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Traditional Chinese Culture: a Barrier or an Opportunity for the Development of Copyright Protection in China
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Chapter 1: Introduction

We are living in a post-industrial world in which creativity and culture industries are increasingly emphasized as the source of economic growth in many countries. Intellectual property (IP) protection is receiving much more attention worldwide than before. Yet in some emerging countries such as China, the development of intellectual property protection is still in its early stages; it is not effective enough to meet demands from both domestic and international markets. China has set up a well-established framework of intellectual property laws. However, China’s intellectual property system lacks effective and intensive enforcement. Poor awareness of intellectual property protection on part of the Chinese public makes copyright infringement a social problem (Wang, 2004; Montgomery and Fitzgerald, 2006). Many studies have been conducted for exploring the reasons behind these problems. Through reviewing the history of Chinese intellectual property, some scholars claim that Chinese laws pertaining to intellectual property are, in essence, passively transplanted from the West, and the concept of intellectual property is still an alien notion in the mind of the Chinese public. (Alford, 1995; Qu, 1999; Cui, 2002).

Meanwhile, with the development of digitalisation, the future of copyright is being questioned as digital technology is rewriting culture industries in many aspects, some of which are production, distribution and consumption. In 2005, world-renowned scholars from various fields collaborated to issue the Adelphi Charter which states that the current western intellectual property system is “out of line with modern technological, economic and social
trends” and the purpose of Intellectual Property Law should be to encourage both knowledge-sharing and innovation (The Adelphi Charter, 2005). With this backdrop, many scholars suggest that China should build its own balanced intellectual property which corresponds with its national conditions, mainly existing user behaviour and traditional Chinese culture (Qu, 1999; Stiglitz, 2007). Creative Commons (CC), an alternative copyright management model, was founded in 2001 by Lawrence Lessig. Its mission was to build a balanced system of intellectual property. In 2006, Creative Commons was introduced in China; it was renamed in Chinese as “zhi shi gong xiang” – “knowledge sharing” in order to highlight its opening principle. More importantly, “knowledge sharing” is a notion that exists in traditional Chinese culture which could promote the localisation of Creative Commons in China (Wang, 2008).

1.1 Research Questions and Objectives

This paper will examine five questions:

1. What is the nature of the relationship between traditional Chinese culture and the western concept of intellectual property?

2. Are there any cultural conflicts between traditional Chinese culture and the western concept of intellectual property?

3. If yes, what are they?

4. Has traditional Chinese culture had an impact on the mind of the current public about intellectual property protection?
5. Can Creative Commons play a helpful role in copyright education in China?

By answering the questions above, this paper aims to explain the copyright protection problems in China from a cultural perspective. This will help both the West and the Chinese to gain a better understanding of cultural factors contributing to the difficulty of copyright protection. In addition, by exploring the link between the value of Creative Commons and Chinese traditional views on intellectual creation, this study attempts to examine the significance of the development of Creative Commons in China, eventually appealing to attach importance to these cultural barriers.

1.2 Definitions and Parameters

“Traditional Chinese Culture” is a broad term covering all ideologies and cultures accumulated in the five thousand years of China’s history. In this paper, Traditional Chinese Culture refers to Confucianism since it lies at the core of traditional Chinese thoughts and has had a profound influence on all aspects of Chinese society including Chinese scholarly traditions and Chinese legal culture.

Numerous factors have been considered in the present studies on the history of development of Chinese intellectual property, such as economy, technology and culture. This thesis only explores the cultural factors, given that culture directly influences people’s conduct and activities. These culture factors will be analyzed to explain the lack of institutionalised
intellectual property laws in Imperial China, the failure of the first introduction of intellectual property laws in the late Qing dynasty, and the current difficulties in intellectual property protection.

In reviewing the development of intellectual property system in the 20th century, the author leaves out the period between 1911 and 1949, a period of turbulence. China experienced several wars which greatly affected its economic and social development, thereby achieving little progress in legal development.

1.3 Methodology

In order to answer the established research questions, this paper has used a number of secondary sources including books, academic research papers, journals and surveys aiming to present a theoretical and cultural analysis of this issue. These materials are on the subjects of the philosophy of intellectual property, the history of intellectual property development, intellectual property protection in China, traditional Chinese culture and Creative Commons.

Various resources document the history of development of intellectual property system in China, some being official Chinese legal websites and relevant research conducted by both Chinese and western researchers.
Statistics from two recent surveys have been used to show Chinese people’s awareness of intellectual property protection and some enlightening results have been highlighted in this paper.

1.4 Literature Review

There have been heated discussions in Chinese academic circles about whether an institutionalised intellectual property protection system existed in ancient China. A common point of agreement was that in Imperial Chinese history, some measures had been taken to regulate the reproduction of creative works. Yet those efforts have not been developed to the forms of institutionalised intellectual property laws in the modern sense, both by the state and the authors themselves (Alford, 1995; Ocko, 1996; Qu, 1999, Feng, 2007; Wu, 2008; Ling, 2005).

In terms of why China lagged behind in the development of intellectual property rights (IPR), Wu (2008) points out that factors such as economy, technology, ideology and politics played a role. In the West, the rise of new production sectors such as metallurgy, mining and textile industry in the 15th century laid the technological foundation for the emergence of intellectual property institution (Wu, 2008). The Renaissance (14th - 17th century) attached great importance to humanism: the value of man, rather than the established religious doctrines, which promoted the development of intellectual property culture (Cui, 2002; Wu, 2008). Cui (2002) and Ling (2005) emphasise that rapidly growing productivity and capitalist production
relations are the real driving force behind the development of western IP rights since the First Industrial Revolution (18th century-19th century). By contrast, natural economy had dominated Imperial China for thousands of years, although the modern commodity economy emerged in a few parts of China in the late 19th century.

Among the cultural factors that hindered the development of IP system in China, Qu (1999) states that China’s one-hundred-year IP history is a passive transplantation process; little attention was paid to its own traditional culture and national conditions. Alford (1995), the author of To Steal a Book is an Elegant Offense: Intellectual Property Law in Chinese Civilization, claims that there was no indigenous counterpart to the western idea of IP in Imperial China as its political culture was influenced by Confucianism. Wu (2008) discusses that the IP culture is, by nature, a private legal culture characterised by individualism, liberalism and rationalism; this culture conflicts with Chinese Confucianism which emphasises holism, collective spirit, morality, and a principle based on obligation. This view is further developed by Li (2010). It has been proved that traditional Chinese culture has a negative influence on China’s legal institution of IP up till now (Li, 2010). This statement corresponds to Alford (1995, p.91)’s argument that China’s current problem lies in the difficulties of “reconciling the western legal values and institutions” with the restrictions of its own circumstances. Few studies specifically focus on Chinese tradition of intellectual creation and relevant legal culture in which IP laws are rooted.
A lot of researches have been compelled to rethink the current copyright system. Lessig (2004, XIV) maintains that modern culture is “a culture in which creators get to create only with the permission of the powerful, or of creators from the past”. Montgomery (2006) claims that in the digital age of “downloading, sampling, remixing and re-versioning”, the current copyright has become increasingly unworkable. Therefore many scholars argue that the methods of protecting creative products in a digital environment need to change. Creative Commons is a new form of alternative copyright management, designed to create an online space where people can share, access and reutilise certain creative works freely (Creative Commons, 2013). This open licensing model has been introduced to China in 2006, and many studies have been done to discuss the feasibility of the application of Creative Commons in China. Cheng (2009), Sheng (2012) and Lu (2010) focus on the possible status and effects of Creative Commons in the current Chinese copyright system after its porting and the potential institutional change after CC 3.0’s introduction to China. Some researchers focus on the significance of application of CC license in China. Xiao (2007) examines the significance of CC to the establishment of a more reasonable and flexible online regime of copyright protection. Wang (2008, p.309) states that the adoption of CC license will contribute to China’s copyright education, because “in China, the CC concept develops from a tradition of communal ownership of property towards a moderate protection of copyright” and “CC licenses could help cultivate an attitude of conscious sharing within the Chinese society”. There are few studies on the connection between China’s collaborative creation tradition and the concept of Creative Commons.
Therefore, this paper explores the cultural factors in Chinese tradition of intellectual creation and legal culture that might impede the development of IP protection in China and influence the public’s mind about intellectual property. In subsequent chapters, this paper examines the link between China’s scholarly traditions and the idea of Creative Commons, further examining the role of Creative Commons in bridging the ‘traditional western approaches of strict copyright and the traditional Chinese approach of no intellectual property right’ (Wang, 2008, p.309).

Chapter 2: Development of History of Intellectual Property Laws in China

This chapter reviews the development history of IP laws in China in order to explore the nature of the relationship between traditional Chinese culture and the western concept of intellectual property. In general, IP consists of two categories: industrial property and copyright. Both of them will be explored in this chapter, providing a comprehensive view of the history to the readers. The remaining chapters only focus on copyright.
2.1 Historical Review of China’s Efforts on the Regulation of Intellectual Works

As discussed in the literature review, many scholars maintain that there were no institutionalised IP laws in Imperial Chinese history although both officials and authors themselves have taken some measures to regulate the reproduction of creative works (Alford, 1995; Ocko, 1996; Qu, 1999, Feng, 2007; Wu, 2008; Ling, 2005).

The government’s concern about unauthorized publication was, by nature, for the purpose of controlling the transmission of ideas and not for the protection of private property interests or the building of a good market environment for ideas (Alford, 1995; Cui, 2002; Feng, 2007; Ling, 2005; Qu, 1999). According to Cui (2002) and Wu (2008), measures taken by the ancient Chinese government in this field mainly consisted of restrictions on reprinting, pre-publication review and prohibition on materials against its imperial power. For instance, the Tang Dynasty (A.D. 618- A.D.907) forbade pirated copies of officially published works, the unauthorized publishing and selling of official legal declarations, and replication or distribution of “devilish books and talks” (Alford, 1995; Cui, 2002). In virtue of the progress of printing, the following Song Dynasty (A.D. 960-1279) witnessed a great growth in the amount of printed materials by both the Directorate of Imperial Academy (known in Chinese as Guozijian) and individuals, many of whom were officials that wrote books as sideline activities (Alford, 1995; Cui, 2002). In order to control the spread of undesirable content, the
Song government enacted a regulation that each private printer should submit the works to local government offices for pre-publication examination and registration before publishing.

For “private” persons, the “private” authors of creative works, they made some efforts to consciously protect their rights related to their creative works, but those rights were only limited to moral rights, not extended to economic rights (Wu, 1995; Feng, 2007). Fact shows that Chinese scholars in Pre-Qin period (primitive society – 221 B.C.) had the consciousness of paternity right (Wu, 1995). That was a period of “a hundred flowers blooming and a hundred schools of thought contending” (bai hua qif ang, bai jia zheng ming), which witnessed the birth of Chinese classic philosophies including Confucianism, Taoism, Mohism, etc (Keane, 2006, p.286). At that time, scholars from different schools of thought signed their names or the founder’s names onto their works, so as to declare their authorship and make their thought recognized by others. For example, *The Analects of Confucius*, the collection of sayings and ideas attributed to Confucius and his contemporaries, was recorded by Confucius' followers to spread Confucian ideas. Other classics of philosophy were even entitled as the names of the authors, such as the work of Taoism was named as *Lao Zi* (the founder of Taoism). In addition, the act of plagiarism was absolutely despised by Chinese traditional scholars, which was regarded as the stealing of others’ creations (Wu, 1995; Feng, 2007). However, according to historical records, there were no economic rights of authors being recognized at that time (Wu, 1995).
2.2 Turn-of-the-Century Introduction of Intellectual Property Law into China

This paper mentioned earlier that the Chinese history of intellectual property is a passive transplantation process (Alford, 1995; Li, 2010; Qu, 1999; Wu, 2008). The term ‘intellectual property’ was first introduced to China during the end of 19th century, before which there was no counterpart to the western notion of IP in China, much less the IP laws (Wu, 2008).

This process was named by Alford (1995, p.30) as “learning the law at gunpoint”. Alford (1995) points out that IP issues had become increasingly important in trades between China and the West since the Opium War (1840-1842; 1856-1860), resulting from an expansion of traded items from bulk commodities (e.g. opium, tea, and silk) to commodity-owning brands. A similar view is held by Qu (1999): during the end of 19th century. Improper use of names and trademarks of foreign companies by Chinese merchants became a cause for concern for western businesses, and they required trademark protection. There were two main reasons contributing to this situation. Chinese merchants used the names of foreign brands to avoid paying internal taxes which targeted Chinese businesses, not foreign businesses. Also, the veil of western brands helped Chinese merchants obtain internal transmit permissions from local officials easily (Alford, 1995; Qu, 1999).

Meanwhile, increasingly more international attention was being given to IP rights by the turn of the 20th century. These rights were incorporated in the promulgation of the Paris
Convention (1883) dealing with industrial property and the Berne Convention (1886) for literary and artistic property protection. Although “China was not a party to either convention or any other treaty concerning intellectual property” at that time, western merchants requested that their trademarks registered at home should be protected in China (Alford, 1995, p.34). In fact, China did not have legal obligations to respond to the western charge of trademark infringements either by the Chinese or by other foreigners. This reflected the widely accepted interpretation of Chinese modern history (1840-1949) – no diplomacy for a weak nation like China. Even some western scholars admitted that “this mirrored the general disdain of foreigners for a system with which they had little familiarity and for which they had even less respect” (Alford, 1995, p.35).

The Qing government signed bilateral treaties in 1902 and 1903 with Britain and the United States chiefly dealing with trademark protection. In 1904, at the request of China’s Ministry of Foreign Affairs, the British Maritime Customs prepared a draft trademark law for China, which turned out to be a copy of British laws and biased in favour of the interests of British merchants. For example, it was claimed in the draft that every foreign trademark was eligible to be protected in China, even if previously unregistered in China or abroad (Alford, 1995). In practice, none of the commercial treaties and trademark laws satisfied the West because of poor enforcement.

In terms of copyright laws, the Qing government enacted laws on printing and the distribution of newspapers during the period from 1906 to 1908. However, the Chinese
government’s concern about unauthorized publication was in reality for the purpose of controlling transmission of ideas not for real copyright protection, which was corresponding to the previous Chinese empires’ similar efforts in this field since Tang Dynasty (A.D. 618-A.D. 907) (Alford, 1995; Cui, 2002; Feng, 2007; Ling, 2005; Qu, 1999). The highest level of Chinese state at that time, the Empress Dowager Cixi (1835-1908), merely considered the law reform as a necessary short-term expedient to pacify western countries before the Qing government was able to reassert its proper form (Alford, 1995; Ling, 2005). Under pressure from the western powers, Chinese government disputed that it was too early to promulgate a copyright law before the trademark law was put into effect. However, in 1910, the Chinese government finally promulgated Copyright Law of Qing Dynasty as a result of compromise.

From the West’s perspective, they tended to believe that Chinese lacked the awareness of Intellectual Property and that they were unable to understand the IP law (Alford, 1995; Ocko, 1996; Qu 1999). According to Heuser (1975, P.50), in 1904, US Consul General of Shanghai wrote to US ambassador that “The Chinese seem to have confused a trademark with a patent …You will remember that in our negotiation of the 1903 Treaty, it seemed nearly impossible to explain to them the difference between a trademark and a patent.” Some western scholars argue that the West should have explained the utility of Intellectual Property; most importantly, they should have trained Chinese in putting the IP law into effect (Alford, 1995; Ocko, 1996).
It has been stated that Qing government and the western powers had different attitudes towards IP protection in China (Qu, 1999). The west forced Chinese government to promulgate relevant laws to protect their own interest in China (Alford, 1995; Qu, 1999). Although unwillingly, the government of the Late Qing Dynasty compromised adopting the legal reform in the hope that foreign powers would abolish extraterritoriality in exchange as they agreed (Alford, 1995; Qu, 1999). When Chinese officials realized that, in fact, the West would hardly fulfill their promise, Chinese government declined to join the Berne Convention in 1920, reasoning that it would have a negative impact on both China economic development and education system.

2.3 The People’s Republic of China’s Early Efforts at IP protection

On 1st October, 1949, the People’s Republic of China (PRC) was established, marking the birth of a “New China”. In terms of legal system including Intellectual Property laws, Chinese Communist party drew extensively on the Soviet model provided by USSR (Union of Soviet Socialist Republics). In 1950, PRC government published the Provisional Regulation on the Protection of Invention Rights and Patent Rights. As New China’s initial efforts in protecting IP, this regulation followed the Soviet model in using a two-track system, under which the right-holders could choose their intellectual creations to be protected either as inventions or patents (Alford, 1995; Xinhua News Agency, 1950; CNIPR, 2012). Specifically, this system provided inventors with certifications of invention which entitled individuals or entities to monetary awards generated from their inventions. At the same time,
it granted the state the right to exploit and publicize these inventions (Alford, 1995; Xinhua News Agency, 1950). Alternatively, the state could grant ownership and basic control of inventions to the inventors by issuing patents, however, the royalties they received might be negotiated in this case (Alford, 1995; Xinhua News Agency, 1950).

There is a view that the value within USSR’s Marxist model actually reflected Chinese traditional opinion on Intellectual Property that “intellectual creation is a product of the larger society from which it emerged” (Alford, 1995, p.57). The young nation naturally reproduced the Soviet model and showed similar “disinclination to establish purely private ownership interests in Intellectual Property” (Ocko, 1996, p.564). Alford (1995) suggested that Soviet model’s system of Intellectual Property protection might be more accessible to China than relevant laws used by the previous government. Nevertheless, it is nearly impossible to verify this statement because of the lack of enforcement of this provisional regulation which issued 4 patents and 6 certificates of invention in total before it was finally abolished in 1963 (CNIPR, 2012). More crucially, during the early decades of its establishment, China experienced two “social movements” - the Socialist Transformation of Economy (1952-1956) and the Great Cultural Revolution (1966-1976). The former primarily eliminated private ownership, while the latter not only assaulted material awards in intellectual property but also made attacks on “professionalism and the formal legal system itself” (Ocko, 1996, p.564).
2.4 Re-introduction of Intellectual Property into China after the Reform and Opening

China sped up the process of building an intellectual property protection system after it started the policy of “reform and opening to the outside world” (1978). According to Chinese Government White Papers (1994), “China considers the protection of intellectual property an important part of its policy of reform and opening to the outside world and of the building of its socialist legal system”. However, both Chinese scholars and western scholars believe that China’s efforts in rebuilding the system of IP protection since the 1980s was a result of the external pressure both economically and politically (Qu, 1999; Wang 2004; Wheare, 1996; Ocko, 1996). Wang (2004, P.255) points out that the real driving force behind the rebuilding of IP laws was to “gain access to the rich treasure of technological advances in the developed country”. A similar view is held by Wheare (1996) that China had to catch up with the international standards of IP protection in order to gain one of the basic conditions for conducting international exchange in science, economy and culture.

Since China started opening its domestic market to the outside world, especially during the 1990s, a great amount of foreign products flowed into the market, including media products and software. Some large international chains such as Walmart in China played an important role in providing the distribution channel of legal audio-visual products such as CDs and CVDs. However, Chinese merchants had established some illegal distribution systems which could offer Chinese consumers a vast range of products at very cheap prices. Pirated media
products and software remain very common in China. It is estimated that “piracy rates remain at between 80 percent and 95 percent of market share” in China’s film and music industries (Montgomery and Fitzgerald, 2006). With this background, on 7 September, 1990, the 15th meeting of the Seventh National People's Congress Standing Committee approved the Copyright Law of the People's Republic of China, marking the establishment of PRC’s first Copyright law.

Making a review of China’s current development in the protection of Intellectual Property rights, we could find that China has made great achievements in the past 50 years. China entered the race much later than developed countries, yet it is catching up quickly and narrowing the gap between Chinese and international standards (Wang, 2004). Research (Isinolaw, 2002) indicates that since the Trademark Control Act was enacted in 1963, China began to establish its own Intellectual Property protection system with an impressive speed. “Until now, China has (a) well-established Copyright Law (promulgated in 1990) and has signed agreements with the World Intellectual Property Organisation (1980), Paris Convention (1985), the Madrid Agreement (1989), Berne Convention (1989, 1992), Universal Copyright Convention (1992), and the Patent Cooperation Treaty (1994)” (Ma, 2013). As stated by Wang (2004), China has contributed to the international system on intellectual property protection and is fulfilling its obligations.

Similar to the first introduction of Intellectual Property into China in the late 19th century, the re-introduction of Intellectual Property was primarily driven by external reasons (Qu, 1999).
Nevertheless, it was under the external pressure that China has done great amount of effective work in building the IP protection system since the late 1970s. More importantly, China itself, to some extent, has been benefiting from this system in importing advanced technology and equipments from developed countries and exploiting its own intellectual creations.

2.5 Current Situation of Intellectual Property Protection in China

Many scholars state that the main problems of current Intellectual Property protection in China are the lack of effective enforcement of IP law and poor public awareness of Intellectual Property protection.

2.5.1 Weak Enforcement of Intellectual Property law

The main characteristic of the mechanism of Chinese IP law is “the combination of administrative and judicial enforcement”, which is one of the prominent weaknesses in the enforcement of Chinese intellectual property law (Wang, 2004, p.256; Tao, 2004). According to Tao (2004, p.107), the deficiencies in China’s enforcement of intellectual property rights protection “may have an even greater impact on trade than delays in the issuance of regulations”. There are two main reasons contributing to a weak enforcement of copyright and industrial property laws in China. A major reason is the insufficiencies in the organizational structure of the copyright and industrial property rights administrations, namely, “the National Copyright Administration, the State Intellectual Property Office and
other provincial and municipal administrations” (Wang, 2004, p.257). The other is the frequent cross-fire among multiple governmental agencies which have overlapping responsibilities over the enforcement of Intellectual Property rights.

In addition, Tao (2004) points out that, in fact, local protectionism is one of the greatest barriers to protect IPRs in China. The problem partly caused by local officials’ misconceptions that IP infringement, including counterfeiting can benefit the local economy because it effectively increases employment and fiscal revenue. Some Chinese local officials even think that “the copy and counterfeiting foreign brands are justifiable as a way to protect local industries from international competition” (Ma, 2013, p.7). Apart from the above factors, China’s large population and uneven distribution of economic development of the whole country is hindering an effective implementation of IP law (Wang, 2004).

2.5.2 Poor Public Awareness of Intellectual Property Protection

In China, most pirated goods are produced targeting the domestic market and a majority of Chinese customers believe that piracy does not breach the law. It is believed that this concept originated from “China’s collaborative creative traditions” (Montgomery and Fitzgerald, 2006, p.408). Confucian philosophy stressed the transmission of creative works and knowledge for others to draw on and build upon, rather than learning or creation as individualized activities. Confucianism has a profound influence on all aspects of China’s social development, including the establishment of IP law in China. It is shown that the
Chinese government’s original approach to IP highlighted the people’s need to access information rather than the individual creator’s right to benefit from his or her creative work, which gave rise to the Chinese traditional concept of collective ownership of intellectual works. According to *The 2009 National Investigation on Public Cultural Literacy on Intellectual Property Protection*, the average index of Chinese public literacy on IP rights is 42.1 out 100, which is quite low compared with developed countries (Gao, 2009). To some extent, IP infringement is a social problem in China.

### 2.6 Summary

Based on the analysis of Chinese traditional measures of managing and protecting intellectual works, both the officials and the authors had taken some efforts to regulate the exploitation of the fruits of creations in Imperial Chinese history. However, those regulations have not been developed to institutionalized Intellectual Property laws. In fact, the government’s concern about unauthorized publication was for the purpose of controlling the spread of ideas, reflecting the feudal cultural autocracy; some authors of creative works also made efforts to consciously protect their rights related to their creations, but those rights were only limited to moral rights.

In the early 18th and late 19th century, the concept of intellectual property was first introduced into China by foreign powers. Under external pressure, especially the West’s military threat, Qing government compromised to adopt legal reform and establish its own IP laws in spite of
the opposing beliefs between Chinese Confucian culture and the intellectual property culture. There was no counterpart to the western idea of intellectual property protecting private ownership interest in China; therefore it was even difficult for Chinese people to understand the utility of Intellectual Property law (Alford, 1995). Some of relevant laws enacted by late Qing government are basically copies of western laws biased in favour of foreign powers’ interest in China. At that time, China was not allowed to consider whether the transplanted law was suitable to its own social culture, public mind and national conditions. The first introduction of IP laws ended in failure along with the fall of the Qing Dynasty (1644-1912).

Over the next four decades, China experienced a Civil War (1927-1949) and an Anti-Japanese War (1937-1945), which affected its economic development and sapped its resources. The development of a judicial system including IPRs laws had been stagnant during that period. In 1949, the People’s Republic of China was established by Chinese Communist party. This young state drew extensively on the USSR’s Soviet model in terms of rebuilding the legal system including Intellectual Property law. It followed the Soviet model in using a two-track system which emphasized the people’s need to access information rather than the individual creator’s right to benefit from his/her creative work. As proposed by Alford (1995), this model reflected Chinese traditional attitude on Intellectual Property. Nevertheless, it was abolished soon with little enforcement. During that time, China experienced two radical “social movements” which eliminated private ownership. In conclusion, little progress had been done in the development of IP laws during this period, because of the lack of stable and suitable economic and social environment.
China’s policy of reform and opening to the outside world (1978) promoted the re-introduction of Intellectual Property laws into China. Intellectual Property laws play as an essential role in modern international trade. Hence for China, accepting and following the “rules” became one of the stepping-stones to the access of international trade. Similar to the first introduction of Intellectual Property in the late 19th century, the re-introduction of Intellectual Property was primarily a result of both economic and political external pressure (Qu, 1999; Wang 2004; Weare, 1996; Ocko, 1996). It cannot be denied that under external pressure China has made great progress in legislation of Intellectual Property since the late 1970s; China also has been entering international agreements in this field such as Berne Convention (1989). However, many scholars (Qu, 1999; Li, 2010) point out that China has been focusing on catching up with the international standards but has not given enough concern on either the western culture behind Intellectual Property laws or China’s five thousand years’ creative tradition.

The present situation of Intellectual Property protection in China is criticised by many scholars for two reasons- the insufficiency of effective implementing of IP law and the poor public awareness of IP protection (Montgomery and Fitzgerald, 2006). The fact shows that it is difficult for Chinese people to thoroughly accept intellectual property culture. In Chinese traditional thought there is no such notion as intellectual property. Confucianism stressed the communal ownership of intellectual creations, rather than creation as an individualized activity from which people can gain profit (Montgomery and Fitzgerald, 2006; Li, 2010). The
argument finds its basis in the fact that China’s difficulties in copyright law enforcement is not legal or caused by the level of economic development, but through its collaborative creative tradition (John, 2009).

To conclude, according to the above discussion, China’s one-hundred-year intellectual property history can be regarded as a passive transplantation process in which little concern has been given to its own tradition of intellectual creation. However, the cultural conflicts between Chinese Confucian views on intellectual creation and the spirits of Intellectual Property have become a great barrier to the effective enforcement of IP in China.

**Chapter 3: The Invisible Power against Copyright Protection: Traditional Chinese Culture**

Law shapes a nation’s politics, economics and society in many ways; meanwhile, the law reflects a state’s cultural, social and economic background. As proposed by Max Weber, the author of *Economy and Society*, a proper process of legal transplant should be “firstly establishing a system, then obtaining the enforcement, and then gradually melting into the social mind and public mind (legal acculturation), and finally completing the process of localisation” (Li, 2010 quoted in Zhang, 2007, P.251). Most importantly, the prerequisites of
transplanting a legal system are the public mind of initiative acceptance and the similar economic and social environment between the “importer” and “exporter” (Alford, 1995; Qu, 1999; Zhang, 2007; Li, 2010). Obviously, if a law is transplanted for the external reason, or if the transplanted legal culture conflicts with indigenous culture and value, the effectiveness of the law will be very likely decreased.

The Intellectual Property culture is a private legal culture characterized by individualism, liberalism and rationalism (Wu, 2008; Li, 2010). However, Chinese Confucian culture which influenced Chinese legal tradition “is a patriarchal clan culture and moral culture, which pays attention to the holism, collective spirit and obligation standards” (Li, 2010, p.275). Much research has been done on the comparative study of western idea of intellectual property and Chinese creative tradition. It is found that there is no such notion as intellectual property in China’s accumulated five-thousand-year traditional culture (Alford, 1995; Qu, 1999; Montgomery and Fitzgerald, 2006; Wu, 2008; Li, 2010). Moreover, the values behind the Confucian culture and intellectual creation tradition, in many ways, are completely opposite with the western notion of intellectual property (Alford, 1995; Qu, 1999; Wu, 2008; Li, 2010). As a result, “the western intellectual property is merely successfully transplanted its biologic framework whereas the psychological construction is still the brand of ‘Chinese tradition’ ”, which can be one of reasons for China’s insufficiency in Intellectual Property protection (Li, 2010, p.270). As discussed in literature review, many factors have contributed to the difficulties in the practical part of Intellectual Property laws. This Chapter only focuses on the cultural factors.
3.1 Collectivism, Only Obligations, No rights

Traditional Chinese culture is a group-oriented culture, which is defined as collectivism (Cui, 2002; Wu, 2008). The interest of group is prior to that of an individual. “Collectivism” can be found in *The Analects of Confucius*. From Confucius’ point of view, the individual’s duty is associated with his social position. The ideal life is realized in “the five human relations”: ruler to state official, father to son, husband to wife, the old to the young, and friend to friend. Individuals have to fulfil specific duties in each relation. The feature of collectivism is that individuals subordinate their individual goals to the goals of collectives. Triandis (1988, p.47) thinks that “Chinese in group-oriented cultures have internalized the rules of their collectives so completely that there is no distinction between in-group goals and individual goals”. Chinese people count on their in-group (relatives, patriarchal clans, or organizations) to look after them and in return for that they believe they should be absolutely loyal to their group.

In Confucianism, people are instructed to respect Yi and despise Li (Cui, 2002; Wu, 2008). In general, Yi and Li can be interpreted in three ways: “the first meaning is moral pursuit (Yi) and material benefits (Li); the second meaning is mental civilization (Yi) and material civilization (Li); the third meaning is the interest of the whole (Yi) and the individual interest (Li)” (Li, 2010, p.275 cited in Hu and Qiu, 2009). Confucius thinks, “Wealth and honours are

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1 “The Analects of Confucius is the collection of sayings and ideas attributed to Chinese philosopher Confucius (551B.C.-479B.C.) and his contemporaries, traditionally believed to have been written by Confucius’ followers” (Wikipedia, 2013)
what men desire, but abide not in them by help of wrong” (Legge, 1999, p.23). Also, he said, “a gentleman considers what is right; the vulgar consider what will pay” (Legge, 1999, p.25). Although the Confucianism admits the rationality of “Li”, it states “people should give up their individual interests once the public interests are incompatible with individual interest” (Li, 2010, p.276 cited in Hu and Qiu, 2009). There are a large number of famous quotes by Chinese ancient intellectuals about their resistance to the pursuit of money. For example, Fu Mi (A.D.1051-A.D.1107), one of the four greatest calligraphers of Song Dynasty, said that “it is wrong to talk about the price of the calligraphy works; A gentleman should not break this principle due to money”(Li, 2010, p. 277). Indeed, sometimes Chinese intellectuals would be invited to write articles for others, which can be regarded as the transferring of the works’ ownership in the modern sense. In return, they would be paid by a certain amount of materials or money; however, strictly speaking, it cannot be regarded as the commercializing of intangible/intellectual property (Wu, 1995). Interestingly, Chinese scholars called the payment as “moistening the writing brush” (this step will help the writing brush absorb ink), an implicative way to talk money, which reflects their concept of “despising Li”.

The Confucianism had been considered as the legitimacy for imperial Chinese domination for thousands of years; the Confucian rule of propriety was advocated as the holy principle to sustain the imperial power and patriarchal clan system (Cui, 2002; Li, 2010). Accumulated for five thousand years, the group-oriented thought is deeply rooted in Chinese people’s mind and has a far-reaching influence on traditional legal culture (Wu, 2008; Li, 2010). Chinese
traditional legal culture is characteristic of the obligation standard that disregarded personal rights and restricted individual interests for the purpose of maintaining social order.

In comparison, originated in the ancient Greek, western culture is an ego-centric culture, which is identified as individualism. It has been stated that Individualism is characterized by individuals who subordinate the collectives’ goals to other individual goals. Westerners give many considerations to personal wills, value, freedom, and creativeness because they believe that individual is the smallest unit of survival (Triandis, 1988). According to Maine (1860), the shift from family to the individual person symbolized the rise of modern law in the west. Personal value and individual interests are highly respected in western legal culture. More importantly, individualism lays the cultural foundation for the modern western private laws and directly promotes the formation of Intellectual property laws (Hughes, 1988; Hettinger, 1989; Wu, 2008). In modern intellectual property law, the intellectual property is, by nature, a private property; the intellectual property right is the private right. It is “not authorized by the sovereign but is the author and inventor’s personal creation” (Li, 2010, p.276).

Since the first promulgation of Intellectual Property laws, “western jurisprudence and scholarship about intellectual property have been inextricably linked to debate about the nature of real and personal property” (Okco, 1996, p. 567). However, we cannot find similar discussions in Chinese context because the individual rights and freedom were not regarded as the objects of protection from the first place. Due to the lack of the concept of

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2 The Statute of Monopolies 1624; Statute of Anne 1710
individualism and private rights, it is hard for Chinese people to completely accept the idea of protecting intellectual property for individual interests and rights. As discussed in the previous part, with the belief in “respecting Yi despising Li”, Chinese individuals rely on the state and the family. They tend to subordinate their individual interests to the collective interests and their values are basically shown in the groups they belong to such as the state. Influenced by this tradition, it is nearly impossible for a person without independent personality to claim his/her individual rights and to make material benefits from these rights.

3.2 Life Ideal: Carrying on Morality and Yi

In Confucianism, a person’s life goal should be to carry forward the morality and Yi³ (Cui, 2002). Accordingly, a person’s value is mainly judged by one criterion that at what degree this person has contributed to the society at a spiritual level. Confucius stated “a gentleman fears lest his name should die when life is done” (Legge, 1999, P.93), which clearly clarifies the Confucian life ideal that being admitted and remembered by the society. In terms of the production of creative works, Confucius thinks that it is not an individualized activity, but a transmission process in which the past knowledge can be passed on to the present and the future for others to draw on and build on (Cui, 2002). Qian Sima (104 B.C.- 91 B.C.), the author of the Records of the Grand Historian (Known in Chinese as Shi Ji), chose to endure humiliation in exchange for time to finish this book because he believed that those history

³ According to the concept of Yi and Li, Yi refers to moral pursuit, mental civilization and the interest of the whole.
materials, which would be beneficial to the society, should be passed down by scholars instead of being held by individuals (Li, 2010).

Such thoughts may explain why Chinese scholars had a totally different attitude to “copying” from western scholars (Alford, 1995; Cui, 2002; Li, 2010). It is widely accepted by Chinese traditional intellectuals that they are responsible for communicating and sharing their findings, especially the trans-historical truth. For this reason, it will be shameful to gain material profit when they are fulfilling their social obligations. Therefore, Chinese scholars feel happy when their literary works or artistic works are copied by others, because they regard it as recognition and compliment for them⁴. This ideology has resided in Chinese public mind up until now. According to Cui (2002), during the Second Session of the Fifth CPPNN National Committee in 1979, literati Dagang Luo complained that his articles had been copied by others, but someone replied that “it was his honour to be copied; knowledge is never personal property”. Similarly, there was a debate on the distribution of interests between the creator and the public during the preparation of the draft Copyright Law of the PRC. Someone claimed that fewer rights should be given to the authors and copyright owners than the public under socialism which highly emphasizes on individuals’ contribution to the society.

By Contrast, originated from ancient Greek, western culture attaches primary importance to individual interests. During the period of the Renaissance (14th-17th century), the spirit of individualism had been strengthened again; People were inspired to pursuit freedom and

⁴ Plagiarism without acknowledge is strongly despised by Chinese gentlemen although copying is welcomed.
self-realization (Wu, 2008). Different from Chinese traditional life ideal – promoting morality and Yi⁵, personal goal and self-realization were respected and encouraged in western culture. Private interests, which were excluded from Chinese traditional social moral mainstream, had been protected by law in modern western society, such as intellectual property (Wu, 2008; Li, 2010). In addition, according to Hegel, intellectual property rights are used as a tool to “secure recognition for the individual” (Hughes, 1988, p. 51). This concept is different from the Confucian thoughts on intellectual creations that “all the new intellectual contributions are from the past wisdom” and it is intellectuals’ responsibility to transmit them to the present and the future (Li, 2010, p.277). These thoughts could be the cultural reason why it is not easy to make Chinese people believe that the piracy and the consumption of infringing products as serious unlawful acts.

3.3 “Law is Criminal Punishment”

There is a view that China’s traditional legal instrumentalism has been one of the obstacles for its intellectual property development (Cui, 2002; Wu, 2008; Li, 2010). In Chinese traditions, law was considered as “a tool for class domination and a measure for maintaining the operation of the state apparatus” (Li, 2010, p.270). The Chinese traditional legal system is characteristic of emphasis on criminal laws rather than civil laws (Ma, 1997; Li, 2010). Taking a review of Chinese laws enacted before the end of Qing dynasty, we find that the traditional legal system has attached much importance to criminal laws and that the few

⁵Ibid., 3.
provisions on civil laws and administration laws existed only as supplements. In addition, civil suits even followed the procedure of criminal litigation (Fan, 2000).

As Yuanpei Cai, one of the famous modern educators in China, pointed out, “in ancient China, law is different from propriety; the law equals to modern criminal law while propriety equals to modern civil law”. Propriety interpreted as customs or ethical codes, is an important pillar of the Confucian culture, covering the whole spectrum of a person’s interactive activities with people, the nature and material objects, such as learning, tea drinking and governance, etc. In Confucianism, morality and propriety are essential tools used to govern a state while the criminal punishment is merely regarded as assistant method for political domination and civilizing people (Li, 2010). This thought is clearly illustrated in the Analects of Confucius⁶: “guide the people by law, subdue them by punishment; they may shun crime, but will be void of shame; guide them by example, subdue them by courtesy; they will learn shame, and come to be good” (Legge, 1999). Under this cultural background, a large amount of private regulations only existed in the form of propriety / customs rather than legal rules. Admittedly, there was no space and no opportunity for private laws such as civil laws to grow up and become an independent legal system in China (Li, 2010).

The reason for the formation of such a legal system lies in the “legal instrumentalism of traditional Chinese legal culture”⁷ (Li, 2010, p.271). Chinese ancient laws originated from the

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⁶ Ibid.,1
⁷ Chinese traditional legal culture refers to the accumulated legal culture before the establishment of People’s Republic of China (1949)
criminal punishment used in tribal wars, which was adopted by the winner to sustain the domination and oppression upon the defeated (Yu and Shi, 2000). The conception of Chinese ancient laws, in essence, was formed and developed from the instrumentalist view instead of the value view (Li, 2010). As discussed above, the Confucius advocated moral education whilst downplaying the position of law. Therefore, Law was regarded by the Chinese as a reflection of the ideology of the dominator and a tool for class domination, not an embodiment of freedom, justice and equity, the spirit of western legal system.

This thinking of legal instrumentalism has profoundly influenced Chinese legal cultural throughout the feudal era and even modern Chinese legislation. One example is the definition of law. According to Shuo Wen Jie Zi (an ancient Chinese dictionary of words and expressions), “law is criminal punishment”. Even in modern society, the instrumentalism’s shadow could be found in some early versions of publicity materials for law education, in which law was defined as “behaviour norms enacted or admitted by states and is implemented by the power of state… it is a reflection of the consciousness of ruling class”(Li, 2010, p.272). Another example is Chinese government’s placing priority on rebuilding criminal law rather than private laws in the late 1970s. Fact shows the criminal law and criminal procedure law were promulgated first and very quickly because of its function in maintaining social order, while civil law and commercial law were enacted very slowly (Li, 2010). As stated by Qu (1999), if the US government did not persist in including the rules of
intellectual property in the two China-US agreements in 1979⁸, Chinese intellectual property law system would not be built at such a quick speed.

Growing up with different natural environment, social and economic conditions, the western legal culture is different from Chinese legal culture in many ways, such as the primacy of law, emphasis on private laws and rights-based principles (Wu, 2008). It is believed by ancient Greek philosophers that city-state should be governed by law rather than a ruler or an interest group, which is a result of the exploration on nature attributes and human reason. Ancient Rome also followed the spirit of the primacy of law that the law had been regarded as an important role in political management (Pang, 2008). During the end of the Middle Ages (5ᵗʰ -15ᵗʰ century), the Renaissance (14ᵗʰ-17ᵗʰ century) rose in Italy and spread to other European countries, which attached great importance to humanism and marked the beginning of the modern period in the West. With the rebirth of individualism and rationalism developed by ancient Greece and Rome, this cultural movement placed great emphasis on human nature and the value of man rather than the established religious doctrines. People were encouraged to pursue personal rights, freedom, equality and democracy. The spread of those new cultural values aroused people’s faith in law which was regarded as the embodiment of justice and rights (Wu, 2008). The idea of “the rule of law” had been fixed in the form of law during the Bourgeois Revolution, for example, in England the establishment of the Bill of Rights 1689 limited the Crown’s power and set out the rights of Parliament, marking the transformation from “the rule of the Crown” to “the rule of the law”. In contrast to western people’s

conception of ruling by law, Chinese people were instructed to follow propriety in the belief that morality and propriety were the main method to govern a state. Law, the criminal penalty, was just a supplementary tool to remedy the limitation of propriety. Therefore, there is a difference in the public’s attitude towards law between China and the West.

Western law attached great emphasis on private laws such as civil law, commercial law while Chinese traditional law merely focused on criminal law (Li, 2004; Lin 2004). Private law, by nature, is the law governs the relationship between individuals. As the cultural background of modern private laws, individualism can be found in many areas in private laws, such as the emphasis on individual rights, individual interests, private autonomy and right-based principle, etc (Wu, 2008). During the English Bourgeois Revolution in 17th century, John Milton, Thomas Hobbes and John Locke all advocated the principle of popular sovereignty, equality of rights and freedom and they also stressed the inviolability of private property (Wu, 2008). Under the influence of traditional legal instrumentalism, little consideration had been given to the development of private law until the establishment of the People's Republic of China (1949). It has been stated that China lagged behind in the development of private law due to economic, social and cultural factors, which resulted the fact that compared with the strong public culture, China’s private legal culture is still at a developmental stage (Lin, 2004; Wu, 2008; Li, 2010).
3.4 Summary

This chapter has discussed Chinese traditional view on intellectual property and Chinese traditional legal culture. It has been found that there are some contrasting values between traditional Chinese culture and western intellectual property culture; the Chinese legal tradition lacks the essential factors which are the prerequisites and foundation for the legalization of intellectual property protection.

Confucianism has dominated Chinese society for thousands of years. For Chinese people, Confucianism is “a worldview, a social ethic, a political ideology, a scholarly tradition, and a way of life”, which influenced Chinese tradition of intellectual creation as well (Ocko, 1996, p. 562). Traditional Chinese culture is characteristic of collectivism, which advocates that Chinese individuals rely on the state and the family; the interest of the group is given priority over that of an individual. This value is fully demonstrated in the Confucian thought of “respecting Yi and despising Li”, which gives little concern to personal rights and restricts individual interests for the purpose of maintaining social order. Due to the lack of the concept of individualism and private rights, it is difficult for Chinese people to thoroughly accept the notion of protecting intellectual property for the individual interests and rights, similarly, it is hard for a person without independent personality to claim his or her individual rights and to gain profit from these rights.
Influenced by Confucianism, traditional Chinese intellectuals believe that a person’s life goal should be to carry forward the morality and Yi and their personal value will be judged by their contribution to society at a spiritual level. Confucius believes that individual creations draw on the past wisdom which belongs to all members of society; therefore, neither learning and nor creation is an individualized activity, but a collective transmission process in which the past knowledge is passed on to the present and the future. This thought greatly influenced Chinese people’s attitude towards copying behaviour. Traditional Chinese scholars welcomed copying as a compliment. However, traditional intellectuals would feel ashamed if they gained material profit from their spiritual works since they believed communicating and sharing the findings is their social responsibility. This idea has been influencing Chinese public mind up until now.

Law is relevant in almost every area of people’s life, so it is nearly impossible to draw a clear border between legal culture and general culture. According to a widely accepted view, legal culture reflects “culture background of law which creates the law and which is necessary to give meaning to law” (Michaels, 2011, p.2). In other words, the general culture has an impact on the shaping of legal culture. Influenced by Confucianism, traditional Chinese legal culture is characteristic of legal instrumentalism, with an emphasis on criminal laws and individuals’ obligations. During the period of imperial China, Chinese people considered law as a tool for class domination reflecting the ideology of the dominator, not an embodiment of freedom, justice and equity, the spirit of western legal system. Chinese legal tradition disregarded

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Ibid., 3.
individual rights and restricted private interests for the purpose of maintaining social order. As a result, little consideration had been given to the development of private law until the founding of the PRC (1949).

In conclusion, the values behind the traditional Confucian culture and intellectual creation traditions, are, in many ways, the completely opposite of western concepts of intellectual property. China lacks a private legal culture in which the system of intellectual property law is rooted. Given that both intellectual property culture and relevant private legal culture directly influences people’s conduct and activity, these cultural conflicts discussed above can be part of the reason for the lack of a counterpart to the western idea of intellectual property in China, the failure of the first transplantation of intellectual property law in the late Qing dynasty and the current unsatisfactory situation of intellectual property protection in China.

Chapter 4: Copyright in Public Mind

Although the domination of Confucianism has been interrupted by the political and ideological changes which have taken place since the end of Qing dynasty (the early 20th century), Confucian culture has a profound influence on all aspects of China’s society. Through analyzing the results of two recent surveys and a case, this chapter will discuss whether traditional Chinese culture has an impact on the current public’s mind about intellectual property protection.
4.1 Public Awareness of Intellectual Property Protection

There have been many studies on the issue of intellectual property rights protection in China. According to US Customs (2007) and EU Taxation and Customs, China is the main source of infringement products in the world. In terms of copyright-based industries, statistics show that “piracy rates remain at between 80 percent and 95 percent of market share” in China’s film and music industries (Montgomery and Fitzgerald, 2006, p.410). The Motion Picture Association of America (2006) claimed they lost about 93 % of the potential film market in China due to the high rate of piracy. The problem of IPR protection in China has drawn increasing attention from academic circles.

Investigations have been conducted on the Chinese public’s awareness of IP protection. According to the 2009 National Investigation on Public Cultural Literacy on Intellectual Property Protection, the average index of Chinese public literacy on intellectual property is 42.1 which is quite low since it is on a scale of 100 (Gao, 2009). An interesting phenomenon is revealed in the 2007 Survey on the Influence of Public Awareness of Intellectual Property on the Victimization of Intellectual Property. According to the survey, if people have a higher education degree, they are more likely to recognize intellectual property. However, there is no inverse correlation between the education level and the proportion of consuming pirated products (Zhao and Wang, 2007). In terms of the survey on the consumption experience of infringing products, people who have bachelor degrees or above occupy 73.8% of the total
number of buyers while those people only take up 53.1% of the total sample, which implies that people with a higher education degree are more likely to consume pirated goods (Zhao and Wang, 2007). Another interesting finding is that the frequency of consuming infringing goods goes up along with increased earnings, which is contrary to an assumption that the more income people have, the less they buy pirated products (Zhao and Wang, 2007). This survey demonstrates that it is wrong to simply blame rampant piracy in China on low education level as people with that background have limited knowledge on intellectual property. Also, it is wrong to assume that a low level of average income is the primary cause of the consumption of infringing products. In fact, the main reason behind the overflowing intellectual property infringement lies in the traditional Chinese culture (Qu, 1999; Cui, 2002; Zhao and Wang, 2007; Wu, 2008; Li, 2010). For Chinese people, having knowledge about intellectual property does not necessarily mean they will protect intellectual property. There is a gap between an awareness of IP protection and acting to protecting IP.

4.2 “In The Spring” Event: a Case of Music Copyright Infringement

Music copyright protection became a hot topic in 2011 because of the “in the spring” event, a copyright dispute case in music industry. This event aroused a heat discussion among musicians, scholars in intellectual property field, a large number of internet users and even TV presenters from China Central Television. As stated by Qu (2011), both the “in the spring” event itself and the debate around this case revealed the cultural conflicts between traditional Chinese culture and the modern system of intellectual property protection.
4.2.1 Introduction of “in the Spring” Event

*In the Spring* is a song written by Chinese rock musician Feng Wang; it is included in Feng Wang’s album *Belief Flies in the Wind* (2009) which won him the Most Popular Male Singer in mainland of China at the 14th Chinese Music Awards.

In October 2010, two Chinese farmers Gang Liu and Xu Wang become famous overnight after a video of their heart-rending cover version of *In the Spring* appeared on the internet. As Wang and Liu said, the lyric of the song is a true portrait of a vulnerable group\(^\text{10}\) like themselves. That video received more than two million hits and has moved thousands of people to cry (China Daily, 2011). Four months later, Wang and Li were invited to participate in the 2011 CCTV Spring Festival Gala and they performed *In the Spring* on the big stage, which made them nationally popular overnight. Afterwards, Wang and Liu received innumerable invitations for commercial performance and they kept on touring all over the country. The songs they used to perform were nearly all from Feng Wang’s works including *In the Spring*, however they had not paid any royalties or even applied for the license to the copyright owner of those songs, Feng Wang. Therefore, on 10th February, 2011, Feng Wang informed Wang and Liu that they should stop using his music works in commercial performances, which was covered by the media immediately and led to a heat debate including a lot of criticism to Feng Wang.

\(^{10}\) In this context, vulnerable group refers to rural-urban migrant workers in China.
4.2.2 Different Voices around “in the Spring” Event

According to Dan (2012), as the copyright owner of “in the spring”, Feng Wang has the right to protect his music works from infringement. Wang and Liu’s act of uploading the video of cover version of “in the Spring” on the internet should be classified into the category of fair use because the purpose of use is non-profit (Luo, 2011; Dan, 2012). In terms of Wang and Liu’s performance in 2011 CCTV Spring Festival Gala, that use of “in the spring” was legal because CCTV had gained the permission from Feng Wang and paid license fee (Luo, 2011; Dan, 2012). After that performance, that license fee was donated by Feng Wang to Wang and Liu to “help them pursue their music dream” and Feng Wang suggested them to use their own music in the near future (Wang, 2011). But in subsequent commercial shows, Wang and Liu still used Feng Wang’s songs without permission, which undoubtedly can be defined as copyright infringement (Dan, 2012; Qu, 2011).

However, Feng Wang’s statement of protecting his copyright drew lots of criticism from the public. The discussions were mainly on the internet, where many people doubted the motive behind Feng Wang’s vindication of his right, such as, “Feng Wang merely envies the two farmers’ success”. Some people claimed that as a famous singer, Feng Wang should be more generous and help the vulnerable underclass in the society like Wang and Liu. Wang and Liu also released a public statement, in which they said “they owe Feng Wang an apology and they knew little about music industry” (Dan, 2012).
Qu (2011) points out that “In the Spring” event revealed the cultural conflicts between traditional Chinese culture and the system of intellectual property protection: intellectual property is still a foreign notion in China. In this case, people who criticized Feng Wang actually judged him with the value of morality not the law. They even ignored the principle of equality of rights and thought that Feng Wang should give up his personal rights and interests to help the weak, because it will benefit the society (Dan, 2012). More critically, this event reflects the public’s confusion on the exclusive rights reserved to the copyright owner and their poor awareness of intellectual property protection.

4.3 Summary

The two surveys on public awareness of intellectual property protection show that most Chinese people have a weak public awareness of intellectual property protection. Low educational degree or low-level of income is not the direct reason for people’s consuming infringement products. The case of “in the spring” indicates that it is still hard for some Chinese people to think of copyright as a private property right. As proposed by Dan (2012), if the music works in this case were placed by some tangible properties such as car, there would be no dispute. Based on the analysis of the public’s criticism to Feng Wang, it can be found that they made their judgment according to traditional moral values (collectivism) rather than the law. Moreover, the principle of equal justice under law was also overlooked. In conclusion, traditional Chinese culture still has an influence on the Chinese public’s
Chapter 5: Creative Commons: an Educational Tool?

As discussed in the previous chapters, there exist some cultural conflicts between traditional Chinese culture and the western concept of intellectual property. These cultural barriers have a negative influence on the current institution of intellectual property protection and could be the reason for the public’s weak awareness of copyright protection. This chapter will discuss whether Creative Commons can play an educational role in the development of copyright protection in China.

5.1 Two Challenges to China’s Copyright Industry

Over more than one hundred years of development, China has achieved undeniable progress in legislation of intellectual property under external pressure (Qu, 1999; Wang, 2004; Montgomery and Fitzgerald, 2006). The 21st century has witnessed China’s initiative efforts in enhancing intellectual property protection since China needs to exploit its own intellectual property for the demand of a vibrant socialist market economy and fierce international

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11 The World Intellectual Property Organisation places copyright in the central part of creative industries, which are classified as the ‘core’ copyright industries, the ‘interdependent’ copyright industries and the ‘partial’ copyright industries.
competition. China’s government has been placing increasing importance in developing its own cultural industries since the early 2000’s, which reflects China’s 21st century cultural policy that China needs to “enhance Chinese culture as part of the country’s soft power” (Zhang, 2010, p.383). Accordingly, the protection of intellectual property has been closely scrutinized and invested in by the Chinese government since it is directly connected to its own cultural sector (Montgomery and Fitzgerald, 2006).

It has been found that a weak IP enforcement and a poor public awareness of IP protection are great barriers to the development of Chinese cultural industries (Wang, 2004; Montgomery and Fitzgerald, 2006; Ma, 2013). Meanwhile, with the development of digital technology, the management of copyright in cultural industries is facing a new challenge: digitalization (Towse, 2010). As stated by Montgomery and Fitzgerald (2006, p.409), we are living in a digital age of “downloading, sampling, remixing and re-versioning” when people start to question the future of copyright because it is increasingly considered as overly restrictive. For China, the number of Chinese internet users is growing quickly\(^\text{12}\), which does not make it viable to implement a strict copyright regime online. Moreover, the assumption of “copyright is the basis for creativity” has been questioned. According to Towse (2010, p.462), the current copyright policy is made nearly without empirical evidence, because “it is very difficult to find counterfactual situations for testing the impact of copyright on the creator as copyright automatically attached to the authors”.

\(^{12}\) According to China Internet Network Information Center, the number of Chinese internet users has reached 591 million by the end of June, 2013.
With this background, some scholars suggest that the policymakers of China should not forget China’s own traditional cultural practice that knowledge has been shared and transmitted when there was no counterpart of intellectual property laws in this past (Montgomery and Fitzgerald, 2006). Furthermore, similar concepts of “opening” information are becoming a significant aspect of western intellectual property protection system (Montgomery and Fitzgerald, 2006; Wang, 2008). Therefore, China should draw upon its own historical experiences and incorporate scholarly traditions into building the current IP system. In addition, some more open models for managing copyright such as Creative Commons License and Free Software should be promoted in China since they may help to maximize each party’s benefits in this digital age; more importantly, these open licensing models may play an educational role in popularizing the notion of copyright and cultivating a conscious sharing habit for Chinese people (Montgomery and Fitzgerald, 2006; Wang, 2008).

5.2 When Creative Commons Meets China

Creative Commons (CC) is an international non-profit organization which provides free legal tools – Creative Common Licenses to enable people to mark their intellectual works with selected intellectual property rights they wish to reserve and freely “license out” the rest. Creative Commons is designed to free information rather than close it off, aiming at realizing open access to knowledge (Wang, 2008). Creative Commons “is not against copyright, but notes the importance of copyright and creates a balance to benefit the creators, and the general public as well, through providing an alternative option to authors, scientists and
artists\(^{13}\) (Wang, 2008 cited in Lessig, 2006). In essence, Creative Commons is an alternative solution to remedy the overly restrictive copyright protection.

In 2006, Creative Common was introduced to China; since then it has become a significant copyright management instrument in bridging the ‘traditional western approaches of strict copyright and the traditional Chinese approach of no intellectual property right’ (Xiao, 2007; Wang, 2008). Confucian intellectuals believe that intellectual creations have always been built on the past wisdom; learning and creation are not individual activities, but collective transmission processes, through which the past heritage can be passed down to the present for people to share and draw on. Influenced by Confucianism, some intellectuals and creative workers in cultural industries are still following the ideology of “art for art’s sake” and they even feel ashamed to commercialize their creations. As an accumulated tradition, Chinese consumers of cultural products tend to take it for granted that the creative works of authors are free for use in any way (Wang, 2008).

With providing a moderate model of “some rights reserved”, Creative Commons creates a reasonable middle ground for China, a “bridge” between the western “all rights reserved” copyright system and Chinese “no rights reserved” tradition. In other words, Creative Commons provides a sensible compromise between the two extremes: the western tradition of strict protection of private intellectual property and the Chinese tradition of collective

\(^{13}\) A various forms of intellectual works including words, images, music, films and scientific knowledge can be licensed under Creative Commons Licenses.
ownership of intellectual works. Therefore, Creative Commons could play an educational role in popularizing the notion of copyright and “could help cultivate an attitude of conscious sharing within the Chinese society” (Wang, 2008, p.309). For copyright owners, Creative Commons provides them an easy-to-understand system, rather than a complicated legal procedure, to clearly announce the rights they wish to reserve. At the same time their works can be transmitted freely and effectively under the licensing conditions. Indeed, this balanced mechanism could encourage more Chinese creators to protect their private rights and enhance their consciousness of rights. For content users, Creative Commons provides them with clear announcements of permissions and prohibitions before they legally share, remix, and reuse the creative works. This would be an educational process in which the real meaning of intellectual property could be delivered to the end users - intellectual property is, by nature, a private property; the intellectual property right is private right.

In addition, with the rapid development of internet, the number of Chinese internet users has reached 591 million by 2013, ranking the first in the world (CNNIC, 2013). Research shows that the Internet is becoming the main access for Chinese consumers to gain content resources and consuming cultural products (Wang, 2008). This fact makes it even more important that China should adopt a well-balanced copyright regime for the copyright owner, the industries and the end users. As proposed by Stiglitz (2007), intellectual property system will be beneficial to the society only when the obstacle to information flow is eliminated; China should establish a balanced intellectual property regime corresponding with its national
conditions rather than a duplicated western system which may lead to monopoly of knowledge.

5.3 Summary

Based on the discussion above, two challenges to the development of Chinese copyright-based industries have been identified. One is the common problem of intellectual property protection in China – weak enforcement regime and poor public awareness of copyright protection; the other is the challenge of digital technology. Digital technology makes the reproduction of content comparatively easily and generates an interactive web culture or “read-write” culture based on new media, which is different from the traditional “read-only” culture\(^\text{14}\) (Lessig, 2006). In addition, increasing numbers of Chinese people are consuming cultural products via the Internet. Those changes make it quite hard for China to enforce a strict copyright regime online.

Meanwhile, the international academic community has been calling for free information and knowledge sharing and some open models for managing copyright such as Creative Commons License has been established. The mission of Creative Commons – helping realize open access to knowledge, corresponds to Chinese traditional approach to intellectual creation that knowledge is created for sharing; its transmission within the community will

\(^{14}\) According to Lawrence Lessig, in a society where the public simply consumes resources created by others, it shall be called a “read-only” culture. On the contrary, in a society where the public generates resources while consuming them, it can be called “read-write” culture.
generate more value for the public (Wang, 2008). Creative Commons, the “some rights reserved” model, may play an important role in bridging the western “all rights reserved” copyright system and Chinese traditional “no rights reserved” approach. Therefore, as stated by Wang (2008) and Xiao (2007), Creative Commons could help in the education of copyright protection and cultivating a legal and conscious sharing habit for Chinese people.

Chapter 6: Conclusion

Five main questions have been explored in this paper: What is the nature of the relationship between traditional Chinese culture and the western concept of intellectual property? Are there any cultural conflicts between traditional Chinese culture and the western concept of intellectual property? What are the cultural conflicts? Has traditional Chinese culture an impact on the current public’s mind about intellectual property protection? Can Creative Commons play a helpful role in the copyright education in China? Through literature review
and the analysis of historical facts, recent surveys and a case of copyright infringement, this paper makes the following conclusion.

There was no counterpart to the western notion of intellectual property in imperial China, much less institutionalised intellectual property laws. China’s one-hundred-year development history of intellectual property laws is a passive transplantation process under external pressure in which little concern has been given to its own tradition of intellectual creation. Since the very beginning of this transplantation process, the accumulated traditional Chinese culture has been struggling with the legal value of intellectual property laws.

There are many culture conflicts between the values behind the traditional Chinese culture and the western concepts of intellectual property. Confucianism is characteristic of collectivism, which deprives Chinese people of the concept of individualism and private rights. Traditional Chinese culture emphasizes the communal ownership of intellectual works rather creations as private properties that individuals can profit from. Moreover, Chinese legal culture is characteristic of legal instrumentalism and China lacks a private legal culture which is the prerequisite and foundation for the legalisation of intellectual property protection. These cultural conflicts could be part of the reason for the lack of a counterpart to the western idea of intellectual property in China, the failure of the first transplantation of intellectual property law in the late Qing dynasty and the current unsatisfactory situation of intellectual property protection in China. More importantly, these ideologies have resided in Chinese public mind up until now and help people to “justify” their copyright infringement acts.
The Chinese government has attached great importance to the development of culture industries as an essential factor of national competitiveness. Much effort has been put in the constructing of intellectual property culture to ensure a healthy marketplace for culture products. However, the impact of traditional culture hardly can be eliminated in a short time. As stated by Qu (1999), traditional Chinese culture could be both the barrier and the opportunity to the development of copyright protection in China. This digital age has promoted the emergence of some open models for managing copyright such as Creative Commons License. The mission of Creative Commons – helping realize open access to knowledge, corresponds to Chinese traditional approach to intellectual creation that knowledge is created for sharing. Analysis in the previous part shows that Creative Commons could play an educational role in popularizing the notion of copyright and cultivating a conscious sharing habit for Chinese people.

In terms of the implications of this thesis for Chinese policymakers, a successful system of copyright protection should serve as an effective interest balancing mechanism among creators, successive creators and the public; more importantly, it should correspond with its own national conditions. Traditional Chinese culture should not be overlooked in the development of copyright protection. Since the development of Creative Commons is in its early stages and the application of Creative Commons is limited in scope, in the near future, further studies should be conducted to examine the extent to which Creative Commons will contribute to copyright education in China.
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