ Ibid.

²⁵⁵ Shoukang Guo, ‘Conference of IPR, and 30-year Reform and Opening’ (2008)
<<http://www.sipo.gov.cn/ztlz/zxhd/ggkf/>> accessed 25 December 2008

²⁵⁶ Ibid.

²⁵⁷ Ibid.

²⁵⁸ Ibid.

²⁵⁹ Ibid.

²⁶⁰ Ibid.

²⁶¹ Ibid.

b. 2001-2008 The International Stage

Before and after China's accession to the WTO in 2001, in order to adapt to the needs of joining the world trade organisation and the construction of the socialist market economy, China carried out the comprehensive modification of existing intellectual property laws, regulations and judicial interpretation and promulgated *The Layout Design of Integrated Circuit Protection Ordinance* and *The Olympic Symbol Protection Ordinance*. Intellectual property laws and regulations in China not only highlighted the intellectual property system promoting the purpose of encouraging independent innovation in terms of the legislative spirit, right content, protection standards, methods and so on, but also implemented *The Agreement on Trade-related IPR* (TRIPs agreement) and other international intellectual property rules.

c. The National Strategic Stage

On April 9th, 2008, Premier Wen Jiabao chaired a state council executive meeting, deliberated and adopted “the national intellectual property strategy compendium” that was issued by the state council after further modification on June 5th, 2008.²⁶² As the programmatic document of implementing national intellectual property strategy, it marks the official start of the implementation of national intellectual property strategy. Its content includes the preface, the guiding ideology and the strategic target, strategic focus, special tasks, strategic measures and so on, a total of 65 items, about 7600 words. “The national intellectual property strategy compendium” deploys the overall mission that carries out the strategy of IPR and identifies seven special tasks and nine aspects of key initiatives, which will speed up the intellectual property legal system construction and improve the protection of IPR, aiming to become the country of high levels with intellectual property creation, utilisation, protection and management.²⁶³

Corresponding to this, various provinces and cities have also established their own intellectual property strategy compendium that is applicable to the jurisdiction. Various industries and regions also develop intellectual property industry strategy and regional strategy. Then, IPR in China has entered a new stage with scientific development and

²⁶² Zhongbing Qian, ‘Premier Wen Jiabao chaired a state council executive meeting, deliberated and adopted “the national intellectual property strategy compendium”’, <http://news.xinhuanet.com/newscenter/2008-04/09/content_7947772.htm> accessed 04 September 2008

²⁶³ Yanchao Yang, ‘The Huge Change of IPR during The 60 anniversary of the founding of the PRC’ <http://www.zhiyiwang.com/news/show_3128.html> accessed 02 October 2009

there was a rapid development of intellectual property application and authorisation in 2008.

2. The Reasons of the Rapid Development

Strong external pressure is an important reason of the establishment of the intellectual property system in China. It greatly influenced and even determined the pattern of growth and development of intellectual property law in a sense. Some scholars thought that the construction of Chinese intellectual property law is the result of foreign political and economic pressure rather than the need of its own IPR protection. The establishment of the intellectual property protection system is passive and utilitarian. The external pressure reflects that the international political, economic and legal the environment was difficult at the beginning of the reform and opening up, there is no alternative but legislation.

There are two factors that cannot be ignored: Firstly, Sino-American trade relations and the protection of IPR. Mr. Li Yufeng had sighed with emotion: since the late Qing dynasty, China's intellectual property legislation has a strong colour of the United States.²⁶⁴ He revealed the truth of matter in a few words that the establishment of the modern Chinese intellectual property had American “shadow” whether it is admitted or not. The United States is the only superpower in the world. When China toddled to the world in 1978, the United States was the “perilous peak” that must be overstepped. Data shows that the import and export trade between the two countries were increasing since China restored economic and trade relations with the United States in 1972. By 1987, the United States has become the second largest export market of China.²⁶⁵

However, there was a wide gap for the comparative advantages of bilateral trade. China's exports to the United States are raw materials and primary products, while what the US exports to China are intellectual property products. From the point of America, the lack of strict protection of IPR is impossible to have normal trade as it can produce serious trade imbalance and cannot really reverse the growing trade difference. Therefore, the protection of IPR becomes the most sensitive problem. The primary factor for the trade is the issue of the protection of IPR. The core issue of communication is IPR.²⁶⁶ In this way, IPR “kidnap” in “chariot” of Sino-American trade relations from the beginning. In 1979,

²⁶⁴ Yufeng Li, *Qiangkouxia De Falv: Zhongguo Banquanshi Yanjiu* (Intellectual Property Publishing House, Beijing 2006)

²⁶⁵ Data from <<http://zhs.mofcom.gov.cn/tongji.shtml>> accessed 22 November 2009

²⁶⁶ Jinzhu Ling, *IPR Factors and Sino-US relations* (Truth and Wisdom Press, Shanghai 2007) 264

“the United States of high energy physics agreement” and “the trade agreement” that signed by America and China include the “IPR protection clause” that was insisted by the USA, asking China to provide the patent, trademark and copyright protection and limitation of unfair competition. Perhaps it is a coincidence of history that China opens an all-round legislation system of IPR after signing this two agreement. Since then, the direct cause of every trade friction of China and the United States seems to have differences on the protection of IPR, but every time the solution of the contradiction is the result of the protection for a consensus based on the protection of IPR.

Secondly, discussing the General Agreement on Tariffs and Trade (GATT) negotiations and joining the World Trade Organisation (WTO). Since 1984 China formally began to apply to resume the contracting party status in GATT and participated in the Uruguay round of multilateral trade negotiations and joined the WTO in 2001. In November 1990, it has reached the agreement on trade-related IPR (TRIPs) in the Uruguay round of multilateral trade negotiations of the general agreement on tariffs and trade. It marks the formation of a new international standard on the protection of intellectual property. The formulation and the content of the rules of the game have been closely related to the negotiation skills of the participants, and Western nations are destined to become the leaders of the rules. The TRIPs that is under the framework of WTO aims to set the international minimum standards of the protection of IPR for each member. Obviously, the low standards which are dominated by the developed countries become the high standards in the developing world. China, eager to blend in the international community, has no more opportunity and room for bargaining. The present situation of the poor is also destined to produce the lack of the ability of the international price. Modern powers all agree with the concept, that is, take it or leave. As the late-comer of the world trading system, China has always played the role of recipient (at best participants).²⁶⁷

Of course, it is not convincing enough if China's IPR legislation is only regarded as the product of external forces of oppression. It at least cannot explain why the IPR legislation was made in such a specific time. In fact, before the reform and opening up, China was facing with the same or even more severe international situation. Why didn't it lead to the emergence of the intellectual property system? The rapid development of China's IPR legislation also has profound internal factors. There was strong internal motivation to push the process. Firstly, it was very urgent to attach the importance to the knowledge that was included in the agenda of the party and the country. The development of productivity,

²⁶⁷ Handong Wu, 'History Thought about the Chinese Copyright Law Concept' (2009) 1 CL 51,68

invigorating and opening to the outside world were the problems China urgently needed to solve after the catastrophe of a “cultural revolution” and were the long-term goals of the development of China. In 1978, when the third plenary session of the eleventh decided that the party's work centre of gravity should shift to the socialist modernisation construction, the status of intellectuals was to be sure and “respect knowledge, respect talent” became the theme of party policy on intellectuals, because the primary task is to develop science and technology in order to rapidly increase productivity.²⁶⁸ Science and technology began to be regarded as the first productive force. Obviously, “evenly” approach in the past is difficult to form effective incentive, how to motivate people involved in the creation of knowledge, efficiently produce knowledge and protect the knowledge fairly were the problems in a system that must be solved. Secondly, a feasible method was to introduce the foreign advanced technology in the situation that China's own knowledge creation was difficult to meet the needs of economic and social development. At the beginning of the reform and opening up, China has the early implementation of the technology capitalisation, technology licensing, and technology for market and so on. However, it necessarily involved IPR, transnational investment, and the introduction of technology, or the purchase of complete sets of equipment. How to become credible? It depends on legislation. In a sense, symbol meaning of legislation of intellectual property is far greater than its actual meaning under the social reality that property rights consciousness is not strong and the law enforcement is lax.²⁶⁹ It showed China's treatment of IPR in open position to the world. This is very important to China who just go to the international community. For foreign investors, compared with the formal document and administrative means, law at least provides a predictable and transparent framework for cooperation. Thirdly, the movement of reform and opening up reflected the legislative trend. In dealing with the relations between legislation and reform and opening up, China adopted a strategy of advanced legislation and used legislation to guide it. The law is the product of social practice. The advanced legislation will deviate from the social reality. However, there is a string degree of convergence in the practice of different countries, especially in the field of IPR. Reform and opening up is not an effort in a specific point of time, but a feat of long-term struggle. Even if the system shows inadaptability with real life in the timing of the launch, however, the social evolution trend will always present a consistency with the rest of the world total of system over time.

²⁶⁸ Xiaoping Deng, ‘Respect Knowledge, Respect Talent’ from *Deng Xiaoping Anthology* (People Press, Beijing 1994) 40,41

²⁶⁹ Ting Xu, *Discussion about the Private Relief* (China University of Political Science and Law Press, Beijing 2005) 246,251

3. IPR Protection and Economic Development

It is a “double-edged sword” to have the high standard legislation which is dominated by the government in compulsory vicissitude way. It is likely to face different system cost regardless of the implementation methods. On the one hand, a country's priority is to spread and apply knowledge with low cost in the early stages of the economic and social development. And a certain scope and degree of wide standard and weak protection is conducive to satisfy this requirement. As a developing country, China would pay a big cost of law enforcement in the early stage of economic development, if it really had strict enforcement of these high standards of legislation, which may not really suit the reality of domestic economic and social development demands. On the other hand, that China adopts the system of high standards of protection of IPR are not just a written declaration of policy. It has to be a real practice. It can bring the benefits superficially if it allows too loose enforcement or even no law to abide by, but it will shake the legal foundation and defeat the confidence of the international community. Society will pay a huge cost. The key problem for China's IPR institutional change is as following. It must resolve the system of the high cost that was brought by the protection of high standards and relieve the cost of spreading and using of knowledge. At the same time, it must achieve certain coordination in the strict and easy implementation, adapt to reduce the cost in line with international standards and inhibit all sorts of drawbacks that are brought by the phenomenon of on law to abide by.

From the history of China's IPR protection, to ease efforts of the cost of high-standard legislation system mainly embodies in two aspects. One is the support of the government, and the other is the laxity of the law.

The government's support. Almost in all the countries, the development of IPR is inseparable from the certain scope and degree of government support, especially for the developing countries.²⁷⁰ At the beginning of the reform and opening up, the growing Chinese enterprises appeared insufficient strength when competing with foreign enterprises with the advantage of IPR. It was hard to participate in international competition with no government support for IPR. It was very practical to foster knowledge products with the use of government resources in the case of congenital deficiency. In this regard, the measures and methods in China is various, such as fiscal

²⁷⁰ Handong Wu, ‘History Thought about the Chinese Copyright Law Concept’ (2009) 1 CL 51,68

support, tax, credit, financing support, the convenience of government procurement, market access, and brand selection, qualification, and the system of unchecking. In addition, simplifying administrative procedures, giving priority and preferential for superior evaluation, technology development, energy supply, transportation and so on, supporting to set up enterprise group, first listing the “fraud” and “protection enterprise” and giving a priority for marketing campaign arrangement, etc.

However, government intervention always has a boundary. China must maintain sufficient vigilance that a government support covering a wide range without control and intervention measures can also bring new system costs when China's government support for IPR offsets the high cost of intellectual property and benefits for the enterprise. The most typical example is. China has the widespread activity of “select the most outstanding and build the band” dominated by the government. No restraint of all kinds of assessment and selection activities actually is a government monopoly in the market “reputation”. This will cause unfair competition and “rent-seeking” behaviour. In this process, some support provided by the government behaviour has brought many social problems and caused a great social crisis. For example, for the selection methods and certification system of “Chinese famous brand products”, it overemphasised government objective voice on the quality of our products, which led to a serious lack of consumers and ignore the value of reputation. As a result, the enterprises turn to the “mayor” instead of the “market”, which is not responsible for consumers.²⁷¹ The implementation of the “the system of unchecking” led to some companies ignore the quality of the products and induced a similar “Sanlu milk powder” event.²⁷² More far-reaching harm was that “intellectual property” of the enterprise was marked by deep administrative birthmark, which lost the necessary independence and self-sufficiency and evolved into the “concession” controlled by a kind of administrative authority. For example, in some places, there were very tough conditions for the protection of famous trademarks, brand-name products deadline, geographical scope and transfer. This is actually setting restrict for the reputation of the brand expansion in terms of time, space and property rights assignment, which was contrary to the laws of property rights and market intention. For instance, “the interim measures for the recognition and protection of well-known trademarks in the Beihai” would stipulate “Beihai well-known trademark registrant transfers its registered trademark in accordance with the law”, resulting in the loss of

²⁷¹ Xiaorao Xie, ‘Chinese Famous Brand: Thought of Goodwill Contract’ 4 HFPL 1

²⁷² In 2008, milk products manufactured by Sanlu Company in China were found added melamine and poisoned tens of thousands of infants.

qualification on its own for the people who own the trademark but do not live in Beihai.²⁷³

This is a long-term and difficult subject that has been a taboo. In China, strict and high standards of IPR protection eased the operation cost of the system by the low-level implementation over a period of time. The calculation results of the intensity of the protection of IPR over the 20 years (1985-2004) show that there was a huge gap between the strength of Chinese intellectual property legislation and that of its enforcement. The legislation intensity was close to that of the western developed countries, while the intensity of law enforcement was not enough. To 2004, the strength of China's intellectual property protection legislation was up to 3.857, but the intensity of law enforcement was only 0.657 at the same time, meaning that it was two-thirds of execution in a high level of intellectual property legislation strength, the equivalent of level of Canada in 1990, which was far lower than that of the U.S.²⁷⁴

In general, if there was a high probability of investigation of IPR infringement, even lower compensation of actual damages would be enough to effectively curb illegal activities. And when the investigation was not enough, taking a stricter responsibility or even the punitive damages is enough to overcome "performance of the error caused by the lack of responsibility." The main reason why China is in a low level of enforcement is that its investigation probability and punishment for violations of the law responsibility are low at the same time.

The discovery of the infringing acts. It is generally believed that IPR of illegal acts and the speed of the development of IPR have a certain positive correlation, presenting the growth of some kind of correlation. However, in China, there was a great dissonance for the number of IPR violations and the speed for the development of IPR with unbecoming development curve. Taking the patent for example, from 1998 to 2007, the number of patent awarded jumped from 67,889 to 351,782, over 5 times in 10 years, and licensing curve presented an accelerated rise development momentum. However, compared with the rapid growth of patent grant amount, patent law enforcement quantity curve was almost a smooth straight line, the minimum was only 1,726 in 2007 and the maximum was only 3,901 in 2005.²⁷⁵ Each level of administrative law enforcement organs dealt with less than 9 cases per year on average, with the largest annual amount of law enforcement -

²⁷³ Xiaorao Xie, 'Chinese Famous Brand: Thought of Goodwill Contract' 4 HFPL 1

²⁷⁴ Yinbi Tang and Mei Yong, *History Research* (Shanghai People Press, Shanghai 1997) 174

²⁷⁵ See China Statistical Yearbook 2008

13.6 cases and the least- 6 cases.²⁷⁶ Compared with the development speed and scale of IPR, the probability of illegal act prosecution and investigation was strikingly low. The amount of trademark and trademark law enforcement case number also presented the same but not harmonious situation. Not only the cases of the administrative law enforcement, but also the intellectual property civil litigation cases became less as a whole. From 1985 to the end of September in 2008, the district court had dealt with and concluded the first instance of IPR in civil cases was only 135,475 and 124,851 respectively.²⁷⁷ During this period, from 2001 to 2007, all the district courts in China had dealt and concluded the first instance of IPR in civil cases has accounted for 77,463 and 74,200 each. From 1985 to 2000, district courts dealt and concluded the first instance of IPR in civil cases was only 58012 and 50651 respectively for the 16 years, handling and concluding the cases per year on average for only 3, 625 and 3,165.²⁷⁸

The strength of the punishment upon infringements. When the investigation probability of illegal acts was low, relatively strict accountability measures should be taken to curb illegal behaviour. However, overall, the liability of IPR infringement in China was not clear. Taking the case of the punishment for the trademark in the administrative law enforcement for example, the amount of the fines for illegal behaviour was obviously low. Even by the 1998-2007, the highest average penalty of single administrative case in China was no more than 10,000 RMB.²⁷⁹ The number of confiscated trademarks was surprisingly low, only about 600 trademarks for each case were seized averagely in some years. Too light punishment means that the cost of offender's illegal behaviour is low. When violations are profitable, it actually provides an incentive for illegal activities.²⁸⁰

Taking the amount of civil compensation as an example, China takes full compensation rules in terms of inapplicable punitive damages for IPR infringement. In terms of the actual damage of the holder or the calculation of fraudulent gains that offender gains, it involves quote difficulty in practice for these two calculation methods. The current laws in China all stipulate the statutory compensation, which “the copyright law” and “trademark law” stipulates was within 500,000, except that set by the new revision of the

²⁷⁶ Ibid.

²⁷⁷ Supreme People's Court, ‘Guan Yu Quan Guo Bu Fen Fa Yuan Zhi Shi Chan Quan Shen Pan Gong Zuo Zuo Tan Hui Ji Yao’ < http://www.court.gov.cn/zscq/sfzc/201304/t20130426_183679.html> accessed 20 July 1998

²⁷⁸ Ibid.

²⁷⁹ Xiaorao Xie and Xiankai Chen, ‘Knowledge Property Revolution-“Chinese Miracle” of Intellectual Property Legislation’ (2010) 3 FXPL 37,48

²⁸⁰ Ibid.

“patent law” in 2008, below 1 million. In fact, the compensation in judicature in China in the past was between 5000 RMB and 300,000 RMB.²⁸¹ Specific to the application of the cases, China was still in lack of the authority of justice statistics. According to statistics of superior people's court, the province accepted 1,694 intellectual property cases in 2008 and the average compensation was 183,600 RMB.²⁸²

According to the report of “Chinese intellectual property protection: the trend of lawsuit and economic compensation” which was released by the world famous NERA Economic consulting firm, the compensation amount of the loss of indemnity of IPR set by China's judicial decision was very low compared with the United States and the loss caused by the infringement, despite the number of China's IPR maintained growing while the average amount that should be paid did not increase. From 2006 to 2007, the median value of all loss compensation for China's intellectual property was about \$15,000. The median value of the amount of compensation for damages was about 15% of that the holders applied for. The median of patent, copyright and trademark infringement compensation were \$18,109 and \$34,722 and \$18,488 respectively, although the growth of the trend of intellectual property compensation was obvious, the damages were still very low.²⁸³

For 30 years, China's law enforcement appears to have been in contradiction of the “cracks”. In order to decrease the cost of the intellectual property system, high standard legislation must be with the help of the implementation of the low level. Then, it seems to be difficult to find a more effective mechanism for cost allocation. However, too lax law enforcement will make return to the years of lawless, leading to the destruction of a society of legal value and influencing the health of its market environment. This might perhaps destine that the critical point of the law implementation is that it not only can help to offset utilisation cost under the system of knowledge of high protection, but also is unshakable for the legal basis. That might explain that why IPR in China has not yet formed the “discipline” of normalised law enforcement. A large part of law enforcement is “law enforcement in holiday”, “law enforcement because of disaster” and “surprising law enforcement”, often in the form of “special operation” and “centralised management”. Many intellectual property enforcement activities are due to the need of diplomacy. For example, there was half-year special law enforcement against infringement activities carried out on January 1, 1995. Closing half of existing optical disc factories in 1996 and

²⁸¹ Ibid.

²⁸² See ‘Zhe Jiang Zhi Chan Shen Pan Gong Zuo Hui Shou Yao Jing Nei Wai Mei Ti Lie Xi’ *People’s Court Newspaper* (Beijing, 16 April 2009)

²⁸³ See Sepetys K, Cox A. ‘Intellectual property rights protection in China: Trends in litigation and economic damages’ (2009) NERA Economic Consulting

conducting positive investigation of law enforcement for the remaining 15 factories are the positive attitude of China showed for the United States during the period in negotiations with the United States. China's intellectual property management departments, customs, industry and Commerce Department usually carry out the clean-up activities in a large scale before China's President, secretary of state, or some minister coming to China or some major agreement to negotiate or sign. The process of pirated discs sent to destroy by bulldozers could be often seen in TV. This is a very interesting phenomenon. The profound social background of these abnormal and selective law enforcement are that on the one hand, it should fit in the development of the enterprise, the local government level of realistic need of protection for IPR and the legal system must be maintained at least on the other hand.

If the intellectual property system cannot become the intrinsic need of the society and gain the survival and development of their own power, it will not be able to survive in China. Regardless of government support and the easing of the law, it can only reduce the operation cost of the system to some extent, but cannot solve the problem of high standard legislation to sustain social foundation. One side of China's miracle is the high level of protection in regulation, and the real miracle or the revolutionary progress is that the intellectual property system that began in the west and eventually deepened plunge into China's soil and became the spontaneous selection in China's society, and got the motive power of independent development.

4. The problem that need to be solved

a. Weak Awareness of IPR

Overall, China's copyright protection started late, yet achieved big achievements. However, the fact should be faced is that there are a lot of problems on promoting the innovation, use, management and protection of the copyright due to the late start and short history. Some problems are outstanding. In terms of the lack of innovation, excellent and original works cannot adapt to the needs of the development and prosperity of culture. Compared with its innovation and use, copyright protection is a more prominent problem. The legal rights and interests of the oblige cannot get effective maintenance. Books, audio, software, network development is restricted by piracy. And there are some problems that have been clearly stated in regulations, but the speed of the solution is

relatively slow, or even they have not yet been solved. The Awareness of IPR is still weak. For example, the concept of proprietary IPR is still vague. All the non-IPR is regarded as the IPR. A feature of the proprietary IPR is “exclusive” or “monopolistic”. The proprietary IPR that the media, officials and experts claim now have no proprietary IPR in essence. Take CHR (the high-speed wheel/rail that has been operated in Guangdong, Shanghai and Hangzhou) for example, CRH production technology did not involve only one IPR, but many. If its core technology is China’s intellectual property, it has the right to forbid Japan to produce in accordance with the principle of exclusive and monopoly. China can go to other countries to sell its high-speed wheel/rail technology. Now the truth is that not only can Japan use this technology in its own country, but it can go to the countries all over the world to sell them the high speed wheel/rail technology and products. If China wants to build CRH high-speed wheel/rail, it needs Japan’s agreement. Money should be given to Japan if China wants to build CRH high-speed wheel/rail, but the media shows that” the CRH trains in China with proprietary IPR are the road”²⁸⁴The national consciousness of IPR in China is also still indifference. Take a famous Chinese writer infringement case for example.²⁸⁵ The parties concerned are the famous writer Feng Jikai, and famous photographer, Li Zhensheng. *10 Years of the 100 People* (referred to as the “ten years”) that was written by Mr. Feng Jikai, which the author called “memory of the past and inspire the future”, recording and displaying the shocking and sobering past events in the “cultural revolution” decade. At the beginning of the published, it has been translated into many words and produced widespread influence at home and abroad. “Let the History Tell the Future-A Memoir in the Crazy Years” is a set of the “cultural revolution” historical photos that reflect many facts. The author Li Zhensheng recorded and saved the precious historical scenes in the high risk period. The book “10 years” written by Feng Jikai in 1991 that was published by Jiangsu literature and art publishing house, pirating 4 “cultural revolution” photography that were taken by Li Zhensheng. On 4th November, 1993, Li Zhensheng formally submitted a civil action to Nanjing intermediate people's court, listed Jiangsu literature and art publishing house and Feng Jikai as co-defendant for photography copyright infringement.

The plaintiff Li Zhensheng said in the complaint: The defendant Jiangsu literature and art publishing house in July 1991 published “ten years” of “cultural revolution” documentary literature written by the defendant Feng Jikai. The defendant, Jiangsu literature and art

²⁸⁴ See Chinese Technology Industry vol.3, <<http://www.cqvip.com/QK/95140X/200703/>> accessed 15 March 2007

²⁸⁵ Yilin Chen, <http://old.chinacourt.org/public/detail.php?id=145089> Chinese Court, all the materials about this case is base on this report.

publishing house, took measures of duplicating and copying and piracy by unfair means, duplicating and copying photography, which was in “China photography for forty years” in the large album, has the author’s signature and declared “all rights reserved, reprint any will investigate”, into the photos without the author’s permission. It chose some pictures for the book as inset published after the examination of the defendant, Feng Jicai, including the high value of four award-winning photographic works of plaintiff and having a picture used twice on the front page of foldout and at the end of the page for the use of large-span page. The book was printed for the first time in July 1991 and reprinted for the second time in December of the same year, and the infringement act was taken even in the third printing, and it did not pay to the plaintiff according to stipulations of remuneration. In the indictment, Li Zhensheng asked for an immediate stop of the infringement, regain of work properties of the plaintiff, and compensation related economic losses.

On the afternoon of November 19, Feng Jicai accepted a telephone interview of the editorial department of photography in Chengdu, Sichuan province. He took “Tree No” attitude, namely, no reply, no concern and no word about the event that Li Zhensheng sued him. He said, “I’m just a literary author and I publish literature. It has nothing to do with me as for the press in love with the picture in the book, what cover design, its photo authorship, and the paid has given or not. I don’t have too much to ask. For the event that Li Zhensheng sued me, I won’t reply, or care or talk about it.”

Next, he said bluntly, “Chinese people in the past were not used to bring a lawsuit against someone. Now, more and more people tend to file a suit, and many people have sued me. They just want to become famous and get some money, something like that. I have nothing to say about them. It’s so flattering for them. Personally, I think Li Zhensheng’s photos are good. He has the right to sue me. I don’t mind it.”

On March 1, 1995, it has made the first-instance judgment for the case that has clear fact. One of the defendants, Jiangsu literature and art publishing house, constituted infringement and was sentenced to lose. Feng Jicai, as text writer, had no statutory audit obligations for the press on the legal use of illustrations. It did not constitute to copyright violations for Li Zhensheng.

Although the plaintiff won the case and got economic compensation, Li Zhensheng was not happy. He was very shocked, resentful and confused. Why Feng Jicai was was judged to be “irrelevant” for his apparent infringement. Surprisingly, ten years later, the same

photographer works infringement happened for the same writer of the same book. Infringement to Li Zhensheng happened again, and Feng Jicai became the defendant. In July 2003, the Era of literature and art publishing house was made by authorisation of Feng Jicai, published the decade of one hundred people (illustrated) (referred to as the “ten years (illustrated)”) that was edited by the Spring of Beijing Cowboy culture company. It used pirated “cultural revolution” photos that were published and signed by Li Zhensheng without the author's permission, nor the author's name in advance. It also did not indicate the source, and pay the remuneration in accordance with the regulations. Feng Jicai didn't admit anything for infringement listed by the plaintiff, Li Zhensheng. As he puts it: “Whether *Ten Years* involved in any infringement has nothing to do with me. Ten years ago I had no infringement, and it is still the same for me this time.”

The plaintiff said in the court mediation, “In fact, Feng Jicai constitutes infringement. He should have the courage to assume corresponding civil liabilities according to law. It is not a big thing. As long as he says, ‘sorry, because of the lack of my legal consciousness of infringement, I used your photo.’ I will withdraw a lawsuit.” Although the plaintiff clearly accounted for a reason, he backed down in court. The case can be settled if Feng Jicai agreed his fault. If the lawyer of Feng Jicai could conveniently grasp this opportunity, and promised, “I will convey the meaning of plaintiff to Mr. Feng.” There might be some changes. Unfortunately, the lawyer's answer was very tough: “Feng has nothing to do with this case. There is no mediation.” At last, the court gave a fair judgment. The activity of Li Zhensheng's safeguard on legal rights won. Feng Jicai shall jointly bear civil liability with the Time literature and art publishing house and the Shepherd Boy Spring Company.

There is an international example. On January 20, 2008, the fifth edition of *The Reference News* published a report with the headline: “America copied the Olympic Games bicycle motocross cross-country race track The passage said, “The cycling federation and the United States Olympic committee cooperated to build the bicycle motocross cross-country race track which is same with that of Beijing Olympic Games. The circuit training has started this week.”²⁸⁶

It must be the world's dream for every good athlete to get a great achievement in the 2008 Beijing Olympic Games hold every four years, but such an ideal can never rely on infringement of China's IPR. As a new project of the Olympic Games, Bicycle Motocross

²⁸⁶ See more --, ‘Who is infringing China's IPR’(2008)02 Gonghui Bolan.

cross-country track is built with different design in different hosts. It is similar to types of the 400 meters and is different with 50-meter pool and belongs to the legal sense of the specific content. Obviously, the familiar degree directly affects the level of athletes. According to the report, “the track of every detail is exactly the same with Beijing track.” That's because the two circuits are built by the same designer, Tom Ritzenthaler, the world's most famous circuit designer. The track built in Beijing is designed by him and the track of the United States is a replica of the track in Beijing.

What should be considered here is whether there were regulations stipulating the design of the circuit in Beijing belongs to China when China Olympics Committee signed the contract in Beijing with the famous designer in the design? If there is no such clear rule, it is China's own problem. If there is the regulation about this issue, it should have immediately strong protest and representations with America to remove the BMX cross-country race track immediately, near the Mexican border a few miles South of San Diego Olympic training centre. If the international community and legal profession have no clear and unified awareness about the problem, but it should also determine a typical case from the Chinese lessons to solve such cases in the future.

b. The Shortcomings of the “Double-track System”

Chinese intellectual property laws stipulate that the IPR protection should be under that “double-track system.” The so called “double-track system” of Intellectual Property Protection refers to the two ways of existence of public administration and judicial protection remedy of intellectual property at the mean time. For the protection of intellectual property, it can either take judicial remedy measures as the common civil rights, or it can be protected by administrative management. There is no mandatory requirement of which way should be taken and it is decided by preference of client.²⁸⁷

Considering the national situation, it is reasonable and necessary for China to conduct a “double-track system” strategy with judicial and administrative protection on intellectual property rights. As for the “double-track system” protection of intellectual property, what has caught more controversial arguments is that China has made the choice of the mode to apply by the administrative protection of IPR from the beginning of the intellectual property protection system established.²⁸⁸ Why is administrative protection chosen? What is the reason for the existence of administrative protection? What are the advantages of

²⁸⁷ Yue Chen, ‘China’s “Double-track System” in Patent Protection’ (2012) 6 CFXYXB

²⁸⁸ Ibid.

the administrative protection and judicial protection?

The mode of administrative protection of IPR was established in the early stage of Chinese reform and opening up as a solution to the disputes and settlements, due to the lack of judicial protection of IPR.²⁸⁹ At this stage, with the fast development of Chinese market economy, the function of administrative protection has been gradually declining. However, considering China's market economy is still in the primary stage of development, market structure with unified and orderly competition did not completely form. Laws and legislations are not sound and the infringement of IPR still exists.²⁹⁰ Besides, right owners' consciousness is still relatively weak. Reserving the administrative protection of IPR is of important meaning to stopping IPR infringement, maintaining the legitimate rights and interests of the right owners and the third person, and therefore can ensure a fair and stable market competition environment. With the improvement of the IPR system and judicial adjudication in China, infringement disputes should be resolved through legal ways,²⁹¹ which is conducive to the rational allocation of social resources in line with the target of China's legal construction.²⁹² However, the administrative protection of IPR also has incomparable advantages compared with justice protection.

Firstly, the administrative procedures provide simpler and quicker conditions to deal with infringement disputes than judicial procedures. Since the IPR have a certain time limit, resolving the dispute in time is more conducive to its protection. Secondly, compared with the IPR judicial remedies, administrative remedies spend a relatively shorter period and the costs associated is also lower.²⁹³ Thirdly, the confidentiality. Judicial protection must come with hearing in the public. Even it is not a public trial, it also required the public sentencing. The administrative protection of trade secrets or in other IPR sectors is more rigorous. Fourth, the staffs in administrative institutions are relatively more specialised in dealing with disputes, with providing professional advice and support. However, in most conditions, the court faces difficulties to settle down the dispute due to the lack of relevant experts.

From the prospect of the Chinese historical tradition in resolving disputes, it has been accustomed to reach adjudication by the Chief Executive in taking place of justice. In

²⁸⁹ Dong Chen, 'The Administration Protection of IPR' (2011) 15 CQKJXB

²⁹⁰ Ibid.

²⁹¹ See Jiali Xu, 'Problems in China's Current IPR Protection and Suggestions' (2006) 3 FLSY

²⁹² Yuelin Xu, *The Explanation for the Trademark Law of PRC* (China Law Press 2002) 175

²⁹³ See Feng Liu, 'The Legitimacy of the "double-track system" in China's IPR protection' (2008) 2 IPRS

views ordinary citizens, it is acceptable to follow the decision made by executive authority to resolve disputes and this recognition will exist in a given period in citizens' minds according to current situation. At present, the administrative protection continues to play a leading role in China's IPR system. The reason lies not only in the executive power which has the initiative to investigate officially, but also in the jurisdiction which has its passivity of "taking ignorance unless it is prosecuted". Actually, the deeper reason is that IPR owners trend to be more dependent on the executive protection mode. They are more willing to go to the administrative authorities for carrying out a legal rights protection instead of turning to the court to prosecute legitimate rights protection. With the constant improvement of China's IPR legal system, more problems appear in Chinese "double-track system" of IPR protection.

"Double-track system" wastes public resources.

The IPR cases, such as civil disputes, should be started by the parties who was also responsible for the cost. The administrative departments should not take active interventions, rather than using tax to deal with private right disputes. Judicial departments, as the specific departments for civil disputes, should adopt judicial means to protect IPR, which is a worldwide common sense. For these same characters of disputes established on parallel co-existed law enforcement system, it is not only a waste of public resources, but also raise the discriminations between administrative and judiciary departments, which made it more complicated to handle the corresponding dispute settlement procedures.

Convergence issues of IPR "double-track system"

First of all, one thing is certain that the protection system conducting "two parallel ways" of the administrative and judicial protection is accepted by TRIPS agreement.²⁹⁴ However, in practice, there is a problem of convergence in administrative enforcement and judicial protection. For example, the procedure is usually taken by administrative enforcement first, and then comes to judicial departments if the case involves criminal punishment.²⁹⁵ However, in some situations, the judicial departments could not get the proper information because they did not participate in the case previously.²⁹⁶

²⁹⁴ See Shasha Qu, 'Conflicts in the "double-track" system in IPR protection' (2010) 8 KJDK

²⁹⁵ See Jiali Xu, 'Problems in China's Current IPR Protection and Suggestions' (2006) 3 FLSY

²⁹⁶ Ibid.

Furthermore, from the perspective of IPR judicial system, since courts with different nature deal with administrative, criminal and civil cases regarding IPR, the dispersion of trials cannot be effectively integrated forced. It is also prone to gain a different understanding or application of the law.²⁹⁷ The separating criminal and civil courts is not conducive to the legal proceeding and will lead to difficulties in conducting the civil compensation. It is almost impossible to compensate the victim's civil damages by fine according to the legal spirit.²⁹⁸

The suggestions for the improvement of IPR “double-track” system

i). Establishing a unified Administrative Agencies of IPR

Through observing the IPR protection system in developed countries, most of which have an independent and unified Patent and Trademark Office or Industrial Intellectual Property Office. Today, the centralised administration of IPR has become the common mode of intellectual property management throughout the world. It has been a trend of international intellectual property management that more and more countries merge the copyright into the same management department of the state administration.

What China is facing to is the complicated subordination of intellectual property administrative departments with their separate distribution of copyrights, patents, trademarks. The national copyright administrative departments belong to the General Administration of Press and Publication. The state patent administrative departments belong to the State Intellectual Property Office. The state trademark administrative departments belong to the State Administration for Industry and Commerce. In addition, the National Defence Patent Office, the General Administration of Customs, the Ministry of Culture, Administration of Quality Supervision, Ministry of Science and other departments take the corresponding responsibilities of IPR management.²⁹⁹

Meanwhile, the confusion in many aspects in the function of administrative departments, institutional settings and nature of the institutions still exist in China. After the State Council meeting of the Intellectual Property Office in 1998, the functions of the Office have been assigned into the State Intellectual Property Office (SIPO). However, the SIPO cannot coordinate all the functions of foreign affairs of IPR required. This situation

²⁹⁷ See Qiang Niu, 'Difficulties in IPR Protection and Related Ideas' (2009) 5 BFL

²⁹⁸ Ibid.

²⁹⁹ See Jianwen Liu, *Research of the IPR Protection System in China* (People's Press, Beijing 2002)

reduces the efficiency and authority of the IPR executive management, which in turn weakens the intensity and standard of IPR. Therefore, China needs to promote the reformation of IPR state administration organ. To establish a unified administration of IPR organs to central and local government at all levels, it will integrate IPR management functions which integrate patents, trademarks, copyrights, new varieties, geographical indications and other functions of the IPR management organs together. To provide the IPR administrative system centralised unification, clear responsibilities, overall coordination, smooth implementation are necessarily required to improve IPR administrative efficiency.³⁰⁰

The establishment of a unified IPR administrative organ, on one hand, is conducive in the integration of IPR management functions. It can make full use of advantages of management, coordination and improve the macroeconomic management of IPR.

On the other hand, it helps to strengthen the IPR administrative protection, which can effectively reduce the number of administrative enforcement subject, clarify the function of administrative law enforcement subject, unify as well as integrate the law enforcement resources, and greatly strengthen the coordination and cooperation with relevant departments. Thereby, it will improve the IPR administrative system, protect the legitimate rights of the parties effectively and raise the level of IPR protection.

ii). Considering to establish the Court of Appeal to integrate resources of IPR “double-track system”

If China needs to preserve the “double-track system”, besides basing on national conditions and experience learned from developed countries, China should also focus on the part of the existing system improvements to meet the needs of China's IPR cases at this primary stage.

China may try to establish a specialised IPR Court of Appeal as the subject of unified jurisdiction to the protection of IPR “double-track system” in order to solve the conflicts. Some judges with expertise in IPR field should be hired in the Court of Appeal to deal with the complex cases in an easier, faster and more rational way. The IPR Court of Appeal, despite of the nature of the cases, can decide the accountability for violations in civil, administrative and even the criminal responsibilities to save judicial resources and protect the interests of parties' rights. Most importantly, the Court of Appeal can achieve

³⁰⁰ See Wenjuan Du, *IPR Protection System* (Press Beijing Univ. Tech., Beijing 2003)

the uniqueness of the results, and provide an independent legal privilege of IPR in respect of personnel, budget, etc. Along with running the administrative protection role at the utmost advantages, it can also release the conflicts occurred on the IPR judicial protection and administrative protection to some extent, thus avoiding circulated trials and saving legal resources. The disputes can also be solved as soon as possible at the mean time. Therefore, maintaining social stability is conducive to the stability of the law.

iii). Promotion of the convergence of administrative law enforcement and judicial

In the implementation of the administrative and judicial protection of the IPR “double-track system” process, the obvious problems still exist. For example, in the practice of IPR protection, because of the local protection and department interests. Between the administrative and judicial enforcement, there were situations of cases not being transferred in time or not transferred at all, or even replace the criminal punishment with fine, which means a number of cases failed to be transferred to the judicial departments.

To strengthen the connection between the administrative and judicial protection, many strategies can be adopted. First of all, the government should improve the legislation and mechanism. A relatively realistic method is to revise documents by the Supreme People’s Procuratorate, clarifying the respective responsibilities of the administrative and judicial departments to ensure the cooperation and constrain between each other. Secondly, the national governments should enhance their capacity of managing and protecting IPR. The administrative and judicial departments should set up a mechanism for a better information communication and a compulsive handing over of criminal cases regarding IPR, thus improving the work efficiency. For example, the government may make full use of high-tech means to establish and promote the mechanism of “linking online, sharing information”. Create a sharing information platform of administrative enforcement and criminal justice. Switch the mode that case affirmation is entirely through the regular interface used in the past between departments. Once the sharing information platform established, the system can automatically transfer if it needs to go through the executive and the prosecution procedure. Through information sharing on this platform, the system will push law enforcement authorities to promptly transfer the relevant cases such as criminal cases related to IPR. Therefore, the enforcement can be open and transparent. These strategies are serving as important means to promote the effective convergence. The IPR administrative departments must review and accept the supervision of the judicial departments. Meanwhile, the functions of the administrative and judicial departments are separately responsible for their obligations which cannot be replaced by

each other. Only by firmly establishing the effective and exercisable coordination mechanisms to improve the IPR enforcement, can the convergence of administrative law enforcement and criminal justice achieve completely. The power of mechanism that integrated by administrative enforcement and criminal justice can unify together to make the IPR enforcement well protected.

c. The Lack of Professional Talents

At present, the intelligence of China's IPR is extremely scarce. There are still many problems existing in IPR talent development scheme, which has drawn the attention of the relevant departments.

i). The current problems of IPR talent training mechanism in China

The low status of IPR discipline

At present, the position of IPR as a discipline in China is relatively low in the field of law. And the demand for IPR talent is not only limited to legal talents, but it also requires a lot of IPR management and service personnel. It is not only for the intellectual theory personnel, but also for IPR practice personnel, such as IPR agents, appraisers, etc. For companies, the “Generalists” calls for talents who can both understand the law and master the management skills of IPR as their major demand. In any case, it cannot be covered and resolved “Intellectual Property Law” with the low-level discipline.³⁰¹

The incapability to integrate the IPR human resources to provide the platform for education

Currently, China’s IPR mechanism fails to integrate the human resources to foster the IPR talent, neither within the university nor society. Firstly, inside the university, almost all the universities have teaching staffs in science, engineering, economics, management, law and other disciplines. However, due to the separation of education and teaching institutions in the universities, institutions in the college is a relatively independent benefit unit in teaching and researching.

The Intellectual Property Academy of Law, which is responsible for training intellectual

³⁰¹ Yonghe Yan, ‘Problems in IPR Professionals Cultivation in China’ (2008) 12 DIPR 43

talents, has no right to dominate other college faculty. From the social perspective, the training of IPR talents needs to make joint efforts with both academic teachers and practitioners in society.³⁰² According to current situation in China, the reason of the mentioned problem lies the IPR theory experts are unlike to take up the intellectual property practice, vice versa. The intellectual property practice specialists do little or less theoretical research in the IPR field. Nowadays, most of the colleges hire lawyers, patent agents, trademark agents, staffs from the administration departments in the governments as part-time teacher to train IPR talents. But these part-time teachers do not undertake substantial tasks related to academic teaching.

The existed IPR training mechanism has not fully played its role in the mechanism of undergraduate education.

The relevant IPR Institutes, such as law institutes, the Intellectual Property Academy, College of Science, related Engineering, Economics, Management, and other IPR related institutes, failed to fully cooperate in cultivating undergraduates into high level IPR talents.

Most of the current undergraduate education in IPR in the university in China affiliates legal professions and issues the diploma as well. In the master education system, many master's degrees fail to cooperate with each other such as MA in law, engineering-related master's degree, master's degree in related management, master's degree in related economics. These master degrees do not jointly cultivate the IPR specialised masters with both well performed in science & engineering and intellectual property law. Thus few graduates are found fully capable of understanding economics, management and meanwhile being the master of Intellectual Property Law.

In the education of doctor's degree, there is a similar situation in mechanism that the professional law degree is divided into two sectors----Juris Master degree education (Part of Law) and MBA (Part of management), which is not able to play a greater role in fostering IPR talents. Recently, Chinese government authorities also approved the establishment of the IPR laws master degree in many universities including Peking University, Renmin University of China, Central South University, Zhongnan University of Economics and Law and other colleges and universities.³⁰³ To some extent, though this action is so precious that would alleviate some conflicts, the situation remains difficult to meet the needs of social and economic development.

³⁰² Ibid. 44

³⁰³ Ibid.

The low income of the IPR talent

In general, pursuing maximum economic benefits is the fundamental target of is a common situation, which means the costs and benefits are the key questions when people need to choose whether to enter into the IPR industry or not. Training costs, employment requirements and working payment are the major concerns of the IPR professionals in the course of maturing under the working circumstance. They are also the indirect parts of IPR talent training mechanism. Talent cultivation cost in IPR is generally higher than that in any other professional field.

ii). Suggestions

Position IPR as an independent discipline

It does not seem appropriate to classify IPR into economics, management science, or engineering, for the reason that some technical IPR knowledge like patent involves in science, engineering and legal sections. Considering the needs of the enterprises, whether technical or non-technical IPR are related to the management knowledge. The society, especially the business companies, is eager to employ talents with comprehensive knowledge especially in the cross-disciplines of engineering, management, law and other IPR related professionals. Thus, IPR is a typical cross-subjects discipline.

This is not correct to define IPR as a subject belonging to or under the certain disciplines like Humanities and Social Sciences or even Natural Sciences. From this perspective, it seems to be an independent intellectual discipline. When it is set, it can be established with two secondary disciplines with technical and non-technical IPR in it. The technical IPR includes patents, new plant varieties, integrated circuit design, and computer software, etc. Then the non-technical IPR is consisted with copyright, trademarks, geographical indications, and anti-unfair competition, etc.

Define the responsibilities of specific organisations

It should be made a clear presentation to define the responsibility of organisations in cultivating IPR talents. No matter what kind of task has been carried out, there must be a specific individual or an organisation in charge of the task. There is no doubt that the certain organisation is a premise to improve the training of IPR personnel. In universities where the IPR colleges have been well established, the responsibility of organising the

talents cultivation should be taken by the IPR colleges, while in universities without IPR institutes, the responsibility must be taken by the Law School. Imperatively, it requires organisations to surplus school teachers together in science, engineering, economics, management, law, etc. to construct the IPR teachers group with high quality in carrying out teaching and research work on intellectual property.

Make full use of other relevant mechanisms, and speed up the IPR training with low cost and high efficiency.

Firstly, educational mechanisms should be taken advantages in law and management professional degree--- JM (including the Master of IPR Law) and MBA. Establishing the IPR law branch discipline in JM can offer a choice for students who have a background in science, engineering, economics and management science. The management of IPR in MBA should be established in directions for students in science, engineering, economics, and law to choose differently. This aims at training more specialised personnel of IPR management. The proposal putting forward is to set up the JM contained university offering the discipline of intellectual property law or expanding enrolment of the masters' degree in IPR laws. More colleges and universities with high quality faculty conditions should be allowed to recruit graduates of intellectual property law independently. At the same time, universities which provide MBA courses should establish the discipline direction of IPR management.

Secondly, education departments should make full use of MA in law and management mechanisms. Any university as long as it has the direction of MA in Intellectual Property Law should be encouraged to establish an independent MA degree of in intellectual property law for the purpose of attracting graduates who has related science, engineering, economics, management knowledge to apply. In the Management master degree, the IPR management degree can be in parallel with master degree in education. Universities can also set up MA degrees in intellectual property management, intellectual property management for personnel training.

Thirdly, the universities can make full use of law and management doctoral degrees, to add the IPR law courses in universities which can train more high-level talents. In addition, the comprehensive university especially the science and engineering university should be encouraged to open the minor courses of IPR which can be offered to the undergraduates who has mastered the knowledge in science, engineering, economics, management and other related disciplines. The target is to foster more applicable talents in

the IPR field.

Strengthen the Construction of Intellectual Property Practice Base

The IPR is an application-oriented subjects calling for more practical skills of students with higher requirements. Universities should strengthen the construction of the intellectual property practice base, to enhance cooperation with the Court, the Patent Office, the Trademark Office, Intellectual Property Office and other agencies to set up more intermediaries related to IPR firms to provide students opportunities to learn more practical skills.

d. The Low Level of Economic Development

Some scholars believe, in nowadays' global trading system, if a country takes legal strategy for too strong demands without an appropriate economic development, the only result will be a failure.³⁰⁴ In terms of IPR protection, it is believed that the piracy accelerates the economic development until the IPR protection becomes an economic advantage to the country's economic growth.³⁰⁵ Since China plays an increasingly significant role on the international economy stage, the relationship between its economic development standard and IPR protection level is worth considering seriously. Fortunately, some scholars have started the research from the perspective of economies and provided some solid data. Combining these data and analysis with examining the actual phenomenon in China can provide a comprehensive picture of the difficulties in China's IPR protection.

i). GP index and IPR index

GP index and IPR index are generally accepted as two relatively comprehensive methods to measure the level of IPR protection. So some scholars began to use them to analyse the relationship between the intensity of the IPR protection and the level of economic development. GP index, which is proposed by Ginarte and Park in 1997³⁰⁶, measuring the cover extent submitted under the country's intellectual property laws by five major

³⁰⁴ See Robert E. Hudec, *Enforcing Intellectual Property Law: the Evolution of the Modern GATT Legal System* 364(1993).

³⁰⁵ See Frederick M. Abbott, *The WTO TRIPs Agreement and Global Economic Development*, in *Public Policy and Global Technological Integration* 3, 4-12(1997)

³⁰⁶ See Ginarte J C, Park W G. *Intellectual Property Rights and Economic Growth*[J]. *Contemporary Economic Policy*,1997,15:51~61.

categories of primary indicators and 17 secondary indicators. They used GP index to evaluate the rating on more than 100 countries' IPR protection every five years from 1960 to 2005.³⁰⁷ This measure was also adopted by many scholars. The index is in value between 0 to 5 that made a positive correlation between the IPR protection and the index value.³⁰⁸

IPRI index (International Property Rights Index) is written by the Property Alliance (Property Rights Alliance-PRA), an international organisation located in Washington, DC. The study aims to promote the worldwide IPR protection. This index is the first global index to measure the degree of IPR protection announced by the property Union (PRA) in 2007. It includes three aspects: Legal and Political Environment (LP), Physical Property Rights (PPR) and Intellectual Property Rights(IPR).³⁰⁹

The study found that the higher ranked countries are basically developed industrialised countries, mainly in Europe and North America. While lower ranked countries are around Africa and Latin America. Those developing countries which actively promoted the IPR protection also have a higher GDP growth. Some scholars believed that this phenomenon has highlighted the improvement to the IPR protection can effectively release poverty.³¹⁰ In general, it shows a positive correlation between the value of a country's IPRI index and GDP per capita.

GP Index

GP index covers the figures in the 1995, 2000 and 2005. This index selected 75 representative countries and according to the World Bank classification criteria to divide the counties into 4 GDP per capita level groups--- high-income countries, upper-middle-income countries, lower-middle-income countries and low-income countries.³¹¹ Through the study, from 1995 to 2005, GP index in both four groups grew up steadily. GP exponential growth in middle-income countries was greater than that in high-income countries and low-income countries.³¹² Then, GP index average in high-income countries

³⁰⁷ He Sun, 'The Research on the Economic Development of Developing Countries' (2007) World Economy Theory 2, 9~16

³⁰⁸ Ibid.

³⁰⁹ See more at <http://internationalpropertyrightsindex.org/introduction> accessed at 5 January

³¹⁰ Yuxiong Han& Huaizu Li, 'Analysis of the level of China's IPR Protection' (2005) Science Research 3, 380

³¹¹ Primo Braga,C., Fink,C.,Paz, Sepulveda,C. Intellectual Property Rights and Economic Development. World Bank Discussion Papers, 2000~412.

³¹² See Ziyin Zhuang, *Innovation, Copy, IPR and Global Economic Growth*(Wuhan University Press,

and upper-middle-income countries was higher than that in lower-middle income countries and low-income countries. The highest average value was in high-income countries while the increase of the average GP index in most low-income countries was relatively slow which was once slightly higher than the lower-middle-income countries in 1995, then was surpassed by lower-middle-income countries in 2000.³¹³

While researching at the general relationship between income level and GP index, the researchers found that the higher the income level group lies, the higher GP index gains. Chen and Puttitanun (2005) used the data among 64 developing countries through conducting the similar studies and have reached the similar conclusions. They believed that there was a positive correlation between the GP index and GDP per capita. Countries who got higher GDP per capita were more inclined to take the higher of IPR protection.

IPRI-IPR index

As the only aspect of three indexes of IPRI index, the IPR index has covered 70 countries figures from 2007 to 2011. According to World Bank standards, it is divided into high-income countries, upper-middle-income countries, lower-middle-income countries and low-income countries into four groups. To study the average in 5 years of annual data for each group of countries and work out the average IPR Index in each group in each year. The results showed that all groups of countries were growing steady of IPR index without significant fluctuations in the data. The average of IPR index in the descending order was following by high-income countries, upper-middle-income countries, lower-middle-income countries and low-income countries. Among them, the low-income countries and middle-income countries are much closer, while the IPR index in high-income countries was much higher than the other three groups of countries. It can also be found that the IPR index in low-income countries fiercely caught up with the lower-middle income countries in 2011. And the gap between them was narrowed.

The PRA was also shown in the 2011 annual report that the IPR index and GDP per capita were roughly showing a positive linear relationship, indicating that there was a positive correlation between the level of per capita income and a country's IPR protection. Because it has shown that GP index measuring the IPR protection and the GDP per capita have a positive relationship. Therefore, these two indexes reflected the positive correlation between the intensity of IPR protection and the economic development of a

Wuchang 2010)
³¹³ Ibid.

country.

GP index and GDP per capita

In further studies, the researchers researched the relationship between GP index (measured the IPR protection) and GDP per capita. They found that the GP index in high-income countries has an obvious positive correlation with GDP per capita. With the increase of GP index, GDP would sharply accelerate the increase, which indicates that the growth of the GP index can promote the economic development in high-income countries. The GP index and its GDP per capita presents an “U” shaped curve in the upper-middle-income countries, indicating that the growth of the GP index caused negative effects to the economic development at first, but when it reached a certain level, to improve the GP index would sharply promote the economic development. However, the GP index and its GDP per capita presents an inverted “U” shaped curve in lower-middle income countries, indicating that when GP index is low, the increase of GP index will promote economic growth, while once GP index exceeds a critical value, it will become an obstruction to economic development. The GP index and GDP per capita in the low-income countries shows a most significant positive correlation, implying that there is a great promotion to increase the GP index for economic growth.

Thus, for different income groups and intervals of GP index, the strategies might be diversified to promote economic growth and the IPR protection. Specifically, for the upper-middle-income countries, economic development can be promoted by the growth of GP index. While for the in the upper-middle-income countries, they should reduce the GP index before reaching the certain critical value. Then, when exceeded the certain critical value, they should increase the GP index to improve the economic growth. On the contrary, the lower-middle-income countries should increase the GP index to improve the economic growth before reaching the certain critical value. When exceeded the certain critical value, it should cut down the GP index for the improvement of economy.

IPR index and GDP per capita

Researchers draw a conclusion of the relationship between the IPR index (another index to measure IPR protection) and GDP per capita. The conclusion is as follows:

The IPR index and GDP per capita in the high-income and lower-middle-income countries show a most significant positive correlation. Thus the increase of IPR index will

promote the economic growth of these two groups. The IPR index and its GDP per capita present an inverted “U” shaped curve in upper-middle-income countries. Therefore, in the implementation of intellectual property strategy, a country should observe in which stage its economic development is and take a corresponding strategy to increase the IPR index before it reaches the certain critical point and to reduce the IPR index after it reaches the certain critical point. On the contrary, the IPR index and GDP per capita in the low-income countries show a negative correlation, indicating that improving IPR index will adversely affect the country's economic development. So this group of countries should take a loose IPR system.

Although there are differences when these two indexes ---the GP index and the IPR index measure the relationships between the IPR protection and the GDP per capita, but the common point lies that for countries with different income levels, the relations between IPR protection and the level of economic development is different. Therefore, blindly improving IPR protection does not make a positive influence on promoting the economic development. IPR strategies should be implemented in different countries according to their different levels for economic development.

As a result, different IP strategies should be adopted to deal with the different stages of technological advances, different levels of income, different IPR protection in different countries. Specifically, high-income countries are the technology leader who should improve its IPR protection to safeguard its national interests and high-technology holders, while low-income countries are technology followers who should reduce its IPR protection in order to maximise to encourage technical imitation and absorption to promote technological progress and economic growth. However, the relations between IPR protection economic growth in the middle-income countries is much more complex so that their countries should put forward a more effective IPR strategies to promote economic growth. As for China, whose development is growing rapidly, is facing the question of how to make the effective strategies on IPR protection.

ii). Difficulties in China

The argument about the influence of economic development to IPR protection leads to another question: whether the IPR protection is insufficient or overdone. Two different views emerged in recent years on the strength of IPR protection in China. On the one hand, multinational companies in China have repeatedly accused China of inadequate

protection of intellectual property. On the other hand, some domestic scholars and Chinese companies complain that the current domestic IPR protection is too stringent.

Dilemma of Domestic Companies

Indeed, intellectual property infringement repeated in China. In January 2005, the closure of the famous Silk Street Market in Beijing is a classic case. This market was well known of its counterfeit products and had become a tourist destination. Twenty years ago, it was famous as “China Silk Street” and became very popular in fine silk products to the domestic and export trade clothing, which made it extremely popular among foreigners. Until the mid-1990s, with the fading out of the first generation of Xiushui businessmen, new vendors brought fake brand-name products, from clothing to luggage and everything. Deceptive imitation and the ultra-low prices, made the Beijing Silk Street become the world famous “fake and not shoddy” market.³¹⁴

Along with the prosperity of the Silk Street, intellectual property protection that had been overlooked problem brought people’s attention in 2005 when it is closed because of that. In fact, before being shut down, Silk Street had never stopped its crackdown. Issues related to intellectual property protection has also been put on the agenda again and again. However, unfortunately, it had little impact. As early as in 2001, fake products in five brands NIKE, ADIDAS, POLO, BOSS and TOMMY were completely blocked in the Silk Street. Since then, dozens of shops, no matter large or small, have been seized of taking fake brand-names.³¹⁵ But not long before that, the market had returned intact; In August 2003, the business management department confiscated counterfeits “China and India” Olympic shirt in Silk Market; In 2004 before the holiday in May, business administration department of the Silk Market issued an edict that the counterfeits must be taken down within 10 days.³¹⁶

But these measures did not completely change the nature of famous Silk Street according to its popularity of fake products. This problem in the Silk Street became a weapons by which the US started to attack China, and that made the Chinese government very embarrassed. The repeating counterfeiting problem in the Silk Market is a microcosm of current situation of IPR protection in China. Markets like the Silk Street in Beijing city

³¹⁴ Mu He, ‘Analysis of China’s IPR based on the Closure of Xiushui Market’(2006)25 Journal of Xinjiang Normal University, 440,441

³¹⁵ Ibid.

³¹⁶ Ibid.

still are very common. A large number of these markets became the paradise of buying fake designer's products. It happens to audio-visual products as well. In Beijing Haidian Book Hall, almost every one of the best-selling books can be found in the new listing piracy; as for movies and software, it is easy to buy pirated discs on Beijing flyover. The foreign companies' complain seems to be justified.³¹⁷

However, considering comparison between the per capita income and the commodity prices, the existence of such violations seems to be inevitable. For example, some scholars have analysed the average income of Chinese is only 2 percent of that in the US. One can assume that the price of Microsoft which claims to concern about the user's operating system in the United States, is reasonable, then the Chinese price of Microsoft's operating system should be the US price of 2. An upgraded version of Microsoft's Windows 98, for example, the price was 79-89 US dollars,³¹⁸ less than the average American worker a single day's wage. The reasonable price in China should be around 13 yuan. But Microsoft in China determined the price at 1198 yuan, which is 60% higher than that in the United States, which was equal to the average wage for a month in China. This example shows that for the same product the United States invested 50 times higher than the cost of Chinese people on Microsoft. Since the interest distribution pattern of intellectual property rights is so irrational, no wonder why piracy in China and other developing countries is so serious.³¹⁹

the vast majority of low-income people in developing countries and developed countries cannot afford the products whose prices were determined according to the purchasing power of ordinary people in developed countries.³²⁰ The Piracy is actually the result of correcting the irrational prices in the market. The low-income consumers know it is illegal and immoral but have to choose the pirated products as they don't have enough money. The strengthened efforts to combat piracy achieved little success and brought a large financial resources consuming to the state and enterprises. Meanwhile it also constantly caused international friction. The global spreading of piracy poisoned the people's moral consciousness and also warned us that there is a problem in our existing system of property rights from the negative side.

³¹⁷ Ibid. 442

³¹⁸ Consumer Federation of America data, cited by Mu He, 'Analysis of China's IPR based on the Closure of Xiushui Market' (2006)25 Journal of Xinjiang Normal University

³¹⁹ Tidian Chen, 'Golden Principles of IPR' (2006) 03 DEVELOPMENT RESEARCH, 48-50

³²⁰ Ibid.

Once the prices of knowledge products in developing countries coordinated with its people's incomes, it will drop ten times or more and be close to the prices of fake products. In that case, counterfeiting and piracy will be unprofitable and since it is against morality, it will naturally disappear. Intellectual hegemony of developed countries will be fundamentally limited, but due to the elimination of piracy, its interests will not be influenced so much (and perhaps increase). Developing countries will get closer to the 19th century when the United States did not restrict the use of international intellectual property achievements, which will greatly benefit the development of these countries., according to Microsoft has reduced its price in Asian countries. Perhaps it unconsciously took into account the ratio of the income and price, thereby restraining piracy.³²¹

On the other hand, Chinese companies are indeed subject to the adverse effects of intellectual property protection to some extent. Taking patent as example, in recent years, more than 400 of the world's 500 strong multinational companies entered China, and it was a way to obtain a large number of patent rights and to establish a monopoly. Till November 2005, the number of cumulative foreign companies who had applied for patents in China was nearly 430,000, accounting for 49.9 percent of total national patents for invention. Particularly in high-tech fields, multinational patent applications filed more than 70%, much higher than domestic companies. After completing the task of occupied the market, multinational corporations began to further erode the meagre profits of domestic companies. Typical case happened in 6 C Union (including Toshiba, Hitachi, Mitsubishi, Time Warner, Panasonic, IBM and JVC DVD including seven vendors mastering in core technologies), for levying technology patents royalties after the Chinese DVD industrial development got into full swing. Industry figures released showed that Chinese companies exported a DVD for \$32, including the foreign patent fee \$18, the cost \$ 13, and the rest was the profit, only \$1. As for US companies, the royalties received from other state enterprises could be amount to 1500 billion US dollars giant; and there were currently 95 percent of the world's patents dominated by the developed countries. Just from this perspective, it is not difficult to understand.³²² Developed countries can dominate the market in other countries merely by the occupation of intellectual property. The domestic companies were thus out of business and developed countries can continuously get interests from developing countries.

Multinational enterprises conducted their IPR strategy with great fanfare, which is

³²¹ Ibid.

³²² Mu He, 'Analysis of China's IPR based on the Closure of Xiushui Market'(2006)25 Journal of Xinjiang Normal University, 440, 442

Chinese companies' disadvantage. From trademarks to patents, as well as copyright, multinationals had tentacles stretching to every aspect of intellectual property rights, and gradually eroded the Intellectual living space of Chinese enterprises. In terms of trademarks, well-known domestic brands in 1990s almost all disappeared and replaced by some familiar international brands. Early in 1994, Tianfu Cola which was a state banquet beverage, was acquired by Pepsi Cola, and since then it quietly vanished from the market.³²³ In 2000, after a famous brand "Yangtze" in China's refrigerator industry once ranked No. 2 in the rankings was acquired by Siemens refrigerator, it was sealed for 30 years. Cases like these are numerous.³²⁴ Most multinational companies through joint ventures, acquisitions, etc., to the annexation of China's brand, or "frozen", or "strangle", but take advantage of China's marketing channels to promote its own brand. Ultimately foreign brands dominated the market and the rest national enterprises that have lost their brand and vanquished.

As to patents and copyright, multinational corporations often rush-registered in China. After Chinese enterprises had built up the market, they would suppress Chinese companies

under signboard of technology royalties. DVD's case is the most typical example. The audio-visual and software copyright is no exception. When Microsoft first entered China, it knew about the rampant piracy but ignored it. Not until pirated software helped Microsoft beat domestic rivals, accounting for nearly 90% market share, did Microsoft begin to implement its long-planned anti-piracy plan, performing the national implementation of high-priced monopoly, to grab high profits.

It should be noticed that there is a definite link between the victory of multinational enterprises' intellectual property strategy in China and Chinese companies' weak awareness of intellectual property protection. It is undeniable that since China joined the WTO, Chinese companies and national awareness of intellectual property rights have been greatly improved, but compared to that in the developed countries there is still a wide gap. In the pharmaceutical industry it has been particularly evident. In the field of chemicals, the number of foreign patent applications accounted for 91.6%; in the field of traditional Chinese medicine, although the Chinese patent application accounted for 97%, but most of them were just listing the prescription, lacking the creativity required to apply for a patent; in bio-pharmaceutical field, the number of patent applications in China

³²³ Ibid.

³²⁴ Ibid.

accounted for 48.46%, but the quality of the creative and inventive applications still had a gap compared with other countries.³²⁵ Some well-known pharmaceutical companies does not even have a patent at all. This again shows that the weak awareness of IPR is widespread in China, as well as the hinder to the implementation of such a weak awareness of intellectual property protection brought about.

Local Protectionism

In some developing countries, a large amount of labours was engaged in the industry of infringement of intellectual property rights including counterfeiting and piracy. A complete industrial chain was thus formed based on these infringements in some areas. Once legislation of intellectual property protection has been well established with enhanced implementation, it will put tremendous pressure on industrial reconstruction and transference of labour. This is the major social problem which policy makers need to face.

A simulation of empirical research on this issue has been performed by Professor Maskus, which may provide useful indications. His research shows the impact on employment and prices by strengthening intellectual property protection in Lebanon.³²⁶ For example, a supposed 50% reduction of software copyright piracy rate will reduce 717 workers employed in infringing companies.³²⁷ However, due to the declination of pirated software, the development of legitimate software will be promoted, which can lead to social demands transferred to legitimate products and distribution channels in the country. Thus, some high technical quality of the unemployed workers would be hired in non-infringing companies, or forced to set up their own new business.

At this time, employment in legitimate companies gives a raise of job positions to 426 persons. Generally speaking, strengthening the protection of intellectual property made a net reduction of 291 jobs in Lebanese society as a whole number. Overall, strengthening intellectual property protection in Lebanon let employment cut down 5459 jobs of the Lebanese people, only accounting for 0.5% of the country's formal labour force, which is only a small percentage to the entire labour market comparatively.³²⁸ However, this problem is often concentrated on certain industries or regions. Therefore, economic development and the establishment of a flexible labour market must be speed up to

³²⁵ Ibid 443.

³²⁶ See Maskus, Keith E. Intellectual Property Rights in Lebanon, International Trade Division, World Bank, 1997.

³²⁷ Ibid.

³²⁸ Ibid.

provide adequate alternative employment for the transfer of business and labour to the legal field.

This result partly proves the certainty of the existence of a huge challenge to IPR protection in China: local protectionism. Usually local protectionism is considered as ‘one of the most significant problem in enforcement against counterfeiting’ in China.³²⁹ Sometimes at places, infringement of IPR brings huge benefits to the local economy and hence plays the essential role in it. Sometimes wholesale markets, in which most of the products infringed IPR and then collected money from them, are established by the departments in the governments or administrative institutions establish wholesale markets. For example, about 1 million RMB can be collected by the Administration for Industry and Commerce (AIC) from the wholesale distribution centre and markets it established.³³⁰ They prefer to tolerate such infringements, since local governments can benefit from the counterfeiting or other kinds of IPR infringements.

Yiwu, a small town on the east coast of China is an excellent example to change the old mode of production and develop local economy. An investment of \$10 million has been done by Yiwu government to establish a wholesale market called Zhejiang China Small Commodities City Group (CSCG).³³¹ Within one year of operation, CSCG earned \$470,000 in sales.³³² Further the government privatised the CSCG in order to use the revenues it earned for public purposes but also other purposes without any restriction.³³³ After privatisation, CSCG expanded dramatically and in the year 1996, the revenues had touched as much as \$2.2 billion, even exceed those of many multinational corporations (MNEs) in China, while the rate of growth was about twenty-two times higher than before its privatisation.³³⁴

However, to maximise the profit and reduce the cost, almost ninety percent of the goods in Yiwu market are either counterfeit or infringing stuffs.³³⁵ Since product prices are very low and there are a great variety of products, the business is attracted by CSCG from both

³²⁹ Daniel C.K. Chow, *A Primer on Foreign Investment*, (Kluwer Law International, Hague 2002) 212

³³⁰ Paul Torremans, Hailing Shan and Johan Erauw(eds), *Intellectual property and TRIPS compliance in China: Chinese and European perspectives* (New Horizons in Intellectual Property, Edward Elgar, Cheltenham 2007) 97

³³¹ Daniel C.K. Chow, ‘Why China Does Not Take Commercial Piracy Seriously’(2006) 32 Ohio N.U. L. Rev. 203, 218

³³² Ibid.

³³³ Ibid.

³³⁴ Ibid.

³³⁵ Daniel C.K. Chow, *A Primer on Foreign Investment*, (Kluwer Law International, Hague 2002) 219.

the internal market and the rest of the world.³³⁶ Large percentage of products are exported to other countries, resulting into huge expansion of the trade in the market at Yiwu.

Therefore, the prosperity of the local economy is mainly dependent on the counterfeit goods. First of all, the CSCG is addressed as the largest employer in Yiwu. While nowadays, unemployment is the peaking and serious social problem in China. To reduce unemployment and improve people's living standard, the CSCG is considered as an effective tool to overcome the mentioned problems. Secondly, as a crucial taxpayer, the CSCG contributes significantly to the revenues of local tax. In 1990s, twenty-six percent of the entire local tax revenues were the tax paid by the CSCG only.³³⁷ Moreover, the CSCG has sold out goods to many other businesses, such as hotels, restaurants and transportation companies.³³⁸ In other words, there is a support business relationship between other businesses and CSCG to support each other through counterfeit trading: the introducer earns money from the trade, while further latter reduces the cost of their businesses and generates more customers to gain more profits. In addition, some governors even keep a misconception that counterfeiting, because of the low price, can protect local industries from international competition.³³⁹

Although the CSCG has been privatised, there are still many current or former government officials involved in the senior management team of it.³⁴⁰ As the income of the CSCG directly goes to those officials' benefits, those officials would like to interfere in the administrative enforcement to protect the market. This may explain why the CSCG can survive from the attack, if there is any, as it is considered to be utilised by the local government and.

There are several ways by which the local government can protect such intellectual property infringement. Since the power to decide which cases to pursue and how quickly to conduct a raid is in hands of the authorities,³⁴¹ the officials can refuse to take legal action for many reasons³⁴² or do not pursue a complaint at all,³⁴³ and until the

³³⁶ Ibid.

³³⁷ Ibid.

³³⁸ Ibid.

³³⁹ Paul Torremans, Hailing Shan and Johan Erauw(eds), *Intellectual Property and TRIPS Compliance in China: Chinese and European perspectives*, (Edward Elgar Publishing, Northampton 2007), p109

³⁴⁰ Daniel C.K. Chow, *A Primer on Foreign Investment*, (Kluwer Law International, Hague 2002) 219.

³⁴¹ Paul Torremans, Hailing Shan and Johan Erauw(eds), *Intellectual Property and TRIPS Compliance in China: Chinese and European perspectives*, (Edward Elgar Publishing, Northampton 2007) 97.

³⁴² Ibid.

³⁴³ Ibid. 109.

counterfeiting goods have been transferred to other places they can delay the raid.³⁴⁴ Sometimes the information can be leaked by government officials about the raid to the counterfeiters before the action so that the goods can be transferred in advance.³⁴⁵ In other cases, 'some local officials have been known to confiscate goods, machinery and equipment only to return these materials to counterfeiters once enforcement actions have been concluded'.³⁴⁶

Indeed, measures should be taken in order to restrict the IPR infringement as the local protectionism shows the deficiency of administrative enforcement in IPR protection. However, local protectionism also reflects some level of difficulties in fighting against IPR infringement. As mentioned above in Yiwu's case, counterfeiting is proven as an essential part of local economy. If all of a sudden such counterfeit businesses were removed, then result would be there in terms of huge increase in unemployed individuals. Moreover, the businesses which are connected with those counterfeiting goods gets less benefits, because they had to buy genuine goods at higher prices resulting in raising the cost and generating less profit. In such situation hiring more people would be less likely by these businesses, or even further reduction in the number of staffs may appear. Hence the unemployment problem would seriously increase and influence the stability of the overall society. Since there are many cities and towns like Yiwu, it is less feasible to remove IPR infringement in a short time interval.

Due to the rush of connecting with the world, coupled with the pressure from the US and other developed countries, China's intellectual property legislation is even beyond the level of China's national economic and technological development. From the perspective of developing countries, such counterfeiting and piracy is only part of its strategy of imitation and a way of economic development and growth, just like development path of Japan Taiwan. For China, according to the current status of China's economic development, imitation is easier than innovation. With cheap labour costs, China's generic products are of great competitiveness domestically and even internationally. From this perspective, too high standards of intellectual property protection is not conducive to China's economic development.

However, this is not to say that China should be satisfied with the current situation and take the mentioned theory as an excuse. It should be noted that, copying is like the

³⁴⁴ Ibid. 97.

³⁴⁵ Ibid. 109.

³⁴⁶ Daniel C.K. Chow, *A Primer on Foreign Investment*, (Kluwer Law International, Hague 2002) 215.

grafting while the innovation is like planting trees. The grafted fruits cannot reproduce. Once its wood died, it means the end of its life. Only by obtaining the intellectual property rights through technical innovation can China keep its enterprises' vitality. Keeping high standards of IPR protection can only benefit the master enterprises and it would be always a shackle to the enterprises that rely on imitation and replication. Therefore, although China is still a developing country and the developed countries should understand the deficiencies in its IPR protection, China should make its own efforts for independent innovation and industrial transformation and improve the enforcement on intellectual property protection, so that intellectual property protection could become an accelerator for its economic development, rather than a stumbling block.

The government should increase research and development (R& D) investment. In China, the R& D share of GDP is still low, thus increasing of R& D intensity must be carried out under the guidance of the government. In the high-tech fields, a major breakthrough can only be obtained when the national power is brought in. The Government should make policies technological progress and development and create a favourable social, economic and political environment for the technological progress. Since the fundamental science, social science and some research programs with larger prior input and slower effect are the basics of other subjects, the government should increase the investment in these aspects and provide some preferential policies and financial support for enterprises to encourage them in research and innovation.

China is a developing country. It had many things to do to strengthen its ability in the beginning of the reform and opening up. The low level of productivity was supposed to match the easing of the intellectual property system. However, due to some internal and external factors, China finally chose to establish high standard of intellectual property law system quickly, creating a "Chinese miracle". It was undoubtedly a ferocious "IPR revolution" under the circumstances that the legal system was extremely fatigue and the consciousness of IPR was vague. However, such a revolution brings about several problems when this mechanism is trying to work, such as the shortcomings in the "double-rack system" and the difficulties that domestic companies meet. This is an inevitable pain during the period of social transformation. With the sustainable development of economic society, the knowledge creativity and knowledge product, IPR has gradually become the core element of enterprise competitiveness and realised the sustainable development of important strategic resources. At this time, a high level of intellectual property legislation needs the support of China's social internal demand rather

than the result of external force. High standard legislation is no longer just a symbol, but is a real need of the reality

Chapter Six Conclusion

IPR, as a premature infant in China, has already achieved transcendent development, considering its later appearance and the difficulties it came across. Under the influence of Confucianism, ancient Chinese gave up their personal rights for the benefits of the group. The two classes which were supposed to support the rise of IPR over-relied on the authority in order to preserve their status in the state's politics which prevented them to claim their benefits as compared to western countries. Yet after IPR was brought into China, it didn't have a good chance to develop. Turbulent times and changes of regimes stopped the whole nation from moving forward, while other regions or states grabbed the opportunity and surpassed China with help from western countries. During the initial phase of transferring IPR to China, the government did try to resist the strong IPR protection, because under the circumstances that the whole country was far behind the western world in all aspects, a restricted IPR protection would not allow China to learn new technologies and knowledge from the developed nations. However, in fact such seesaw battle between China and the west did provide interests for either party. After some tortuous development, China is currently still facing the problem of low awareness of IPR. In addition to shortcomings in its administration and judicial system, China's current economic development standard still cannot afford a stronger IPR protection system.

Dr. Peter Ganea expressed such opinion in his speech, "When complaining about legal insecurity in China, it should be kept in mind that not more than 25 years have passed since the country made up its mind to become a member of the international trade society, and that it can hardly be expected to establish a perfect legal framework within such a short period."³⁴⁷ Western countries should be patient and give sufficient time to China to allow a further development and improvement in relation to IPR protection system. Every party should learn from the past that coercion will not bring an expected result. "Do not kill the goose that lays golden eggs." If western countries want to obtain constant benefits from the enormous market of China, they should raise this goose and wait for the golden

³⁴⁷ Peter Ganea, 'The Response to Professor Zheng's Speech' <http://blog.sina.com.cn/s/blog_4d7d209301000bgv.html> accessed at 15 August 2014

eggs. In fact, they can adjust some of the strategies, such as lower the prices of intellectual products, to reduce the damages caused by infringements.

However, this should not be an excuse for China to stop fixing the problems. In the era of peace, China should seize this opportunity and catch up with other developed countries, at least to bridge the gap. China should recognise its substantial problems in its enforcement, and publicise IPR and cultivate more professionals in this field. Apart from making several rectifications in the double-track system, Chinese government also ought to encourage indigenous innovation and accelerate the transformation of its economic development model and optimise the economic structure. Only by taking targeted measures and making comprehensive progress in all aspects can China's IPR protection achieve a significant improvement. And to solve conflicts and promote the development of global trade, efforts from both China and western countries are required.

In terms of the study in the future, since intellectual property is closely related to many other subjects such as economy, science and even history, it would be very useful if scholars from these fields could look into intellectual property rights and provide more professional and technical opinions. Furthermore, staffs who have the access to practise in the field of IPR can reveal more cases or reality of the situation in field works and make the study of IPR protection in China not only theoretical but also practical.

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