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## The History of Chinese Copyright and Legal Orientalism<sup>2</sup>

### *I. Introduction*

A growing volume of literature has explored the origin and development of copyright in ancient China, and most of them primarily tend to focus on printing technology and regulations enacted by imperial powers. By defining the main purposes of modern copyright law as encouraging innovation and creation and guarantee authors' legitimate interests and rights, researchers easily concluded the absence of copyright law in ancient China. Researchers took steps further to explore the main reason why there was no indigenous counterpart of copyright law in ancient China, while most of the explanations were based on legal orientalism discourses which engages in misleading assumptions of legal culture of China.

Undoubtedly, the making of the modern copyright system should be better understood as a process rather than simply as isolated events or stipulations. The *Statute of Anne* of 1709, was often regarded as the starting point in the history of the modern copyright system. But that is not to say that the modern copyright system was established right after the enactment of the *Statute of Anne*. Various protective measures in ancient times were regarded as functional equivalents of copyright protection; numerous precedents and industry customs, to some extent, foreshadowed and ultimately consolidated the spirit of the modern copyright system in the past three centuries. Not surprisingly, such protective measures and industry customs played a significant role in the protection of right owners' interests over works in ancient China.

The overall structure of the article takes the form of five sections. Section II of this article brings up a brief introduction of debate between two copyright experts, Zheng Chengsi and William P. Alford, and summarizes the approaches adopted and the main ideas proposed by them regarding the existence of Chinese copyright protection. Section III explains that the "copyright" was not a lexicon of Chinese traditional culture but an imported concept and concludes the absence of copyright law in the modern sense. In section IV, the author adopts a functionalism view, and proposes a compromise argumentation that Chinese did have a certain degree of awareness of "copyright protection," and have protected their interests generated from works through various measures in ancient dynasties, including but not limited to: (i) decrees issued by imperial government and institutions; (ii) administrative protection for publisher and authors; (iii) proprietary declarations on imprints. Section V criticizes three typical misinterpretations about Chinese culture, and provides detailed explanations to each misleading assumption. Section VI turns attention to legal orientalism and reveals how it constructs, affects, and reinforces Westerners' understanding of Chinese legal culture. At the end of this article, the author tries to convince readers to reexamine the premise when occasionally finding something in ancient China that does not fit in the standard concept of Western law.

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## II. Debate between Zheng Chengsi and William P. Alford

Over the past three decades, intensive debates over the issue of copyright in ancient China have been attracting the attention of many researchers. In response to the question that whether there was copyright law in ancient China,<sup>3</sup> numerous researchers have attempted to relate the emergence of copyright to the advent of certain technology. For example, portable type printing technology, is widely believed to play a decisive role in the establishment of copyright system. The advent of printing technology lowered the cost of producing books, the physical carrier of works, and brought considerable revenue to printers and authors. Instead, advanced printing technology also promoted rampant and uncontrollable literary piracy and theft which infringed the interests of publishers and authors.<sup>4</sup> Consequently, publishers and authors requested government for legal protection of rights over works. Such examinations of technical foundations of the emergence of copyright system have largely improved the research on the objective conditions of the copyright system and have been broadly adopted. However, the improvement of printing technology alone is not the direct and only factor affecting the making of copyright law. Copyright law emerges only when technology brings about the growing imbalance between different interests and actors of publishing industry and consumers.<sup>5</sup> Then scholars turn to the ideas, practices and regulations of copyright protection.

Developed on the findings above, some held that there was primitive copyright system in the Song Dynasty by identifying official and unofficial history which revealed a tradition of printing regulation in Song Dynasty.<sup>6</sup> Citing the relationship between the printing press and the emergence of copyright system as the premise, Zheng Chengsi, a Chinese copyright expert, stated that “both Eastern and Western scholars of intellectual property law believe that copyright developed with the adoption of the printing press.”<sup>7</sup> He argued that the protection of publishers in the form of imperial decree had existed for 800 years since the Song Dynasty (with the exception of a break in the Ming Dynasty), and that so-called “copyright” emerged as a civil right and privilege of creators and publishers, despite the fact that a formal written copyright law has never been discovered.<sup>8</sup> Chinese scholars trace the history of copyright back even further, and consider the signing one’s name on the works during the Spring and Autumn and the Warring States periods (771-221 B.C.) as the beginning of the awareness of copyright protection.<sup>9</sup>

By contrast, William P. Alford shared an opposite point of view in his highly influential work that “imperial China did not develop a sustained indigenous counterpart to intellectual property law” due to “the character of Chinese political culture.”<sup>10</sup> He pointed that the Chinese protection of the unauthorized reproduction of texts and other items distinctively

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<sup>3</sup> William P. Alford, *To Steal a Book is an Elegant Offense: Intellectual Property Law in Chinese Civilization*. Stanford, CA: Stanford University Press, 1995.

<sup>4</sup> Zheng Chengsi (郑成思), *Banquan Fa* (版权法) [Copyright Law]. Zhongguo Renmin Daxue Chubanshe (中国人民大学出版社) [China Renmin University Press], 2009, p.3.

<sup>5</sup> Li Chen (李琛), *Zhuzuoquan Jiben Lilun Pipan* (著作权基本理论批判) [Critiques on Basic Principles of Copyright]. Zhishi Chanquan Chubanshe (知识产权出版社) [Intellectual Property Press], 2013, pp.12-16.

<sup>6</sup> Stephen McIntyre, Trying to Agree on Three Articles of Law: The Idea/Expression Dichotomy in Chinese Copyright Law. *Cybaris: An Intellectual Property Law Review*, Vol. 1, Issue 1, 2010, p.69.

<sup>7</sup> Zheng Chengsi (郑成思), *Zhishi Chanquan Lun* (知识产权论) [Theory on Intellectual Property]. Falv Chubanshe (法律出版社) [Law Press China], 2003, p.10.

<sup>8</sup> *Ibid*, pp.10-25.

<sup>9</sup> Feng Cuiyin (冯翠银), *Zhongguo Gugai Banquan De Lishi Yanjin* (中国古代版权的历史演进) [The Historical Evolution of Copyright in Ancient China]. *Tushuguan Jianshe* (图书馆建设) [Library Development], Vol.3, 2003.

<sup>10</sup> See Alford, *supra* note 2, at p.2.

differentiate from modern copyright protection:

*“The rationale for imperial Chinese protection of intellectual property dictated the character of that protection. Neither formal nor informal bodies of law vested guilds, families, and others seeking to preserve their monopoly over particular items with “rights” that might be invoked to vindicate their claims against the state or against others throughout China. Nor was the provision of state assistance, whether direct or indirect, merely a matter of privilege. In keeping with the tenor of the fiducial bond underlying the relationship between ruler and ruled, there existed among civilized persons expectations as to what was appropriate and fair, as well as a sense that an appeal to one’s magistrate or other representatives of the state might be warranted in the event those expectations went unfulfilled.”<sup>11</sup>*

The “restrictions on reprinting” and “the absolute ban on the heterodox materials” could be understood as “part of large framework for controlling the dissemination of ideas,” rather than the willing to constituting intellectual property rights. Based on the findings above, he criticized Zheng misinterpreting “imperial effort to control the dissemination of ideas” as “constituting copyright,” and the former is also the main reason why there was no intellectual property law in imperial China. Up to now, several studies accepted Alford’s political-cultural analysis and provided more evidences to support it.

Overall, both of their arguments are one-sided stories. They adopted two completely different approaches, resulting in two different perspectives on the argumentation for the emergence of copyright. In the light of the development of printing technology and the economic and social background of that time, Zheng analyzed the practices of copyright protection, the claims of publishers, together with the expression of official legal texts in the Song Dynasty. Instead of paying adequate attention to the laws controlling the meanwhile reflecting the state’s interests, Zheng emphasized on the private sector and chose the historical records of profit-making publishers to support his argument. By exploring the scattered records of protection of printing and copying in ancient China, he concluded that copyright first emerged in China as the protection on the carrier of “books” is similar to the modern copyright in the regard of method and function. In contrast, Alford focused on the imperial power’s efforts to regulate publications, mainly from the perspective of empire’s dominant thoughts, ideologies, and legal systems. He investigated the purposes of the protection through a rights-based perspective. After positioning the emergence of copyright as protection rather than restriction of intellectual endeavors, he directly treated the copyright-like forms of protection in ancient China as subsidiary to censorship of publication, which aimed merely to control the dissemination of ideas and suppress the freedom of thought.<sup>12</sup> At the same time, through examining the technological development, especially the breakthroughs in printing technology, the economic improvement, along with the politic-culture environment, he further concluded that “the dominant Confucian vision of the nature of civilization,”<sup>13</sup> which was characterized by disdain for commercial profits and privilege imitation over innovation, and its manifestation in the ancient centralized political system of absolute monarchy, was an essential factor that frustrated the emergence of the copyright system in ancient China.<sup>14</sup>

### *III. Whether there was copyright in imperial China?*

Scholars usually trace the existing copyright concepts back into history to understand the

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<sup>11</sup> See Alford, *supra* note 2, at pp.24-25.

<sup>12</sup> See Alford, *supra* note 2, at p. 23.

<sup>13</sup> See Alford, *supra* note 2, at p.19.

<sup>14</sup> See Alford, *supra* note 2, at p.20.

evolution of the copyright system, while the different cultural backgrounds as well as changing stipulations of different historical periods have added complexity those concepts. As Alford puts it, “[t]he use by different societies of common terminology does not necessarily ensure that such terms will carry the same meaning in each setting.”<sup>15</sup> It would be far-fetched if one used a modern terminology to interpret and restate ancient Chinese culture and social system without understanding of its specific historical context. Therefore, to discuss the origin of copyright in ancient China, it is necessary to pay special attention to the meaning of the term “copyright,” as its connotation continuously evolves since its emergence.

As Mark Rose revealed that “[r]eputable booksellers may, as a matter of custom, have acknowledged that authors had legitimate claims but there is no evidence that copyright was ever recognized as a common-law right of an author in the sixteenth or seventeenth centuries.”<sup>16</sup> As the Renaissance and Enlightenment laid foundation for the rise of awareness of modern human rights, actors of printing industry gradually realized the importance of pursuing their rights in works. It is widely believed that the *Statute of Anne* in the eighteenth century, as the first modern copyright statute of all time, recognized the right of authors and was “the foundation of all subsequent legislation on the subject of copyright here and abroad.”<sup>17</sup> Modern copyright, nowadays, as a private right, protects authors’ legitimate interests generated from works instead of publishers’ monopoly on printing and publishing of works. It could be concluded that the main purposes of modern copyright law are encouraging innovation and creation and guarantee authors’ legitimate interests and rights.

In the debate between Zheng and Alford, they understood the terminology “copyright” from two different angles and arrived at two opposite conclusions. Following an “interest-oriented” understanding of copyright, Zheng tried to persuade his readers that copyright does exist in Song Dynasty by enumerating both publishers’ ideas and practices, and imperial’s efforts to protect interests generated from intellectual creations. Meanwhile, following the “author-centered” approach and the presumption that copyright protects rather than restricts intellectual creations, Alford concluded that the purpose of such protection propose by Zheng is merely to control the dissemination of ideas, rather than to protect rights of authors.

Obviously, Zheng primarily used “copyright” to refer to “ideas and practices of copyright protection” and “the privilege to print” in his argumentation. As William Fisher noted that modern “copyright developed out of the same system as royal patent grants, by which certain authors and printers were given the exclusive right to publish books and other materials,”<sup>18</sup> there are some similarities between the privilege over intellectual creations in ancient times and the protective-objects of modern copyright. Yet, the ideas and practices of copyright protection and privilege to print and publish, are not equivalent to copyright and copyright law in the modern sense. Ideas and practices of copyright protection could be regarded as the prerequisites or foundations of the emergence of copyright, but not the copyright itself. In other words, decrees that prohibited piracy, privilege to print and publishing rights, and practices of “paying authors to publish their works,” should not be regarded as copyright protection in a modern sense, as the authors’ rights were not legally recognized by the imperial state. Before the notions of “copyright” and “authorship” were created, the publishers enjoyed nothing more than a granted privilege to print and publish, which is opposite to the core value of modern copyright.

Compared to the modern copyright, the so-called “copyright” proposed by Zheng in

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<sup>15</sup> See generally Alford, *supra* note 2.

<sup>16</sup> Mark Rose. *Authors and Owners: The Invention of Copyright*. Cambridge: Harvard University Press, 1993, p.22.

<sup>17</sup> Robert A. Gorman, Jane C. Ginsburg, and R. Anthony Reese, *Copyright: Cases and Materials*. Foundation Press, 2017, p.2.

<sup>18</sup> William Fisher, Copyright, Britannica, available at: <https://www.britannica.com/topic/copyright>.

ancient China was more like a privilege or monopoly to print and publish granted by imperial powers, which reflected the willing to preserve the royal power. Similarly, dating back to the 15<sup>th</sup>-16<sup>th</sup> century, several copyright related regulations in European countries granted specific publisher the identical privilege to monopoly the printing and publishing of books for a brief period and within limited territories.<sup>19</sup> To some extent, the decrees issued by imperial government which prohibited unauthorized printing, copying and distribution of books aimed to neither encourage intellectual innovation, nor protect legitimate interests or property ownership of creators. Most importantly, the “protection of personal property rights” was more like an unexpected byproduct of imperial’s control of dissemination of ideas, which does not contain any element of private rights. Moreover, Mark Rose depicted that “[c]opyright is founded on the concept of the unique individual who creates something original and is entitled to reap a profit from those labors.” The “copyright-like protection” has nothing to do with authors, the core actor of modern copyright protection.<sup>20</sup> After all, it is clear that before the enactment of the *Statute of Anne*, there was no copyright as a private property right in any nation, including imperial China whose modernization begun to unfold at almost the end of the twentieth century.

Apparently, it is easy to make a conclusion that there was no “copyright” in ancient China based on the understanding of modern copyright from a perspective of legal formalism. The earliest copyright law of China, *Da Qing Zhu Zuo Quan Lv* (大清著作权律), was introduced in 1910 through transplanting foreign stipulations and practices.<sup>21</sup> That is to say, the “copyright” was not a lexicon of Chinese traditional culture but an imported concept, and the term was introduced in the Chinese cultural community from Japan in 1890s.<sup>22</sup>

#### *IV. A compromise view on copyright in ancient China*

It is reasonable to acknowledge the imported nature of copyright in China and there was no copyright in the modern sense in ancient China. But from a functionalist approach, the Chinese did have a certain degree of awareness of “copyright protection,” and have protected their interests generated from works through various measures in ancient times. Copyright itself is a changing concept, which has various forms of expression and functions in different societies. The local customs, conventions and other sorts of social norms also maintained the balance of social relations and interactions related to copyright protection in ancient Chinese societies. Particularly, the pre-modern indigenous printing industry did possess something functionally similar to copyright protection.

##### *IV.1. Awareness of copyright protection*

Before the Western Zhou Dynasty (approximately 1046-771 B.C.), almost all cultural and intellectual activities were monopolized by the royal families and aristocrats. In addition, royal families and aristocrats possessed special cultural officials who were in charge of keeping documents and artifacts and conducting intellectual activities. As a consequence,

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<sup>19</sup> Brander Matthews, *The Evolution of Copyright*. *Political Science Quarterly*, 1890, Vol.5, No.4, pp.586-587.

<sup>20</sup> See Mark Rose, *supra* note 15, at p.2.

<sup>21</sup> Li Yufeng and Catherine W. Ng, *Understanding the Great Qing Copyright Law of 1910*. *Journal of Copyright Society of the U.S.A.*, Vol.56. No.4, 2009, pp.767-788.

<sup>22</sup> Wang Fei-Hsien. *Pirates and Publishers: A Social History of Copyright in Modern China*. Princeton University Press, 2019, p.22.

there was no idea of private ownership of knowledge at that time as individuals were unable to engage in intellectual activities like private writing. However, in the Spring and Autumn Period (770-221 B.C.), as the royal authority collapsed, plentiful well-educated declining aristocrats started to impart their knowledge to civilians in order to make a living.<sup>23</sup> Individuals were able to participate in various cultural and intellectual activities, thus promoting the emergence of schools of thought and philosophy. Accordingly, books, as the primary carrier of thoughts and ideas, gradually occupied the most important role in intellectual activities.

From the Spring and Autumn Period to Tang Dynasty, books were mainly copied by hand, which is ineffective and costly, and the number of books produced was very limited. Besides, the authors' economic interests over books had not been taken seriously, and books were often freely accessed, copied, and plagiarized. Not only was there any system to protect the interests of authors, but civilians did not even realize that their copying is an infringement of the authors' economic interests. However, creators at that time were aware of the authorship of their own works, and they usually signed their names on the works to declare the authorship. In the process of creation, creators highly valued the originality and the authorship, despised unauthorized copying and plagiarism. Nevertheless, different people have different attitudes and responses to plagiarism based on various backgrounds and positions. Most plagiarisms were either tolerated by authors, or were condemned by public opinions.<sup>24</sup> After all, there were historical texts recording authors fought against plagiarism by bringing litigation to local officials.<sup>25</sup>

#### *IV.2. Practices of copyright-like protection*

The invention of woodblock printing technology dramatically lowered the cost of publishing book, providing an opportunity for publishers and distributors to earn more profits. Simultaneously, both official and private printing press engaged in printing industry, creating a pattern of mutual competition and conflicting interests. Especially in the Song Dynasty, the demand for books from the private sector and the government greatly stimulated with the popularity of imperial examinations and soaring national literacy rate.<sup>26</sup> Rampant piracy infringed the interests of authors and profit-making publishers, thus stimulating them to defend their moral and economic interests.<sup>27</sup>

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<sup>23</sup> When the royal family declined and the dukes merged with each other, so some cultural officials from the royal family and the dukes began to teach the common people the academic and cultural resources that were originally reserved for the royal families and aristocrats. The above historical fact is recorded in *Zuo Zhuan* [左传] as “Tian Zi Shi Guan, Xue Zai Si Yi (天子失官,学在四夷) [The son of heaven declined, academic scattered throughout the nation].”

<sup>24</sup> Li Mingjie (李明杰), Zhou Ya (周亚), *Jixing De Zhushu Wenhua: Zhongguo Gudai Piaoqie Wenhua Mianmianguan* (畸形的著述文化:中国古代剽窃文化面面观) [The Abnormal Perverse Culture of Writing: A Look at Plagiarism in Ancient China]. *Chuban Kexue* (出版科学) [Publishing Journal], 2012, Vol.20, No.5, p.96.

<sup>25</sup> *Ibid*, p.97.

<sup>26</sup> Deng Jianpeng(邓建鹏), *Songdai De Banquan Wenti: Jianping Zheng Chengsi Yu An Shoulian Zhizheng*(宋代的版权问题:兼评郑成思与安守廉之争) [Copyright Issues in the Song Dynasty: Commenting on the Debate between Zheng Chengsi and William Alford]. *Huanqiu Falv Pinglun*(环球法律评论)[Global Law Review], 2005, Vol.5, p.72.

<sup>27</sup> Li Mingjie(李明杰), *Yishi, Xingwei Ji Fazhi: Zhongguo Gudai Zhuzuoquan Baohu De Lishi Luoji*(意识,行为及法制:中国古代著作权保护的历史逻辑) [Ideas, Practices, and Legal Systems: Historical Logic of Copyright Protection in Ancient China], *Zhongguo Chunbanshi Yanjiu* (中国出版史研究) [Research on the History of Publishing in China]. Vol.3, 2018, p.12.

#### IV.2.1. Decrees issued by imperial government and institutions

It is undeniable that the pivotal purposes for decrees that prohibited or restricted the printing, publishing and distribution of certain works were to maintain imperial's sovereignty and suppress heterodox thoughts, rather than protect interests or rights of authors. Yet imperial government or institutions (*guozijian*) [国子监] in the Song Dynasty also issued *Jin Shan Juan* [禁擅镌] to impose restrictions on publication and distribution of books concerning state ideology, national economy and livelihood of citizens, such as almanacs, statute books, royal documents, Confucian classics, and official history in order to preserve the integrity of historical and cultural heritages, as well as promote social harmony and cultural development.<sup>28</sup> Imperial power also paid special attention to the publication and distribution of documents related to border defense, military secrets and compendiums of government. To obtain the privilege to print and publish the above mentioned materials, private printing press must apply at local government or institutions for prepublication review and registration. Interestingly, such prepublication review and registration system was similar to that of British Stationers' Company in the seventeenth century, which mainly instituted to control the dissemination of ideas.<sup>29</sup>

In order to attract the attention and concern of the imperial authorities, the publishers and authors exaggerated the impact of rampant book piracy, and hid their interests behind the political interests of the imperial power, then indirectly used the punitive function of the imperial authority to protect their private interests.<sup>30</sup> Li Yufeng held that by taking advantage of the state's control over the publishing of designated books and other heterodox materials, some authors or publishers intentionally or accidentally obtained authorization from imperial power for their books, and possessed the privilege to prohibit others from pirating.<sup>31</sup> Li Yufeng further concluded that even if the imperial power intend to control the dissemination of ideas, it could not monopolize the nature of the protection of printed books.<sup>32</sup> Being the beneficiary of such decrees, authors and publishers could regard imperial's efforts to control of dissemination of ideas as a reliable tool to protect their interests.

#### IV.2.2. Administrative protection for publisher and authors

Imperial power paid little attention to books which did not relate to imperial sovereignty, for example, popular literature books. To prevent and curb piracy, some profit-making publishers and authors (in the time of private printing press, the author and publisher usually were the same person) in the Song Dynasty tried to seek protection from the imperial government. In response to the request of publishers and authors, imperial government demonstrated its positive attitude to curb piracy and protect their interests by issuing official proclamations and announcements. Other than issuing proclamations that prohibit reprinting certain books, the local government also issued the so-called "ju" [据] to the author or

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<sup>28</sup> Ibid, at pp.13-14.

<sup>29</sup> Peter K. Yu, The Second Coming of Intellectual Property Rights in China, *Occasional Papers in Intellectual Property from Benjamin N. Cardozo School of Law Yeshiva University*, No.11, 2002, p.5.

<sup>30</sup> Ren Yan (任燕), Lun Songdai De Banquan Baohu (论宋代的版权保护) [On Copyright Protection in the Song Dynasty]. *Faxue Pinglun* (法学评论) [Law Review], Vol.5, 2011, p.156.

<sup>31</sup> Li Yufeng (李雨峰), *Qiangkou Xia De Falv: Zhongguo Banquanshi Yanjiu* (枪口下的法律:中国版权史研究) [Law at Gunpoint: Research on Legal History of Copyright]. Zhi Shi Chan Quan Chu Ban She (知识产权出版社) [Intellectual Property Press], 2006, p.56.

<sup>32</sup> Ibid.

publisher, that is, a license/certificate to prove that the licensee owns the privilege to print and publish certain books. And once the author or publisher found that someone had pirated his book, he could report to the local government with the “*ju*”.<sup>33</sup>

For example, in the year of 1238, in order to protect the interests over a series of Zhu Mu’s self-compiled and self-printed books, local officials of Zhejiang issued a special proclamation declaring that the government protects not only the authorship of Zhu Mu, but also his hard work on compilation for years. In addition, the local government hang the proclamations in its own administrative region, and forward it to Fujian local government.<sup>34</sup> Similar historical records concerning protection provided by local government could be found in Ye Dehui’s monograph, *Shulin Qinghua* [书林清话]. Authors and publishers could apply to local government for an order that prohibits others from reprinting their books, and they are entitled to bring litigation against anyone who reprints such books. Moreover, authors and publishers could obtain more positive results with the help of local government, such destruction of pirates’ blocks, and compensation from the pirates.<sup>35</sup> Even though there was no concept of “right” in ancient China, the government did achieve the substantive protection of the interests of authors and publisher by imposing penalties on infringers.

#### IV.2.3. Proprietary declarations on imprints

In *Shulin Qinghua*, Ye Dehui found that a long square seal that warned against unauthorized reprints below the catalog of a book named *Dongdu shilüe* [东都事略]<sup>36</sup> was put in Song Dynasty. It was written that “Published by Meishan Cheng Sheren’s office. Applied at the officials, shall not reprint.”<sup>37</sup> This statement made by Cheng Sheren was regarded as the first declaration of authorship in China, and publishers adopted such method as common practice to declare authorship and ownership of printing blocks. In Ming and Qing Dynasty, private printing presses placed various forms of proprietary declarations on the printed books.<sup>38</sup> Typically, the statement “XX *cangban*,” which had been used to notify the readers that the printing blocks were retained by “XX” after the printing process, while the “*fanke/fanban bijiu* [reprinting will be pursued and punished] reflects the idea.”<sup>39</sup>

Overall, from a functionalism perspective, the ancient Chinese did have ideas of “copyright protection and enforcement,” and they did adopt diversified measures to protect their own interest over intellectual creations. Undoubtedly, the whole society faced the same problem, piracy, which had different impact on lower class and the upper class. Consequently, authors and publishers shared different views on piracy. Decrees that prohibit piracy could be interpreted as prepublication review of works from the perspective of imperial power who aims to limit the dissemination of undesirable ideas, but they also served as reliable tools to protect authors’ and publishers’ interests. The administrative protection provided by local

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<sup>33</sup> See Ren Yan, *supra* note 29, at p.154.

<sup>34</sup> Ye Dehui (叶德辉). *Ye Dehui Shu Hua* (叶德辉书话) [Ye Dehui’s essays on books]. Edited by Qian Gurong (钱谷融). Hangzhou: Zhejiang Renmin Chubanshe (浙江人民出版社) [Zhejiang People's Publishing House], 1998; See also Li Yufeng, *supra* note 30, at pp.54-56.

<sup>35</sup> See Ren Yan, *supra* note 29, at p.154.

<sup>36</sup> See Wang Fei-Hsien, *supra* note 21, at p.121, note 7.

<sup>37</sup> The original text was “眉山程舍人宅刊行,已申上司,不许覆板.” *Supra* note 26.

<sup>38</sup> See Peter K. Yu, *supra* note 28, p.10, 122.

<sup>39</sup> See Wang Fei-Hsien, *supra* note 21, at p.60. *Fanke* (reengraving), *fanyin* (reprinting), *fanban* (reprinting) were used interchangeably in the convention. As she wrote that “the English Sinologist Herbert A. Giles even considered ‘*fanke bijiu*’ to be the closest Chinese equivalent to the English word ‘copyright.’”

governments and common practices in printing industry indicated that the ideas of “copyright protection” was ubiquitous among ancient Chinese.

#### *V. Why there was no indigenous counterpart to copyright law in imperial China?*<sup>40</sup>

After denying the existence of copyright in ancient China, Alford further investigated another question, “why imperial China did not develop a sustained indigenous counterpart to intellectual property law?”<sup>41</sup> Chinese scholars usually compare such question with The Needham Question,<sup>42</sup> and restated the question as a sub-question of the question why does China lag behind the Europe in the process of modernization. However, Alford’s question seems to be a wrong one because copyright, as a product of Western modern capitalist society, emerged on the basis of general recognition of rights to private property, which of course could not be found in a peasant economy-based and unmodern imperial nation.<sup>43</sup> But many scholars still followed a prevailing cultural explanation to such question.

Li Chen contends that Western scholars emphasize the cultural explanation because they regard “author,” the carrier of human culture, as the center of the making of modern copyright law.<sup>44</sup> Scholars adopt the theory of a utilitarian approach and considered the function and purpose of modern copyright as to provide incentives for intellectual creations, thus the idea of authorship and status of author are deduced to be the primary reason for the emergence of copyright. Consequently, it is reasonable for them to connect the culture and copyright through the author’s junction.

In answering the question, Alford adopted a political-cultural explanation that the imperial political culture, including the resilient Confucian culture, impeded the development of intellectual property law in China. He just provided his readers a prevailing yet over-simplified and misleading cultural explanation indicating “Chinese tradition and political culture privilege imitation over innovation, community over individual.”<sup>45</sup> Ignoring Alford’s advice that “caution is called for with respect to more avowedly cultural explanations,”<sup>46</sup> other scholars followed Alford’s argumentation and further held that Confucianism provided “a strong barrier to the idea of intellectual property,”<sup>47</sup> and led to the “lack of a predisposition

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<sup>40</sup> See Alford, *supra* note 2, at p.3, 9. As Alford puts it, “why Chinese civilization, which was for centuries the world’s most advanced scientifically and technologically, and which by any standard has long been one of the most sophisticated culturally, did not generate more comprehensive protection for its rich bounty of scientific, technological, and artistic creation.”

<sup>41</sup> See Alford, *supra* note 2, at pp.9-10.

<sup>42</sup> In order to discuss the long economic stagnation of Chinese Empire and explores the reasons why it was quickly lagging behind western countries from the 1700s, Joseph Needham raised the question “why modern science developed in Europe rather than in China, despite China’s advanced technology.” In his monograph, he examined the inhibiting factors in Chinese civilization that impeded the rise of modern science by the seventeenth century. See generally Dimaculangan, Pierre, *The Needham Question and the Great Divergence: Why China Fell Behind the West and Lost the Race*

In *Ushering the World into the Industrial Revolution and Modernity. Comparative Civilizations Review*, Vol. 71, No. 71, Article 10, 2014. Available at: <https://scholarsarchive.byu.edu/ccr/vol71/iss71/10>. Redding, Gordon, *The Needham Question Today. Management and Organization Review*, Volume 12, Issue 1, 2016, pp.25-34.

<sup>43</sup> Li Chen (李琛), Guanyu “Zhongguo Gudai Yinhe Wu Banquan” Yanjiu De Jidian Fansi (关于“中国古代因何无版权”研究的几点反思) [Several Reflections on the study of “why there was no copyright in ancient China”]. *Faxuejia* (法学家) [The Jurist], Vol.1, 2010, p.59.

<sup>44</sup> *Ibid.*

<sup>45</sup> See Wang Fei-Hsien, *supra* note 21, at p.3.

<sup>46</sup> See Alford, *supra* note 2, at p.6.

<sup>47</sup> Alexander C. Chen, *Climbing the Great Wall: A Guide to Intellectual Property Enforcement in the People's*

toward the protection of creative efforts.”<sup>48</sup> Some even criticize that Chinese “culture deeply embedded with traditions completely antithetical to the patenting of inventions and to the granting of property rights in other forms of intellectual products”<sup>49</sup> and such Confucian tradition has a continuing influence on attitudes to protection and enforcement of intellectual property rights in modern China.<sup>50</sup>

Additionally, commentators exaggerate the influence of Confucian culture, and ignored the significance of other two dominant schools of philosophy in the traditional Chinese society, the Taoism and the Buddhism. As for the study of history of copyright, scholars have to focus on the issue that “to what extent did Confucianism shape the social relations that copyright aims to regulate.”<sup>51</sup> As Charles R. Stone explained, “[t]he bulk of early book publishing in China was in fact inspired by Buddhism, not Confucianism, and was directed at the acquisition of religious merit that appears to have been unrelated, and was perhaps even antithetical, to what we today would consider a property right.”<sup>52</sup> Unsurprisingly, cultural explanation inevitably leads to a series of misinterpretation of Chinese socio-culture.

### *V.1. Chinese value imitation over innovation?*

Alford quoted Confucius’ statement that “I transmit rather than create; I believe in and love the Ancients [述而不作, 信而好古]”<sup>53</sup> from *Analects* to indicate the dominant cultural tradition of “enjoying interacting with antiquity (*leyu fugu*).”<sup>54</sup> Unlike modern civilians today, Chinese in the imperial dynasties did consider copying or imitation as an offense to the creator, but “a necessary component of creative process.”<sup>55</sup> After enumerating a series of examples, Alford concluded that people in ancient China have an extraordinary and incredible respect for the past, and they pay more attention to the interaction with, and communication and transmission of the past when they participate in intellectual and imaginative activities.<sup>56</sup> Echoing with Alford’s argumentation, Li Yufeng claimed that the conservative nature of Confucianism has fostered a cultural tradition that creators “enjoy interacting with antiquity.”<sup>57</sup> Charles R. Stone added that “Chinese scholars accustomed to copying, memorizing, and quoting classical texts in this manner were not inclined to attach property

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Republic of China. *AIPLA Quarterly Journal*, 1997, Vol. 25, No.1, p.10. Andrew Evans shared the same opinion on the negative influence of Confucian culture and ethics presented as an obstacle to combating Chinese counterfeiting and piracy. See also Andrew Evans, Taming the Counterfeit Dragon: The WTO, TRIPS and Chinese Amendments to Intellectual Property Laws. *Georgia Journal of International and Comparative Law*, Vol.31 Issue 3, 2003, pp.588-590.

<sup>48</sup> Bret T. Yonehara, Enter the Dragon: China's WTO Accession, Film Piracy and Prospects for the Enforcement of Copyright Laws. *UCLA Entertainment Law Review*, Vol.9, Issue 2, p.392.

<sup>49</sup> John R. Allison and Lianlian Lin, The evolution of Chinese Attitudes Toward Property Rights in Invention and Discovery. *University of Pennsylvania Journal of International Economic Law*, Vol.20, Np.4, 1999, p.737.

<sup>50</sup> Eric M. Griffin, Stop Relying on Uncle Sam-A Proactive Approach to Copyright Protection in the People's Republic of China, *Texas Intellectual Property Law Journal*, Vol.6, No.2, 1998, pp.182-183. While Peter K. Yu considered the Confucian vision of civilization as the primary reason why reform of intellectual property law met with resistance from both Chinese government and public. See Peter K. Yu, *supra* note 28, pp.16-18.

<sup>51</sup> See Li Chen, *supra* note 42, at p.59.

<sup>52</sup> Charles R. Stone, What plagiarism was not: Some preliminary observations on classical Chinese attitudes toward what the West calls intellectual property. *Marquette Law Review*, Vol.92, Issue 1, 2008, pp.201-202.

<sup>53</sup> See Alford, *supra* note 2, at p.25. The original text was “*Shuer Buzuo, Xiner Haogu*” (述而不作, 信而好古) [I transmit rather than create; I believe in and love the Ancients].”

<sup>54</sup> See Li Yufeng, *supra* note 30, at p.72.

<sup>55</sup> See Charles R. Stone, *supra* note 51, at p.205.

<sup>56</sup> See Alford, *supra* note 2, at pp.26-29.

<sup>57</sup> See Li Yufeng, *supra* note 30, pp.72-74.

rights to them.”<sup>58</sup> Such cultural tradition not only does not resent imitation of his works by others, but also impedes the emergence of right to prohibit others from imitation and transformative use.

However, “culture” itself is a highly abstract notion. Considering the cultural and linguistic barrier, Western scholars inevitably have some inaccurate understanding of traditional Chinese culture, particularly the Confucianism, which is by often equated with totalitarian thoughts and the Chinese state religion.<sup>59</sup> Typically, they mistakenly took Confucianism as the proxy of Chinese culture. Such hasty generalized misunderstanding was in part due to the preconceived religious knowledge of seventeenth-century missionaries. Western missionaries sought a reconciliation between Confucianism and Christianity and their preconceived cultural and religious knowledge inevitably had an impact on understanding and interpretations of Confucianism.<sup>60</sup> Plentiful sinologists including Alford highly valued the *Analects* but paid little attention to other Confucian classics, not to mention Taoist classics and other intellectual creations that have exerted far greater influence on Chinese life and thought in the past centuries. *Analects* is an important canon reflecting the sayings and ideas of Confucius, but it does not represent the full picture of Chinese culture and tradition.

In addition, the inherent difficulty of Chinese language and Chinese Confucianism classics also leads to misinterpretations.<sup>61</sup> Alford quoted Confucius’ and translated saying that “I transmit rather than create; I believe in and love the ancient,” to support his view that Chinese value imitation over innovation. In fact, it is not true that Confucius only transmitted what he had learnt without creating anything of his own. For example, by compiling and editing ancient documents, Confucius not only made a comprehensive summary of previous wisdom, but also developed many new insights and put forward profound and thought-provoking opinions in the classics. By saying so, Confucius showed his respect and admiration to traditional culture and historical experience, as well as his humble and modest attitude towards learning. Interestingly, the statement that Alford quoted was not about Confucius’ ideas on intellectual creation but his political views.

Yang Naiqiao pointed out the over-interpretation that many commentators, Alford included, adopted a theory of literary hermeneutics rather than Confucian hermeneutics and literally misread “shu (述)” and “zuo (作)” as “following/transmit” and “make up/create.”<sup>62</sup> By carefully analyzed the related texts and materials, Yang suggested that the above saying should be interpreted as “following without making up anything of my own and without making the rise of my own as Saint, believing in and loving the ancients which is about the system of rites[礼] and music [乐] made by Duke Zhou.”<sup>63</sup> In particular, it should be noted

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<sup>58</sup> See Charles R. Stone, *supra* note 51, p.205.

<sup>59</sup> Taylor Rodney, and Gary Arbuckle, “Confucianism.” *The Journal of Asian Studies*, vol. 54, no. 2, 1995, pp. 347–354. They treated Confucianism as an official religion and enumerated other studies of Chinese Confucianism as a religion. Tang Zongli. “Confucianism, Chinese Culture, and Reproductive Behavior.” *Population and Environment*, vol. 16, no. 3, 1995, pp. 269–284. Holding an opposite point of view, Tang argues, “there are some religious elements in Confucianism...Strictly speaking s elements in Confucianism; we will discuss these later. Strictly speaking Confucianism is a philosophy and value system rather than a religion.” See *ibid.* at pp. 269–284.

<sup>60</sup> David E. Mungello, “Sinological Torque: The Influence of Cultural Preoccupations on Seventeenth-Century Missionary Interpretations of Confucianism.” *Philosophy East and West*, vol. 28, no. 2, 1978, pp. 123–141.

<sup>61</sup> Li Chen strongly suggests that the language would be a tricky problem for non-Chinese readers. See Li Chen, *supra* note 42, at p.59.

<sup>62</sup> Yang Naiqiao(杨乃桥), *Zhongguo Jingxue Quanshixue Jiqi Shijing De Zijie Yuanze: Lun Kongzi “Shuer Buzuo, Xiner Haogu” De Duandaunlun Quanshixue Sixiang* (中国经学诠释学及其释经的自解原则:论孔子“述而不作, 信而好古”的独断论诠释学思想) [ Chinese Confucian Hermeneutics and the Self-Interpretation Principle: On Confucius’ Hermeneutical Thought of Dogmatism about “Shuer Buzuo, Xiner Haogu”]. *Zhongguo Bijiao Wenxue* (中国比较文学) [Comparative Literature in China], Vol.2, 2015, pp.2-37.

<sup>63</sup> *Ibid.*, at p.33.

that “信而好古” represents Confucius’ political ideas. Faced with the reality of the collapse of rituals and music system at that time, Confucius insisted on his belief in patriarchal clan system and desired to restore the ancient rituals and music system of Duke of Zhou.<sup>64</sup> Evidently, the “古 [literally as ancient]” refers specifically to the Zhou Dynasty rather than “ancient” only.

In sum, many sinologists misinterpreted Confucian classics and reached to a misleading conclusion that Chinese tradition values imitation over innovation. As Li Chen claimed, “even if there were certain conservative elements in Confucian political ideas, it does not necessarily affect intellectual creation.”<sup>65</sup> Therefore, it is too far-fetched to assert that Confucianism hinders innovation and even the emergence of copyright by seizing on one single statement of Confucius. Admittedly, “the Chinese have regarded copying and imitation as an important living process through which people interact with the past to acquire understanding to guide their behavior.”<sup>66</sup> Moreover, due to the special Chinese education system, the traditional Chinese authors are more inclined to copy the preexisting classics and use allusions than the modern ones.<sup>67</sup> This is by no means a phenomenon unique to Chinese literature creation, but a common feature of traditional society. As Peter K. Yu puts it, “Shakespeare engaged regularly in activity that we would call plagiarism but those Elizabethan playwrights saw as perfectly harmless, perhaps even complimentary.”<sup>68</sup> Richard A. Posner also noticed such phenomenon in ancient literatures:

*“The borrowing that Milton approved of and that Paradise Lost exemplifies—to us stealing—was a way of expressing, in a tradition-oriented society, respect for illustrious predecessors. Such a society is more likely to look backward to a golden age than forward to a future made bright by progress, and more likely therefore to want to maintain continuity with the past than to break with the past for the sake of the future.”<sup>69</sup>*

## V.2. Chinese considered profit as an unworthy pursuit?

Quoting the saying of *Analects* that “a man of virtue [*junzi*] understands and observes what is morally right; while a petty man [*xiaoren*] only has his eyes on and goes after what brings profits,”<sup>70</sup> Alford reached a conclusion that the “Confucian disdain for commerce fostered an ideal, even if not always realized in practice, that true scholars wrote for edification and moral renewal rather than profit.”<sup>71</sup> That is to say, ancient Chinese under Confucianism ideology viewed business with disdain and considered profit an unworthy pursuit. And some further held that the cultural tradition educated Chinese to value

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<sup>64</sup> Feng Youlan (冯友兰), *Zhongguo Zhexueshi* (中国哲学史) [History of Chinese Philosophy]. Shangwu Yinshuguan (商务印书馆) [Commercial Press], 1976, P.34. Yang Naiqiao, pp.21-36.

<sup>65</sup> See Li Chen, *supra* note 42, at p.60.

<sup>66</sup> Yu, Peter K., Piracy, Prejudice, and Perspectives: An Attempt to Use Shakespeare to Reconfigure the U.S.-China Intellectual Property Debate. *Cardozo Law School, Public Law Research Paper No. 38*, p.11. Available at SSRN: <https://ssrn.com/abstract=262530> or <http://dx.doi.org/10.2139/ssrn.262530>

<sup>67</sup> See Eric M. Griffin, *supra* note 49, at p.183., arguing that “the educational system in China was based on faultless and exacting reproduction of classical works,” and “the Chinese are still encouraged to copy,” “Chinese students are taught through a system which concentrates on right and wrong answers with no kudos for creativity”.

<sup>68</sup> See Peter K. Yu, *supra* note 65, at p.28.

<sup>69</sup> Richard A. Posner, *Law and literature*. Harvard University Press, 2009, p.529.

<sup>70</sup> Confucius (孔子), *Lunyu* (论语) [Analects], Liren Disi (里仁第四).

<sup>71</sup> See Alford, *supra* note 2, p.29.

righteousness over profits, thus making authors not dare to and unwilling to claim their interests (or rights). Consequently, copyright did not emerge in ancient China as authors were reluctant to claim their rights. As Peter K. Yu puts it, “[e]mphasizing familial values and collective rights, the Chinese [neither] develop a concept of individual rights,” nor “regard creativity as individual property.”<sup>72</sup>

Needless to say, Confucian tradition did value righteousness over material gains but that does not mean that Confucianism equals to asceticism. However, the Confucian tradition does openly despise unjust enrichment but never denies the pursuit of property interests in the righteous way. Confucius said, “rich and honor are what men desire. If they cannot be obtained in the proper way, they should not be held.” Similarly, notable Confucianists like Xunzi and Zhu Xi echoed with Confucius and held that “both *junzi* and *xiaoren* like what is beneficial and hate what is harmful,”<sup>73</sup> and “profit, is what men naturally desires.”<sup>74</sup> The above Confucian view on profit not only recognized human desires and demands but also respected the rationality of pursuit of profit.

Moreover, it is worth noting that official presentational discourse is not necessarily equal to actual practice. Subsequently, selected phrase of classics does not serve as the only solid proof. Sinologists mistakenly replaced the actual practices with presentational discourses of classics, especially Confucian classics. Accordingly, the Confucian tradition that emphasizes righteousness over profit presented as a standard for moral self-cultivation, rather than practical social norms. For example, Confucianists in the Song Dynasty adopted a high standard for moral self-cultivation, but they not only made significant contribution to the prosperity of literatures and art, but also participated in profit-making activities and promote the thriving economy. In practice, it is still questionable that to what extent such Confucian idea restricts the authors in pursuing profits and whether Chinese traditional culture was incompatible with the idea of individualized copyrights.

### *V.3. Imperial's effort to control the dissemination of ideas?*

Alford tried to persuade his reader that the absolute ban on the reprinting and publishing of heterodox materials could be understood as imperial power's control of the dissemination of ideas, rather than the copyright protection. To a great extent, it was precisely because of the “efforts to control the dissemination of ideas” that a stable publishing privilege arose in England, laid the foundation for the *Anne Statute*, the world's first copyright law.

Taking British Stationer's Company as a powerful tool to censor undesirable materials, in 1557, Queen Mary I issued a royal warrant that granted the privilege to print and distribute books to British Stationer's Company. Exactly the same as Chinese imperial power, the Queen had a royal tool to control materials that harm the interests of royal family, and publishers were given privilege to publish and to censor illegal publications in return for the Queen's favors. Thus the “efforts to control the dissemination of ideas”<sup>75</sup> directly promoted the emergence of a privilege to print and publish. Failing to persuade Parliament to reinstate the Licensing Act, the British Stationer's Company decided to emphasize the benefits of licensing to authors and succeeded in getting the Parliament to consider a new bill, the *Statute of Anne*.

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<sup>72</sup> See Peter K. Yu, *supra* note 28, at p.18. Philip H. Lam held a similar opinion that Chinese tradition emphasized community development rather than individual profit. See Philip H. Lam, Copyright Protection of Foreign Computer Software in the People's Republic of China: Significant Progress in Two Years. *Loyola of Los Angeles International and Comparative Law Journal*, vol. 17, no. 4, October 1995, p.867.

<sup>73</sup> Xunzi: *The complete text*. Princeton University Press, 2014, p.37.

<sup>74</sup> Zhu Xi (朱熹), *Lunyu Jizhu* (论语集注) [Commentary to Analects], Liren Disi (里仁第四).

<sup>75</sup> See Alford, *supra* note 2, at p. 23.

In addition, in modern Europe, the Roman Church and the secular government collaborated together in an attempt to control the dissemination of ideas, and imposed stricter control over the publishing industry compared to ancient China.

While during the Tang and Song dynasties, the imperial power neither granted privilege to publish nor controlled works that did not hinder the imperial's interests. Even in the Qing dynasty, Manchu rulers only imposed strictest censorship and control on books directly related to the political interests of the imperial family (such as those suspected of being anti-Qing sentiment).<sup>76</sup> Therefore, the conclusion that the imperial's efforts to control the dissemination of ideas hindered the emergence of copyright in ancient China is still unconvincing.

## *VI. Concluding remarks: restatement of Alford's question*

Even though there were substantial differences between China and England in the fields of culture, politics and legal system in the seventeenth and eighteenth century, it seems that there are lots of similarities in the making of pre-modern "copyright system" in both nations. Encountered with the similar situation, both the England royal family and Chinese imperial power regarded piracy as a threat to sovereignty and selected the publisher as a powerful and effective tool to control the dissemination of ideas, while publishers in both countries received the privilege to publish and print that guaranteed their interests. Scholars cannot help to explore why the copyright protection of two jurisdictions evolved differently: modern copyright law emerged in the England in 1709, while the notion of copyright was introduced in China in the 1890s. Actually, it would be much more sensible to restate the above mentioned question as "why does China lag in adopting formal copyright law?" As mentioned in the previous chapters, Alford provided his readers with a less convincing cultural explanation. Alternatively, his argumentation could only serve as an explanation for the question why reform of intellectual property law met with resistance in modern China.<sup>77</sup> Moreover, other scholars proposed diversified explanations to the question which mainly focuses on the underdeveloped commercial economy, centralization of the government, lack of awareness of private rights in ancient China. As Li Chen puts it, "it is obvious that these factors are actually descriptions of the general characteristics of all ancient societies."<sup>78</sup> As a matter of fact, the explanations above were based on a widely shared legal orientalism discourse which assumes that "law and China exist in an antithetical relationship."<sup>79</sup> Legal orientalism supporters tend to believe that China suffers from a lack of law and Chinese lack the capability to understand the connotation of rule of law, private property and individual rights. Notably, they hold that the known Chinese legal tradition falls short of "real" or "true" law<sup>80</sup> by referring the modern discourse of rule-of-law, and believe that Chinese legal traditions could only serve as supplementary materials to the universal applicability of modern Western discourses of rights.<sup>81</sup>

Nonetheless, such assumption does not account for the prematurity of copyright protection in ancient China, but engages in misleading comparison between ancient Chinese

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<sup>76</sup> See Deng Jianpeng, *supra* note 25, at p.78.

<sup>77</sup> Peter K. Yu, Intellectual Property and Asian Values. *Marquette Intellectual Property Law Review*, Vol. 16, 2012, p.344.

<sup>78</sup> See Li Chen, *supra* note 42, at p.58.

<sup>79</sup> Teemu Ruskola, *Legal Orientalism: China, the United States, And Modern Law*. Harvard University Press, 2013, p.4.

<sup>80</sup> *Ibid*, at p.12.

<sup>81</sup> Philip C. C. Huang, *Chinese Civil Justice, Past and Present*. Rowman & Littlefield, 2010, p.xvii.

society and modern Western society. Xie Hongren criticized such misleading Eurocentric studies describing the Oriental world as “the Other,”<sup>82</sup> a pre-modern or unmodern, irrational, unpredictable, collectivistic, static and unchanging land, which is a mere counterpart of the modern, superior, individualistic, dynamic and progressive Occidental world.<sup>83</sup> The “self-evident” modern common senses that we accept and are accustomed to nowadays, were most likely to be historically constructed and self-reinforced, while people rarely examine its rationality and legitimacy and take it for granted. For an instance, it is common sense that copyright system was intentionally established and transplanted in many countries to encourage intellectual creation since its first emergence in the eighteenth century. However, by tracing the history of the making of modern intellectual property, Sherman and Bently criticized “the tendency to trace areas of intellectual property law back to isolated legal events,” and “skips from 1624 (the *Statute of Monopolies*) or 1710 (the *Statute of Anne*) through to the twentieth century, with the occasional detour along the way.”<sup>84</sup> Apparently, they adopted an ahistorical view of law and ignored the lengthy transformation process of copyright from a monopoly to private right, but considered copyright protection as a natural evolutionary outgrowth of private right. Moreover, there was no solid social consensus of protecting author’s intellectual creation after the enactment of the *Statute of Anne*. Especially such law was “still confronted with types of questions that arose during the literary property debate” on the rationality of copyright protection, and was far narrower than modern copyright laws.<sup>85</sup> In addition, although the *Statute of Anne* provided exclusive right to the author of a new work to print and reprint, “as the booksellers were able to convince authors to assign their rights to them, this had the effect of providing booksellers with an opportunity to reclaim some of the control they had previously exercised over the book trade.”<sup>86</sup> As long as the “work” is treated as private property, the powerful publishers/merchants could become the copyright owner of such work through transaction, regardless of who the initial owner was. Through intentionally ignoring several key historical facts, scholars successfully provided the audiences a constructed common sense that copyright system aims to protect author’s rights and interests as well as encourage intellectual creation since its emergence. Accordingly, one could not reach any reasonable explanation to a false question based on such misleading presumption if he or she takes “self-evident” common sense as presumption and employs a dichotomy between the ancient China and “the modern West.”

In *Law and Literature*, Richard A. Posner wrote that “[a]nother reason for the lag in adopting a formal copyright law was that there were functional equivalents to copyright, although they were limited.”<sup>87</sup> Although it is debatable that he treated the printing patent and privilege to print as functional equivalents to copyright, his argumentation inspired us that different socio-culture contingencies might generate vastly diversified approaches to identical questions in different countries. According to Xie Hongren, in order to maintain social order, Western rulers adopted a “rights-based” legal approach that emphasizes the protection of individual’s rights (especially the property rights), while the Chinese rulers relied heavily on

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<sup>82</sup> Edward W. Said, *Orientalism*. Vintage, 1979, p.1. See also Shehla Burney, “CHAPTER ONE: Orientalism: The Making of the Other.” *Counterpoints*, vol. 417, Peter Lang AG, 2012, pp. 23–39, <http://www.jstor.org/stable/42981698>.

<sup>83</sup> Xie Hongren, *Fazhan Yanjiu Zhi Fengyun Zaiqi: Zhongguo Yidai Yilu Dui Xifang Jiqi Zhishi Tixi De Tiaozhan* (發展研究之風雲再起：中國一帶一路對西方及其知識體系的挑戰) [Development Studies: China's Belt and Road Challenge to the West and its Knowledge System], Wunan Chuban (五南出版) [Wunan Publish], 2018, p.184.

<sup>84</sup> Brad Sherman and Lionel Bently, *The Making of Modern Intellectual Property Law: The British Experience, 1760 – 1911*. New York: Cambridge University Press, 1999, p.210.

<sup>85</sup> *Ibid*, at p.202.

<sup>86</sup> *Ibid*, at p.12.

<sup>87</sup> See Richard A. Posner, *supra* note 68, at p.521.

“obligation-based” legal approach that focused on individual’s moral obligation to community.<sup>88</sup> To be specific, legal authorities in traditional China followed the “harmony” principle and adopted a relatively low-cost but effective dispute resolution mechanism, namely civil mediation. As Philip C. C. Huang argues, “the Chinese legal system comprised at once highly moralistic representations and highly practical actions and practices.”<sup>89</sup> In the Chinese traditional legal system, the government is mainly responsible for judging severe cases that the communities were not able to resolve matters themselves, while the community is responsible for mediating “minor matters.”<sup>90</sup> The civil relations that belong to the realm of private law of today are better interpreted as moral issues, which was regarded as minor matter, in ancient China. In addition, “most people to this day will look first to mediation and some kind of peaceable resolution, and go to court only as the final resort.”<sup>91</sup> “Copyright” issues at that time are doomed to be viewed as minor matters which “were preferably to be dealt with by society itself, the state would intervene only if the communities were not able to resolve matters themselves.”<sup>92</sup> But it does not mean that the related civilians were unable to claim the interests generated from works without a formal stipulation on copyright. Consequently, in actual practice, local customary regulation together with moral principle and social norms naturally carried greater weight compared to orders of imperial power in regulating piracy, and a formal copyright legislation seemed to be pointless at that time.

“What is a problem for one society may simply not be a problem for another.”<sup>93</sup> It seems impossible for the imperial government to issue a formal law to deal with minor matters, not to mention a copyright law that guarantees the profits generated from works. Instead, the imperial government did protect authors’ and publishers’ interests by imposing punitive measures on the infringers. As William Jones has observed, “in our [Western] system, any act which the law takes cognizance of will give rise to a right. In China, any act which the law took cognizance of gave rise to a punishment.”<sup>94</sup> In addition, conventions, customary regulations and social norms also served as a reliable tool for publishers and authors to pursue profits. Shyamkrishna Balganesh and Zhang Taisu further suggested, “[t]hese [guild] regulations effectively constituted a separate domain of rules, procedures, and enforcement mechanisms that were often more in tune with the economic circumstances of the time than they were with formal law.”<sup>95</sup> Especially, Wang Fei-Hsien revealed in *Pirates and Publishers* that, in the late Qing Dynasty, authors and publishers proactively make use of customary *banquan* regulation and private antipiracy policing to secure interests generated from works under the shadow of formal legal institutions.<sup>96</sup> As it could on occasion be used to achieve effect of protection, but it is clear that we should not confuse this with a concept of rights. Such ancient legal system functioned normally until the end of nineteenth century, a time that modern intellectual property laws emerged and progressed as the consequence of foreign pressures.

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<sup>88</sup> See Xie Hongren, *supra* note 82, at pp.180-181.

<sup>89</sup> Philip C. C. Huang, In Search of a Social Science Anchored in (Chinese) Realities. *Modern China*. 2019;45(1):3-36. In Search of a Social Science Anchored in (Chinese) Realities. *Modern China*. 2019, Vol.45, Issue 1, p.10.

<sup>90</sup> Philip C. C. Huang, *supra* note 80, pp.20-21.

<sup>91</sup> *Ibid*, at p.21.

<sup>92</sup> *Ibid*, at p.22.

<sup>93</sup> See Teemu Ruskola, *supra* note 78, at p.33.

<sup>94</sup> William C. Jones, Introduction to THE GREAT QING CODE 1, 18-19 (William Jones trans., Clarendon Press 1994). Quoted in Clarke, Donald. Anti Anti-Orientalism, or Is Chinese Law Different? *American Journal of Comparative Law*, Vol. 68, No. 1, Spring, 2020, p.84.

<sup>95</sup> Shyamkrishna Balganesh and Taisu Zhang, Legal Internalism in Modern Histories of Copyright. *Harvard Law Review*, Vol. 134, No. 3, 2021, p.1082.

<sup>96</sup> See Wang Fei-Hsien, *supra* note 21, at pp.20, 298.

The Westerners forced the Qing Empire to implement a “colonized copyright system” regardless of whether the civilization of that territory needed or was capable to implement and enforce such legal system or not. In this way, a legal system that deeply rooted in specific national cultures was brought into China as a pure commodity. That is to say, the Western modern copyright system was recoded in a completely foreign and unknown procedure through a de-culturized process. In actual practice, the *Da Qing Zhu Zuo Quan Lv* took effect and was applied for less than a year due to the collapse of the Qing Dynasty in 1912. Even though both the Beiyang Government and the Kuomintang Government subsequently promulgated copyright laws and regulations which were based on the *Da Qing Zhu Zuo Quan Lv*, successive years of wars, devastating famines and political campaigns made the copyright law insignificant until the adoption of opening and reform policy in 1980s. Finally, the long-awaited Copyright Law of People’s Republic of China was enacted in 1990 to reflect global business trends and meet the urgent need of copyright protection.

As Teemu Ruskola pointed out, “the answer to the question of whether there is, or has been, law in China is always already embedded in the premises of the questioner. It necessarily depends on the observer’s definition of law.”<sup>97</sup> As long as the supporters of legal orientalism insist that the “real” law is a western concept, the uneven power structure between the Orient and Occident will not fundamentally change, and the Occident will always hold the only key to understand the connotation of the so-called “real” law. Admittedly, the author recognizes that selected aspects and specific topics covered in this paper are very far from making up the complete picture of the entire story of the history of Chinese copyright law. Moreover, the author does not tend to bring up an anti-Orientalist argument to criticize the dominant ideological hegemony of modernity, or denies the fundamental difference of legal systems in China and the West, nor try to expand the concepts and definitions of copyright to cover the practices of copyright-like protection in ancient China, but attempts to convince readers to break out this intellectual trap and to reexamine the premise when occasionally finding something in ancient China that does not fit in the standard concept of Western law. That is to say, to get a better understanding of Chinese legal history, one must not only explore statutory codes, legal thoughts and theories, but also consider practical application and operative realities of Chinese legal traditions.

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<sup>97</sup> See Teemu Ruskola, *supra* note 78, at p.22.