Comparative Analysis of Intellectual Property between China and the West: A Cultural Perspective*

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Previous researchers have studied the connection between the developed countries’ intellectual property system and China’s practice, in particular, China’s poor social environment unfavourable to the protection of intellectual property rights. But little attention has been paid by those researchers to the unique culture of China, not to mention the elaborate diversity of intellectual property acculturation across the globe. Chinese traditional civilization, (especially Confucianism) distinct from its western counterpart, has significantly influenced the Chinese people over a long period of time.

The findings in this article highlight the potential and inherent difficulties encountered by China’s intellectual property protection and the current perception of the intellectual property system amongst its people affected by the deep-rooted Chinese culture. The author presents a new and better understanding of China’s unique intellectual property protection system through a comparative analysis of the various cultural elements in China and the West. The Chinese intellectual property culture has been deemed as a result of the deficiency and low efficiency of the legal execution system. A better understanding of the intellectual property protection system in the diversified cultural background will provide new direction and avenues to understand the diversity of each nation’s intellectual property protection system.

Keywords: Chinese traditional culture, intellectual property acculturation, legal transplantation, intellectual property protection system

Introduction: Cultural Background

Advocates of the intellectual property system maintain that its intrinsic character is bound to promote cultural knowledge and social innovation at the same time. Those advocates are instinctively inclined to believe that a single such intellectual property protection system and mechanism is universally applicable to all nations and even all peoples of the world since it is sufficiently in agreement with this universal value of all human beings. However, China, as one of the most important developing countries in the world with a unique history dating back to 5,000 BC, has displayed dual character as far its intellectual property system is concerned. On one hand, China has adopted and observed the international rules; while on the other hand, some practices solely belonging to this country have been well preserved too.

‘Culture’, a hard to define word, has been regarded as ‘one of the two or three most complicated words in the English language’. According to one scholar, previous studies by researchers with multi-disciplinary background have found that the interrelationship between intellectual property and culture has been increasingly present and crucial in a large number of fields. Intellectual property protection is complementary to intellectual property acculturation, which accordingly has flourished in the intellectual property legal system. As far as the copyright architecture is concerned, if one looks at it in retrospect from a culture point of view, it might be discovered that copyright culture evolved primarily from oral culture to literary culture to networks copyright culture.

A certain number of created works improvised by poets and other artists became the main resource of oral culture. This oral culture was enriched by the extensive recording of traditional customs and folklores by the earlier generations. Also, unlike in written culture, elements in oral culture can ‘vary flexibly in response to an open-ended scope of social variables’. Literary culture, introduced into the copyright culture area, was deemed as a contribution to the categorized objects system under copyright

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culture. It is in this literary culture period that copyright shaped its traditional and classic architecture that the novel copyright culture relied on. While as new technologies was introduced, a new copyright culture based on allied elements evolved, this was acknowledged as the ‘networks copyright culture’. This copyright culture was based on technical evolution and was characterized on the basis of the media (such as CDs etc.) used to fix the copyright work. Networks copyright culture developed itself on the basis of literary culture, creating a copyright scheme with the intermarriage of technology and culture.

Cultural progress has brought out significant development and innovation within the copyright industry including copyright mediums. Advances in technologies on copyright protection or mediums have in turn caused the copyright culture to move forward. What both of them have been in response to each other, in essence, reflects the veritable relationship mapping of technologies and culture. Cultural analysis on the copyright issue, especially in the digital or cyber world, has become a new method for many cutting edge research studies on copyright matters.

Admittedly, digital rights management (DRM) technology is simply a response to the emerging features of digital copyright architecture. Technology itself under DRM system cannot be protected by the copyright law. However, the whole scheme of digital rights management acts as part of the comprehensive copyright protection system, and is a crucial element in the digital copyright world. The following aspects highlight the nexus (apparent or elusive) between copyright and culture:

First of all, the fundamental purpose of copyright law, which aims to spread and encourage knowledge or culture communication, should be acknowledged. Also, prosperous development of culture is regarded as one of typical incentives of copyright law. The Statute of Anne in Britain in 1710, treated as the first modern copyright statute in the world, encouraged ‘learning’ as its goal. Furthermore, the French copyright law at the time of the Revolution [French Playwrights Decree], issued in 1791, contained the classic article often cited: ‘[T]he most sacred, the most legitimate, the most unassailable, and, if I may say so, the most personal of all the properties is the work, fruit of the thought of the writer.’

Secondly, the object of copyright law is the ‘work’ which is basically the outcome that the authors or creators devote their intellectual effort to. While the source materials of the intellectual creation are mainly from cultural knowledge, what knowledge creation constitutes reflects various cultural elements. For example, a work of art produced several centuries ago may contain a plenty of historical information or cultural background. Similarly, cinematographic works, as one category of ‘works’ protected by copyright law, ordinarily portray elements more or less related to culture, like local manners or customs. ‘Literature and the fine arts that might make us more conscious of the world as well as delight us’. Different culture styles are embedded in diverse types of copyrighted works. In the Age of Enlightenment, terms as ‘learning’ or ‘science’ were commonly perceived to refer to culture.

Moreover, not only the context of establishing and enforcing copyright law relies on the cultural environment, but also cultural factors exert corresponding influence on copyright law. As culture resides in the realm of the superstructure of the interdependent agencies of the state (as in Marxist theory), and law is also considered a part of the same superstructure; the intersection of culture and copyright law, in this regard, seems inevitable. Besides, it is indeed true that culture and copyright law are closely associated with each other.

Although it is widely acknowledged that acculturation is a significant part of cross-culture area, consensus has hardly been reached on defining and measuring it. According to certain scholars, the concept of acculturation (treated as classic), is described as ‘acculturation comprehends those phenomena which result when groups of individuals having different cultures come into continuous first-hand contact with subsequent changes in the original culture patterns of either or both groups’. What this typical definition suggests about acculturation is a mutual and multidimensional synthesis as an outcome of interaction between two different cultural groups bringing about changes of public beliefs, social values and material traits. The process leading to acculturation is progressive, irreversible and contributed to the ethos of dominant culture group. Nevertheless, acculturation research is more complicated and not only the result of culture groups being interactive with each other.

In current surroundings, acculturation of various legal cultures is inevitable. Increasing trends of globalization makes it impossible that certain communities remain in absolute seclusion from others
in the world. The term intellectual property was introduced in the 19th century, but its importance was not realized in the United States until the twentieth century. In Great Britain, the Statute of Monopolies 1623 and the Statute of Anne 1710 are accredited with the introduction of the patent laws and copyright respectively. Intellectual property is deemed as 'a suitable reward for intellectual labour' as demonstrated by Locke's well-known description of property as labour’s ‘just desert’. Regarding intellectual property acculturation, especially the relationship between the Western culture and Chinese intellectual property culture, it seems credible that intellectual property acculturation should be more accepted as intellectual property enculturation. Padilla and Keefe and Padilla defined acculturation based on ‘cultural awareness’ and ‘ethnic loyalty’. According to Padilla and Perez social culture integration inclined to be a supra-construct synthesis.

**Chinese Traditional Culture and the West’s Ideology**

The Western intellectual property culture is based on individualism, liberalism and rationalism, which have been regarded as the basis and spirit of the Western modern legal development. The impact of Chinese history, inertia and social cognition due to its traditional civilization and the actual barriers in the process of legal transformation were responsible for intellectual property law localization in China.

Intellectual property culture is a type of culture that is multi-dimension, comprehensive and esoteric, with emphasis on the individual, spirit of liberty, and reasonable aspiration embedded in private law culture. Intellectual property culture specifically differs from modern legal culture, in that it emphasizes more on consciousness, while legal culture focuses on social values and an institutional system.

Modern legal culture indicates the attitude, belief and evaluation showed by social citizens towards legal institution and legal mechanism. The emergence of intellectual property law in Western countries has undergone change from the period of ‘feudal franchise’ in the late phase of Middle Ages to ‘private property’ in the initial stage of capitalist times. During the fierce social transformation process, the growth of political, economic, and technological elements afforded better social conditions for the burgeoning legal regime.

**Values in the West: Individualism, Liberalism and Rationalism**

The individualism philosophy has been considered to be the consequence of social revolution in modern law and the vicissitudes of the social regime. Chinese traditional cultural psychology and the general beliefs of Chinese people are obstacles to the development of the individualism philosophy. Chinese traditional culture, dominated by Confucius philosophy, asserts that ‘the social ethic based on family unit should be the core of society rather than individual right based on the citizen unit.’

The philosophy of individualism affords the cultural basis in a way for the modern private law construction. Autonomy of private law comes into being through imbibing the essence of individualism. In this regard, intellectual property right as a crucial part of private rights stresses that specific private rights belong to the particular subjects, in other words, intellectual property rights are merely affiliated to particular civil subjects, and not rights enjoyed by the general public.

Individualism leads the progressive trend in which the collective authoritative power is not allowed to interfere on a regular basis with the affairs relevant to private rights, which seemingly exists to promote cognition for rights under private law sphere; whereas liberalism principle has been regarded as the kernel of modern private law. Free thinking and economic liberty, which are the prerequisites of knowledge innovation and knowledge capitalization, have long existed (since the Renaissance) in cultural consciousness and cultural policy. The significant contribution of liberalism to modern private legal culture was ‘discovery of human nature’, and advocated ‘personal liberty’ and ‘development of individual capability.

The Statute of Anne, 1709 in UK which abandoned feudal franchise in publication and feudal publication censorship, to some extent, indicating liberalism in intellectual property law system; profoundly promoted the dissemination of works. Liberalism is deemed to provide the ideological foundation for modern law’s systematization and codification. At the same time, the ‘fair use’ doctrine under intellectual property system reflects the liberalism philosophy of full of fairness and justice, in that the general public’s benefit should be taken into account. However, there is little historical connection between the existence of Chinese feudal franchise in publication and the emergence of modern intellectual property law, which implies that China failed to complete the historical change.

Rationalism more reflects the character of human beings in that man is a reasoning creature and all
Confucianism as the Dominant Philosophy in China

When most Western scholar’s commented that the concept of intellectual property indeed did not develop in China at all, even Chinese people themselves were either accepting or uncertain towards the critiques. The Chinese intellectual property expert Zheng Chengsi however, pointed out that a researcher on Chinese intellectual property law might be clueless if not aware about Chinese history. Confucianism has governed Chinese society for thousands of years, and advocates ‘Social Ethics’ and ‘Lun Chang’ (meaning feudal order of importance or seniority in human relationships). The Confucian spirit, as such is incompatible with what Western traditional culture advocates. The Confucian school however, was discriminated against during the Qin Dynasty and early days of Han Dynasty; and also challenged by the Buddhist Metaphysics in the era of Six Dynasties. Nevertheless, even while experiencing unprecedented adversity, Confucianism has been continuous until now, due to its ‘self-regulation’ in accommodating social changes. Thus, Confucianism has implicit deep roots in the Chinese value system.

Among these values Confucianism admires, ‘Li’ as the conduct principle in traditional Chinese society, inherently dominated by the spirit embodied by Confucianism regarding social relationship between individuals and society. The essence of ‘Li’ has been regarded to negate ‘individuality’, which deviates from the spirit of innovation, creation capability and speculative ability of human beings. Accordingly, psychological benefit under Confucianism hierarchy, beyond all doubt, has seldom been taken into account, even been despised or ignored. In line with to the Confucian culture, intellectual creation is considered as enlightenment gained from ancestors or God without consideration of self-improvement due to intellectual effort. In the traditional Chinese Confucian environment, intellectual creations and poetic creations are required to be shared with each social member unconditionally, which is more than what creators deserved in Chinese view. Consequently, this impression that Chinese traditional culture left on its social values appears impenetrable to modern intellectual property culture. This notwithstanding, the significant unshakable influence of the Confucianism school on the development of Chinese intellectual property cannot be underestimated.

Culture Lag Perspective

In considering the relationship between innovation and social change, one might also consider the ‘Lag culture’ theory. According to this theory put forth by Ogburn, an American sociologist in 1920s: ‘Where one part of culture changes first, through some discovery or invention, and occasions changes in some part of culture dependent upon it, there frequently is a delay in the changes occasioned in the dependent part of culture.’

The essence of culture lag mirrors the unsynchronized relationship between the adoption of novel technologies and homologous non-material culture. Material culture transition currently occurs before material technologies change, by and large, in the culture lag world. However, frequently there have been instances where transformations in non-material adaptive culture took place ahead of material culture variation. According to Marxism, material culture was the determinant of non-material culture. Yet, the vital element of non-material culture would be relatively stable and independent once it comes into being.

In the course of social transition, the development of non-material culture lags behind the progress of material culture and technology advances at all times precede the social perception transformation. Based on Ogburn's 'culture lag' theory, in the change sequence of objects in non-material culture transition, social regime would first vary, then customs and social morality, and lastly social values.

Ogburn used the term of 'culture lag' to sum up the time lag of social transition between material culture and non-material culture. Interdependent components under the culture architecture, showed differing rates of development during social progress. Lopsided and incongruous circumstances were triggered by the unsynchronized development of different social
culture elements. China has been undergoing constant and significant social revolution, which is the same as that most developing countries had undergone. As a consequence, the conditions of culture maladjustment or culture lag in China manifested thoroughly and severely. For instance, some regions in China, while possessing excellent fundamental infrastructure, show deficiency in people’s quality of life and social values have become obstacles to upgradation of culture and economic evolution of those regions. A comparison of the culture lag architecture in China and other Western countries is depicted in Fig. 1.

Abortive Intellectual Property Transplantation in China

Historical experience has illustrated that moderate protection of intellectual property right is necessary. In the 18th and 19th century, Great Britain, France and Germany were the main countries that exported the technology across the world. Concurrently, modern intellectual property laws originated from these three countries and developed significantly subsequently. As a consequence these countries naturally greatly influenced intellectual property protection as they first appeared in history. However, at that time other European countries, America and Japan, belonged to the technical culture importation and legal transplantation countries, while in the 20th century, the US, Western Europe and Japan became the main forces in intellectual property protection. During the same time, other developing regions including China became technical culture importation countries.

Practices of the technical culture exportation countries showed that intellectual protection level in those areas was higher than in the importation countries. In addition, the former group actively intensified promotion of international intellectual property legislation as well. For example, in the 19th century, France and Germany jointly pushed forward the Paris Convention for the Protection of Industry Property and the Berne Convention for the Protection of Literary and Artistic Works. Then, TRIPS (Agreement on Trade-Related Aspects of Intellectual Property Rights) was promoted by the US-led developed countries in 20th century. Accordingly, there has been a stable historic association between technical culture exportation entities and its powerful intellectual property protection.

In his book, Montesquieu famously declared: ‘[Laws] should be in relation to the climate of each country, to the quality of its soil, to its situation and extent, to the principal occupation of the natives, whether husbandmen, huntsmen, or shepherds: they should have relation to the degree of liberty which the constitution will bear; to the religion of the inhabitants, to their inclinations, riches, numbers, commerce, manners, and customs’. Also as Cover stated, ‘law must be meaningful in the sense that it permits those who live together to express themselves with it and with respect to it…’. Considering this, one can conclude that law can only exist in suitable environment. The potential ideological collision between the original transplanted legal system and the receiving system has been regarded seriously with increasing requirement of social acceptance and localization of the receiving legal society.

The acceptance of Western civilization, including legal rules by Asian countries, should be regarded as passive acceptance of legal transplantation. Asian countries had transplanted western legal systems since the latter half of the 19th century, when western countries pressed onward colonization in the Asian region. Chinese scholars in the intellectual property area are convinced that the course of Chinese intellectual property development is more than a process of imitating the west. They prefer to believe the whole history of Chinese intellectual property development actually is a witness to changes from forced use stage to positive adoption stage, which was the case in legal transplantation history as well. Intellectual property law localization through rational selection in China per se reveals how it has absorbed the essence of Western intellectual property law. Even so, China has built its considerable advanced intellectual property system since the establishment of a new China.
The cultural base of modern private law from the aforesaid, Western individualism prepared the ground for subsequent intellectual property culture belonging to part of private legal culture. However, the old Chinese social traditions focused on self-sufficient nature economy culture and patriarchal clan family unit. This was infertile culture soil for intellectual property legal transplantation because of the affirmation of human beings as the subjects in society was not a possibility. Confucianism, the prominent influence on Chinese traditional culture over several thousand years, which was inimical to Western culture, affirmed that it was difficult for China to succeed in transplanting intellectual property culture containing a hefty dose of Western civilization. Hence, it seems predestined that the Chinese intellectual property transplantation should be a failure. Or, rather China has merely transplanted the superficial form of intellectual property legal structure, not the entire psyche of this culture.

Even countries in Europe, had encountered such intellectual property protection dilemmas amongst themselves inspite of similar cultural values. Domestic copyright matters as well as transnational copyright disputes were a difficult challenge to sort for the European countries. A thriving fiction market in England developed due to media industry rise in 19th century, but got bogged down due to piracy trouble in the American sales market as a result of a lack of a global copyright protection system for foreign works. Before the establishment of a uniform code or at least a legislation on intellectual property protection, some European countries, like France and Belgium, faced such knotty intellectual property protection problems across borders. There were several cases of piracy of French publications in Belgium in 19th century.

Obviously, elements contained in Chinese traditional culture have not just simply influenced, but percolated into the Chinese intellectual property protection field. Maybe those critics of Chinese intellectual property protection development need to reconsider the their opinion. The seed of the intellectual property system is not capable of growing in an unaccustomed climate or infertile soil when sown in different countries. In this regard, the foremost challenge for setting up intellectual property protection system and promoting its further development is emphasis on the mechanism as to how to realize the localization of intellectual property protection system in China. It is thus not a matter of the reasonable western statement that China has long been treated as the ‘exceptionally creative and inventive’ country, or adverse comment that China has not hitherto established an intellectual property protection system. The Western attitude towards the current Chinese intellectual property climate should objectively evaluate and fully recognize the contribution of China’s five thousand year old civilization. Otherwise, the conclusions put forth by these scholars in no doubt will be in vain.

Conclusion
To sum up, there is no consensus on the observation that Confucianism has outright influenced Chinese intellectual property system. Although it is a debated proposition that China has attributed its massive infringement to Confucianism, one still has to recognize that Confucianism, as the predominant of the three main philosophies (Confucianism, Buddhism and Daoism) in Chinese traditional civilization, affords the most convincing and widespread cultural explanation for the current dilemma in Chinese intellectual property. Furthermore, the spirit of Confucianism, clashing with the basic principle and original intention of intellectual property system, has been long regarded as the most irreconcilable feature which is against the Chinese, or even other Asian countries’ intellectual property reforms. Therefore, the pressing issue that Chinese intellectual property development faces is a shortage of time provided the global society should accept intellectual property acculturation as its future destiny.

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References
5. The original title of this statute was ‘An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, during the Times therein mentioned’.


23 Paris Convention for the Protection of Industry Property (1883); Berne Convention for the Protection of Literary and Artistic Works (1886).


