

Liberty, Copyright, and Community - Confucianism and the Protection of Intellectual Property in Pre-modern China

Jingwen Guo, PhD Candidate, Dickson Poon School of Law, King's College London, London

Since the twentieth century, innovation had been widely perceived as an important prerequisite for a nation's economic success--an important driver of national power, and therefore a powerful weapon in increasing competitiveness in the international community. The United States is generally seen as the world's leading proponent of strict intellectual property ("IP") protection. The US has consistently sought to strengthen IP protection and enhance enforcement on a global scale.¹ China, by contrast, has long been regarded, especially by the US, as the world's leading IP offender.² On 23 August 2019, the president of the US, Donald Trump, described China as a thief in his Twitter feed: "Our country has lost ... trillions of dollars with China over many years. They have stolen our intellectual property at a rate of hundreds of billions of dollars a year ..." IP protection in China has become one of the thorniest issues of the full-blown trade war between the world's two largest national economies, China and the US. One economics commentator opines that the "US-China trade dispute has had a chilling effect on the world economy as global trade volumes plummet and major companies pause

*All translations from Chinese are the author's own unless otherwise stated.

¹ See Kal Raustiala, 'Intellectual Property in the Information Age: American & Chinese Perspectives' (2019) UCLA School of Law, Public Law & Legal Theory Research Paper No. 19-30, 1. <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3451389> accessed 3 January 2020. See also Catherine Seville, 'From pirates to eagles: America's changing view of copyright' (2007) 29 Eur Intell Prop Rev 406, 406 ("Our current image of the United States is that of an eagle-eyed enforcer of intellectual property rights. The moving force behind TRIPs, America is a vocal opponent of piracy in foreign markets, and an aggressive policeman of others' international obligations.").

² See United States Trade Representatives, '2016 Report to Congress on China's WTO Compliance' (2017) <<https://ustr.gov/sites/default/files/2016-China-Report-to-Congress.pdf>> accessed 10 November 2017. See also European Commission, 'Report on EU Customs Enforcement of Intellectual Property Rights: Results at the EU Border 2015' (2016) <https://ec.europa.eu/taxation_customs/sites/taxation/files/2016_ipr_statistics.pdf> accessed 4 January 2020. China continues to be the main country producing counterfeit goods detected at the EU's borders.

investments. Growth has eased around the world, while several major countries have flirted with recession.³”

Yet China, when it acceded to the World Trade Organisation on 11 December 2001, formally made a series of commitments to be subject to TRIPs obligations without any transition period. It is doubtless that, since then, China had made significant efforts to establish and continued to improve a modern IP system in order to foster an environment in which entrepreneurship and innovation can flourish.⁴ After almost two decades in WTO, it has still perceived by the Western world that there is a gap between the substantial IP laws and the reality of their enforcement, motivating scholarly interest in identifying the underlying reasons of China’s problematic IP enforcement. As the protection and enforcement of IP rights concern not only law and policy, but also a country’s political, social, economic and cultural system, there are many places where IP scholars can look for such reasons.

Indeed, the connection between Confucianism and the concept of intellectual property rights has been a topic of discussion since the publication of William Alford’s *To Steal a Book Is an Elegant Offense*, which gained popularity in the West as well as in China. Alford argues that, although it finds evidence of governmental restrictions on the unauthorised reproduction of particular printed books, brand names and symbols in Imperial China, such restrictions did not constitute intellectual property, as such, because they were concerned with mind-control and power maintenance rather than the protection of private interests.⁵ He recognises that governmental actions to ban unauthorised printing,

³ Richard Partington, ‘Global Markets take fright as Trump Ramps up US-China Trade War’ *The Guardian* (London, 2 August 2019) <<https://www.theguardian.com/business/2019/aug/02/global-markets-take-fright-as-trump-ramps-up-us-china-trade-war#maincontent>> accessed 3 January 2020.

⁴ Improving IP protection has been a national priority for China and the expression “accelerating the construction of an IP powerhouse” and similar ones appeared frequently in governmental documents. For example, the *Promotion Plan for the Implementation of the National Intellectual Property Strategy and Acceleration of Building an IP Powerhouse in 2018*, and the *Outline of the 13th Five-Year Plan for National Economic and Social Development*.

⁵ William P Alford, *To Steal a Book is an Elegant Offense: Intellectual Property Law in Chinese Civilisation* (Stanford University Press 1995). Evans and Griffin share similar perspectives that Confucianism is a strong obstacle for Chinese government to solve the problem of counterfeiting and piracy. See Andrew Evans, ‘Taming the Counterfeit Dragon: The WTO, TRIPS and Chinese Amendments to Intellectual Property Laws’ (2003) 31 *Ga J Int’l & Comp L* 587, 588-90; Eric M Griffin, ‘Stop Relying on Uncle Sam! – A Proactive Approach to Copyright Protection in the People’s Republic of China’ (1998) 6 *Tex Intell Prop L J* 169, 182. It should be noted that this argument is supported by a few Chinese scholars. See Alexander C Chen, ‘Climbing the Great Wall: A Guide to Intellectual Property Enforcement in the People’s Republic of China’ (1997) 25 *AIPLA Q J* 1, 10;

in both the common law and civil law worlds, were initially driven by state interest—that is, controlling the flow of heterodox ideas—rather than protecting intellectual works as the property of their creators.⁶ This was not an unknown phenomenon in the history of Western copyright, of course. In the sixteenth and seventeenth centuries, England’s Licensing Act established an examination and approval system for prints, eventually leading to its first author-focussed copyright legislation, the Statute of Anne.⁷

Alford suggests that the reason why Imperial China failed to develop a modern intellectual property system like Europe did in the seventeenth and eighteenth centuries was partly because social attention had not shifted from the maintenance of imperial legitimate power (which Alford describes as Chinese political culture) to the promotion of innovation and the distribution of intellectual production.⁸ He also posits that the very concept of IP as a property interest referring to creations of the author/inventor did not appear in Imperial China.⁹ Alford’s argument appears to rely on three basic assumptions underlying his fundamental understanding of what constitutes “intellectual property”.

First, he considers intellectual property to be a property interest, at least, a private interest, which he views as essential to the character of an intellectual property system. He criticises Chinese scholars’ depiction of historical governmental efforts to restrict literary reproduction without permissions as constituting copyright, claiming they were driven by the concern of power maintenance instead of the protection of private interest. He does, however, disagree that Western intellectual property law is unidimensional—merely concerned with the protection of property or other private interests—by taking the US as a strong example, in which the goal of copyright

see also Peter K Yu, ‘The Second Coming of Intellectual Property Rights in China’ (2002) 11 Occasional Papers in Intellectual Property from Benjamin N Cardozo School of Law Yeshiva University 6, 16-26. Yu points out the lack of consciousness of IPRs among Chinese people is largely due to Confucian ideology.

⁶ Alford (n 5) 17-8.

⁷ See Mark Rose, ‘Copyright, Author and Censorship’ in Michael F Suarez (ed) *Part II – Economic, Legal and Cultural Contexts* (CUP 2009) 118-31; David Cressy, ‘Book Burning in Tudor and Stuart England’ (2005) 36 *The Sixteenth Cent J* 359.

⁸ Alford (n 5) 17-8.

⁹ *ibid.*

protection is to “facilitate a marketplace of ideas”.¹⁰ Nevertheless, it is without doubt that, in Alford’s opinion, the private-interest character of intellectual creations recognised by a nation’s legal system is fundamental to his notion of intellectual property law qua intellectual property law.

Second, Alford implies that acknowledging the instrumental value of intellectual property as a property interest that promotes innovation and technology is critical to a modern intellectual property system. When comparing the Europe with Imperial China, he emphasises that, as early as the seventeenth and eighteenth centuries, the idea that IP protection would be beneficial to society by stimulating people to create and share their works had been accepted by the European.¹¹ By contrast, for China, he writes, “it is evident that in the early twentieth century, Chinese officials in both the capital and the provinces had not thoroughly addressed the importance for China of intellectual property law.”¹² In his view, Chinese people’s unfamiliarity of IP law, was a reason—although not a sole reason—for their failure to receive and accept the western notions of intellectual property in Qing Dynasty.¹³

Third, Alford asserts that a state’s objective of literary censorship, even for purposes of maintaining imperial power, does not necessarily eliminate the possibility that it has intellectual property law, as long as this objective is not the dominant consideration. He challenges the recognition of the existence of some intellectual property protection in Imperial China by Chinese scholars’ by claiming that the true reason for Imperial Chinese protection of copyright and trade marks was controlling the dissemination of knowledge that posed a threat to state’s rule and not the stated rationale of—“preserving imperial power and fostering social harmony”.¹⁴

Therefore, in order to analyse critically Alford’s thesis that it was Confucian culture that presented the major barrier to the establishment of intellectual property law in Imperial China, one must consider three questions related to his basic assumptions about the nature of intellectual

¹⁰ *Alford* (n 5) 3 & 128 (see footnote 9).

¹¹ *ibid* 17-8.

¹² *ibid* 45.

¹³ *ibid* 45-6.

¹⁴ *Alford* (n 1) 24-5.

property itself: 1) Is the notion of private interest—or at a higher level, individual liberty—incompatible with Confucianism?; 2) Is it true that Pre-modern China fail to recognise the instrumental function of intellectual property protection in promoting innovation and disseminating ideas?; and 3) Was censorship and social control always the primary consideration for limiting the unauthorised copying of books in Pre-Modern China?

Methodology

In sum, Alford's principal argument is that modern IP rights doctrine are incompatible with traditional Chinese culture. This leads one to ask whether the Chinese have historically engaged in piracy because they do not understand or respect copyright as an individual property right. Bearing in mind the direct connection in Western thought between private property and notions of liberty and Alford's basic assumptions about the nature of intellectual property, does this lack of a proprietarian conception of copyright also suggest traditional Chinese culture also lacked a sense of individual liberty? Is the recognition of Western concepts of individual liberty essential to the creation and maintenance of a modern intellectual property regime?

Alford's arguments essentially rely on his assessment of Chinese cultural sensibilities. Since culture may be seen reflected in the behaviours and beliefs of a single individual in a society, this essay applies a historical-biographical approach to address these questions. In order to examine how Confucian thinkers in Imperial China understood copyright within their own cultural, political, and social context, it examines in detail how three Confucianism-educated figures living in Qing Dynasty understood the concepts of liberty, freedom, and copyright and their relationship to each other. Close analysis of the views of Yan Fu, Zhang Baixi, and Zhang Yuanji, demonstrates that, contrary to Alford's thesis, with a slightly more expansive understanding of what constitutes "intellectual property", as such, Confucianism is indeed compatible with Western notion of copyright.

Furthermore, the legal history of early Chinese copyright legislation shows many of the same conflicting pressures and interests that one sees in the early history of Western copyright. China's first

formal copyright law was enacted in 1910 where the Qing Government was faced with external pressures and internal demands for IPR protection. Ironically, that is not unlike the situation in which contemporary China now finds itself. Examining how Chinese people living in late feudalist China (at the turn of the twentieth century) viewed the Western notion of copyright and liberty is necessary to explore whether Alford's culture-driven argument is correct. There are, of course, significant differences between historical and contemporary perceptions of copyright protection, liberty and Confucian values; accordingly, different understandings of the nature of copyright and Confucian ideology tend to lead different answers on to whether Confucianism is or is not a strong cultural barrier to the establishment of IP system and the enforcement of IP law. Therefore, in order to clarify the theoretical discussion, this paper places it more concretely in its historical context, using textual analysis of the individual correspondence and other writings of some historical figures who received traditional Confucian education and had significant influences on copyright-related areas (literature, education and press industry) . It enriches the debate to examine closely how Chinese people in late Qing Dynasty actually saw the foreign new concept of *copyright* and the relationship between this concept and their inherent Confucian beliefs.

In particular, Yan Fu, Zhang Baixi and Zhang Yunaji have been highlighted for close analysis because of their representative backgrounds and unique positions in relation to early Chinese copyright. Yan was born in an age that Chinese society had been penetrated by the "guns" of Western civilisation. He was an important figure, not because of any political or professional activities (he studied naval expertise), but because of his influence on the intellectual development of China.¹⁵ By the age of fourteen, he had already studied the Chinese classics and Han classical commentaries for four years and had mastered some important texts of Neo-Confucianism. Chinese traditional culture

¹⁵ For Yan Fu's biography, see Benjamin I. Schwartz, *In Search of Wealth and Power: Yen Fu and the West* (Belknap Press, 1964). For an analysis of Yan Fu's historical importance, see Ko-wu Huang, 'The Reception of Yan Fu in Twentieth-Century China' in Cindy Yik-Yi Chu and Ricardo K S Mak (eds) *China Reconstructs* (University Press of America 2003) 25-7. For his translations of Western works, see David Wright, 'Yan Fu and the Task of the Translator' in Micheal Lackner, Iwo Amelung and Joachim Kurtz (eds) *New Terms for New Ideas: Western Knowledge and Lexical Change in Late Imperial China* (Brill 2001) 235-55.

and ideology had dominated his life since childhood.¹⁶ After he was sent to England to study naval technology in 1877, Yan soon became interested in Western knowledge, including economics, sociology, politics, and natural science. Due to his experience and his efforts in introducing Western ideas into China, some may argue that Yan Fu was not an orthodox Confucianist. However, to oversimplify Yan's interest in the West as an uncritical admiration or rejection of Confucianism does him a disservice. In the eyes of Yan, Confucian ideas and Western ideas had many things in common—he found analogues in the classics of Confucianism for many of the Western concepts and terms that he attempted to translate. At least, as Schwartz summarises, “Yen (Yan) Fu was certainly at home in the Confucian family morality...his praises of Confucius are intermingled with his invocation of Legalism...¹⁷”.

In 1992, when Japan and the US made attempts to transplant an IP system in China by means of bilateral trade treaties, there was a collective protest organised by students studying in Peiyang University (the first modern university of China), expressing their concerns about the affordability of reading—i.e., the society would be unable to afford the expenses of buying books due to copyright protection.¹⁸ The education concern was also one of the major policy considerations used to oppose the establishment of copyright system at the turn of twentieth century. Zhang Baixi, a minister for Education of Qing Dynasty and the president of the Imperial University of Peking (the forerunner of Peking University), was a noteworthy figure in the debate of copyright clause in trade treaties and the practice of copyright protection in late Qing Dynasty. His attitudes toward Confucianism had been demonstrated by his arrangements on a curriculum for Chinese students in schools and universities. Although Zhang's curriculum integrated Chinese and Western learning, he appeared to maintain the

¹⁶ Kirill O Thompson, 'Yan Fu (Yen Fu)' in Antonio S Cua (ed) *Encyclopedia of Chinese Philosophy* (Routledge 2003) 831.

¹⁷ Schwartz (n 15) 235.

¹⁸ Sanqiang Qu & Huaquan Yang, 'Cong Fa Lv Gong Ju Zhu Yi Xiang Zi Ran Li Xing Hui Gui -- Jian Lun Zhong Guo Zhu Zuo Quan Fa De Bai Nian Li Cheng (Returning from Legal Instrumentalism to Natural Rationalism – Also Discussing A-Century History of China's Copyright Law)' (2010), *Zhong Guo Zhu Zuo Quan Fa Lv Bai Nian Lun Tan Wen Ji* (Thesis Compilation for International Forum on the Centennial of Chinese Copyright Legislation) 279, 281.

superiority of Confucian schools of thought in the education of ethics. For instance, in an official document *Rules and Regulations on Educational Affairs* drafted by Zhang Baixi, he insisted that the subject of ethics should be set in higher education institutes and high-level normal universities, in a manner designed to teach Confucian learning; if the students could act honestly, loyally, cautiously and have self-restraint, they would become “truly Confucianists”.¹⁹

The third person selected is Zhang Yuanji. He was initially appointed as a Hanlin Bachelor, and having passed the highest imperial examination of Qing Dynasty in 1892, he served as an official in the Department of Foreign Affairs and Trade. He subsequently acted as a participant of a famous political reform movement, the “Hundred Days’ Reform”, and later became a leading publisher after he was dismissed due to the failure of the Reform.²⁰ Although he had several titles, Zhang was well-known his contribution to promote the development of traditional culture and China’s press industry. Meanwhile, he was treated by many scholars as a “Confucian Entrepreneurs” and in his own eyes, he described himself, in one of his poems, a “*suan ru*”—literally “sour Confucianist”, meaning pedantic or impoverished Confucian in Chinese.²¹

1. What is Confucianism?

Before addressing the questions listed above through an examination of the writings of these three individuals, it is necessary to summarise the basic tenets of Confucianism. As a complex ethical, social and philosophical system, it also underwent many changes over the course of history, which makes it extremely difficult to identify consistent Confucian philosophical ideals. As a result, this part will provide a necessarily brief summary of these difficult concepts as they developed over a long period of time.

¹⁹ Zhang Baixi, *Xuewu gangyao* (Rules and Regulations on Educational Affairs), published on 26 November 1903, collected in *Zhangbaixi quanji* (*The Complete Work of Zhang Baixi*) (Yuelu Shushe 2008) 41.

²⁰ See Manying Ip, *The Life and Times of Zhang Yuanji 1867-1959: from Qing Reformer to Twentieth-century Publisher* (Commercial Press 1985).

²¹ See Zhang Yuanji’s poem, titled *Daoku shishi* (Ten poems in the premise of robbers).

Confucianism, one of many philosophical rivals in an age known as the “Hundred Schools of Thought”, is originated in the period of Spring and Autumn; it retained a profound emphasis on the social order. Confucius (BC 551-BC 479) came up with his key theory of the “rectification of names”, which is served as the basis of the establishment of well-ordered society, requiring everyone to fulfil his or her social responsibilities.²² His other significant contribution to Chinese philosophy is the advocacy of *Ren* 仁 (humanity or benevolence, referring to being kind and thoughtful to others) as the fundamental and essential virtue for the cultivation of all Confucian ethics.²³

A new school, Neo-Confucianism, revived the strands of Confucian philosophy caused by the challenges from Daoism and Buddhism, and dominated Imperial China for over 800 years, dating back to mid-Song Dynasty (around the eleventh century) and dominating the Chinese society until late Qing Dynasty, when the Western philosophy was first introduced to China at the twentieth century²⁴ During the Song and Ming Dynasties, Confucian philosophers interpreted the ethical values advocated in the oldest Confucian texts in a creative way: that is, although they retained and advocated the traditional virtues of humanity/benevolence (仁 *ren*), righteousness (义 *yi*), propriety (礼 *li*) and wisdom (智 *zhi*), they learned from Buddhism and Daoism and thus built a new system involving “a cosmology to account for the creation of the universe, an ethics treating human being as a unity and affirming the value of human effort, and an epistemology to determine the basis of knowledge of what is and what ought to be”.²⁵

From the early period of Confucius to the late period of Neo-Confucianism, the ordering of human relations, that is, how community members—such as, ruler and subject, father and son, wife and husband, elder and younger brother—should live well together, appears to be a fundamental consideration for Confucianists. Furthermore, their answers are similar: each person should respect

²² *Analects*, Book 7, Chapter 11.

²³ *ibid*, Book 9, Chapter 16.

²⁴ Siu-chi Huang, ‘Historical and Philosophical Contexts’ in *Essentials of Neo-Confucianism: Eight Major Philosophers of the Song and Ming Periods* (Greenwood 1999) 3-4.

²⁵ *ibid* 3-11. See also Pratoom Angurarohita and Victor H Mair, ‘Buddhist Influence on the Neo-Confucianism Concept of the Sage’ (1989) 10 *Sino-Platonic Papers* <http://sino-platonic.org/complete/spp010_buddhist_confucian_sage.html> accessed 18 April 2019.

others, be earnest and truthful, and fulfil his or her duties, both at home and in society. Although they were primarily concerned with ethical issues, the Confucianists (precisely, the Neo-Confucianists) also attempted to explain the phenomena in the universe and endeavoured to harmonise human beings with their surrounding environment through abstract theoretical analyses.²⁶ In addition, Confucianists paid attention to the status of mind of an individual, even seeking methods for “mind control”.²⁷ For Neo-Confucianists, the mind is often obscured by evil desire, bias and narrow-mindedness; therefore, they believed that a person’s mind could become pure, clear and impartial once a person’s selfish motives have been eliminated.²⁸

2. Is the notion of liberty incompatible with Confucianism?

Arguments in favour of IP protection as property have often relied on a concern for protecting individual liberty. For example, Terrell and Smith assert that the origin of property, a concept associated with ownership on tangible and intangible objects, rests in liberty.²⁹ Similarly, Baker argues that, as people cannot produce goods and even survive without having the abilities to use and transform raw materials, one of the various functions of property rules—determining when the community will recognise an individual’s claim of a right to use or exploit a given resource—is to provide individual liberty with major support.³⁰ Gana believes the relationship between human rights and intellectual property can be used to explain the differences of approaches—which is “rooted in the historical and cultural experiences” of a society—to protecting IPRs and its enforcement in

²⁶ For example, the discussion of *li* and *qi* by Zhang Zai and Zhu Xi.

²⁷ Carson Chang, ‘Introduction: Confucianism in Chinese History, and a Comparison with Western Philosophy’ in *Development of Neo-Confucian Thought (Volume One)* (Bookman Associates 1957) 38. He summarises that “The philosophical interest of the Chinese is most concerned with mind-control.”

²⁸ Wang Yangming, *Chuanxilu (A Record for Practice)*, translated by John Kieschnick, cited in John Kieschnick, ‘Analects 12.1 and the Commentarial Tradition’ (1992) 112(4) *J Am Oriental Soc* 567: 571.

²⁹ Timothy P Terrell and Jane S Smith, ‘Publicity, Liberty, and Intellectual Property: A Conceptual and Economic Analysis of the Intellectual Property Issue’ (1985) 34 *Emory L J* 1, 4-5 & 30.

³⁰ C Edwin Baker, ‘Property and Its Relation to Constitutionally Protected Liberty’ (1986) 134(4) *U Pa L Rev* 741, 744.

developed and developing countries.³¹ Alford's argument serves as a significant example—of this theoretical approach; he suggests that the absence of “fundamental political and basic property rights”, which are summarised as “basic civil liberties” by Gana, is likely the main reason for historically low levels of IP protection in China.³² This section aims to answer the first question raised above regarding Alford's basic assumptions about the nature of intellectual property—the compatibility of the notion of liberty with Confucianism—by examining whether a lack of recognition for individual liberties in China, which he has perceived as the barrier to the protection and enforcement of IPRs, could be attributed to Confucianism.

2.1 Confucianism and rights

It is fair to say that the fundamental values of a society will help shape its position on human rights. In societies founded in traditional notions of liberalism, liberty, of course, tends to be one of the fundamental values.³³ Take the United States as an example—any inquiry into liberty in this country, must start from the Declaration of Independence, which claims that every individual has equal, unalienable and self-evident rights to life, liberty and the pursuit of happiness.³⁴ The Bill of Rights provides constitutional guarantees for a large number of human rights, such as freedom of speech (in the First Amendment) and the individual right to bear arms (the Second Amendment), which can be asserted by the individual in response to government action.³⁵ By contrast, one stereotype about China, a country which was dominated by Confucianism for more than two thousand years and is now governed by communist leadership (both of Confucianism and Communism are frequently labelled as Communitarian philosophies) is that that it overlooks the private interest and requires sacrifice of the

³¹ Ruth L Gana, 'The Myth of Development, the Progress of Rights: Human Rights to Intellectual Property and Development' (1996) 18 Law & Pol'y 315, 335-6.

³² William P Alford, 'Perspective on China: Pressuring the Pirate: People Who Lack Fundamental Rights Cannot be Expected to Embrace Complex Property Rights' *Los Angeles Times* (1992) <<https://www.latimes.com/archives/la-xpm-1992-01-12-op-142-story.html>> accessed 15 January 2020.

³³ "Perhaps the most famous national credo is the French triumvirate of ideals: Liberty, Equality, and Fraternity." See Susan N Herman, 'Liberty, Equality, Fraternity: Reconciling National Values and Human Rights' (2017) 4(1) QMHRR 1.

³⁴ The Declaration of Independence, para 2.

³⁵ *ibid* 2-3.

self to community. Some scholars in the field of Confucian philosophy addressed that there is no place for human rights in an ideal society as understood in Confucianism because of its emphasis on community.³⁶ For instance, Ames argues that the idea of human rights cannot be received by Confucianism because the former views human interests are “independent of and prior to society”.³⁷ David Hall holds similar opinion, arguing that a rights-based liberalism is completely new to China as Confucian authority and hierarchy are irreconcilable with liberal democracy.³⁸ In sum, these commentators believe that, Confucianist societies discourage the pursuit of private interest, which prevents human rights receiving public recognition there.

In contrast, David Wong, another influential expert on Confucianism, disagrees with the idea that Confucianism is incompatible with notions of rights. He believes the concept of rights do find “a congenial home” in Confucianism and identifies a possible ground for the recognition of rights—for example, the concept of rights may be acknowledged for the sake of the common good of a community.³⁹ Another scholar, Seung-hwan Lee has argued that the idea of individual rights could be covered by Confucian virtues, given that rights are a conception served to give a person to make justified claims against others who should discharge of their obligation to respect and fulfil them.⁴⁰ Apart from an approach of re-interpreting the notion of private rights, some attempts to re-explore certain themes of Confucian philosophy also demonstrate a Chinese liberal tradition. William de Bary believes the existence of common ground between the Chinese and the Western traditions, which can be mainly revealed in the Neo-Confucianists’ strong sense of self. First, the Neo-Confucian notion of education, developed by Zhu Xi, a leading philosopher of Neo-Confucianism, emphasised that

³⁶ Henry Rosemont, *Against Individualism: A Confucian Rethinking of the Foundations of Morality, Politics, Family, and Religion* (Lexington Books 2015); Roger T Ames, ‘Rites as Rights: The Confucian Alternative’ in Leroy S Rouser (ed) *Human Rights and the World’s Religions* (University of Notre Dame Press 1988); Chad Hansen, ‘Chinese Philosophy and Human Rights: An Application of Comparative Ethics’ in Gerhold K Becker (ed) *Ethics in Business and Society: Chinese and Western Perspectives* (Springer 1996).

³⁷ Ames (n 12) 205.

³⁸ David L Hall and Roger T Ames, *Democracy of the Dead: Dewey, Confucius, and the Hope for Democracy in China* (Open Court 1999).

³⁹ David B Woog, ‘Rights and Community in Confucianism’ in Kwong-loi Shun and David B Wong (eds) *Confucian Ethics: A Comparative Study of Self, Autonomy, and Community* (CUP 2004) 32-4.

⁴⁰ Seung-hwan Lee, ‘Was There a Concept of Rights in Confucian Virtue-Based Morality?’ (1992) 19 *Journal of Chinese Philosophy* 241, cited in *Woog* (n 39) 34.

individuals should study for the sake of themselves, which requires each person learn knowledge for the purpose of self-understanding and self-fulfilment (in other words, self-motivation) rather than external imposition or pressure.⁴¹ Second, he argues that Neo-Confucian scholars and officials in Ming Dynasty had ever expressed their opinions against despotism publicly in their works, demonstrating the existence and importance of political criticism in Imperial China.⁴² An example of their recognition of the individual's freedom of action is Huang Zongxi, a significant Neo-Confucianist, who emphasised the importance of law and education for promoting the general interests of people and protecting the individual against the ruler's abusive power.⁴³ In conclusion, they suggest that Confucianism also values private interests, and even if Confucian societies emphasise the interest of community, they can still recognise private rights.

Nevertheless, Confucianism, characterised as a social, ethical and philosophical system, underwent many changes in the course of an over-two-thousand-year history. The 'incompatibility group' appear to talk about the Confucian ideas in an abstract and general way, whilst their counterparts prefer to use concrete examples, especially from the sayings of Neo-Confucianists, to justify the compatibility of private rights with Confucianism. Furthermore, the "incompatibility arguments" are based on a premise that private rights could only appear or survive in a society where private interests overwhelm public interests. In contrast, a rebuttal from opponents is that private rights could be recognised as being in the interest of the whole community—to promote the common good. These controversial arguments show that the different interpretations of *liberty* and *private rights* are major factors contributing to the widely divergent perspectives on the compatibility of liberty and rights with Confucian philosophy. *Liberty* and *rights* are integral concepts originating in

⁴¹ For a textual analysis, see William Theodore de Bary, *The Liberal Tradition in China* (The Chinese University Press 1983) 21-4.

⁴² *ibid* 67-90. Huang Zongxi and other Neo-Confucianists had ever criticised the conduct, such as violence and corruption of China's rulers as well as challenged the imperial rule itself.

⁴³ *ibid*. De Bary cites a paragraph of Huang's work titled *Ming I dai fang lu*: "Since unlawful law fetter a man hand-and-foot, even a man capable of governing well cannot overcome the handicaps of senseless restraint and suspicion. When there is something to be done he does no more than his share and since he contents himself with trifling accomplishment, there can be no glorious achievement." *ibid* 84.

the West and reflecting Western political and social thought; however, there are no (at least no widely accepted) equivalents or counterparts in China's traditional philosophy.⁴⁴ Furthermore, any studies attempting to re-examine Confucian classics can hardly avoid a problem on how to interpret the old text into modern language correctly and clearly. As the Western concepts of *liberty* and *freedom* had been introduced to Chinese society at the turn of twentieth century, if we observe directly how Chinese people, who lived in that period and were representatives of traditional Confucian education, viewed these imported notions from the West, the difficulties in finding counterparts of these notions in Confucian philosophy and interpreting Confucian old texts could be avoided. The next section will examine how three individuals reacted to Western concepts of liberty, freedom and copyright in order to test how compatible these concepts are with Confucianism.

2.2 Yan Fu's and Zhang Baixi's understanding on Liberty

During the late Qing (Qing: 1644-1912) and early Republic period (Republic of China: 1912-1949), Yan Fu, as a well-known Chinese scholar and translator, played a prominent role in the practices and literary trends of learning from Western civilisation, especially in the introduction of Western liberalism into China—he was regarded as the father of Chinese liberalism.⁴⁵ His thoughts on liberty and freedom are mainly reflected in his translations, especially the translation of Mill's work *On Liberty*.⁴⁶ In translating Mill's book, Yan was less concerned with "political freedom" than with "individual freedom in an ethical sense" and he argued that the correct understanding of liberty emphasised the boundaries between self and group. Yan's explanations on why liberty is limited were

⁴⁴ There is an unsettled dispute about whether the recognition of human rights is essentially a Western Concept. See eg, Raimundo Panikkar, 'Is the Nation of Human Rights a Western Concept?' (1984) 81 Cahier 28; Santos, Boaventura de Sousa Santos, 'Toward a Multicultural Conception of Human rights' In H T Berta (ed) *Moral Imperialism: A Critical Anthology* (New York University Press 2002); Janne Mende, 'Are Human Rights Western – And Why does It Matter? Perspective from International Political Theory' (2019) *Journal of International Political Theory* 1.

⁴⁵ Max Ko-wu Huang, *The Meaning of Freedom: Yan Fu and the Origins of Chinese Liberalism* (The Chinese University Press 2008) xxv.

⁴⁶ For Yan, "liberty" and "freedom" share the same meaning, being opposite to "slavery", "subjection", "bondage" and "necessity". See Yan Fu, "Yi Fanli," *Qunji quanjie lun*, para 1.

mainly based on Spencer's thoughts on ethics. For him, Spencer's work *Justice in Principle of Ethics* indicates that people could not choose to be good or not without liberty and consequently, the development and cultivation of virtue were unable to achieve.⁴⁷ Yan's treatment of liberty as a concept demonstrated two interesting departures from his source material: first, he did not discuss whether individuals should have liberty; second, Yan was primarily concerned with the freedom in a community not the personal freedom per se. Furthermore, Yan Fu believed that the Western concept of freedom shares some basic features in common with two Chinese concepts of *shu* 恕 ("being compassionate by putting oneself in the other's place") and *xieju* 絜矩 ("giving everyone his or her due by applying the same standards to others that one applies to oneself").⁴⁸ But he also pointed out the differences between the Western concept *Freedom* and Chinese ideas of *shu* and *xieju* by emphasising that "these Chinese virtues focus exclusively on the treatment of others" while the West's freedom is actually focused "in the first instance on preserving the integrity of the self".⁴⁹ In summary, for Yan, *Liberty* is a concept in an ethical sense, entitling a person to control his behaviours and own life within the boundaries between self and group in a community. Furthermore, his concerns about the actualisation of others' freedom led him to propose a principle that people should "have the virtue of giving others his or her due by applying the same standards to others that one applies to oneself".⁵⁰ It traces out a logic linking the idea of freedom with that of limits on freedom; it indicates, in Yan Fu's mind, that the emphasis on "limits" is to prevent "conflict". Therefore, as Huang points out, Yan saw "freedom" as combining the two essential dimensions of Confucian morality: the moral subject's sense of empathy and the emphasis on external rules.⁵¹

China's defeat in the Sino-Japanese War was a heavy blow to Yan Fu, he was eager to find out a solution to make his mother country become stronger and he thus chose to translate Thomas Henry

⁴⁷ Yan Fu, "Yi Fanli (Principles of [my] translation)," *Qunji quanjie lun*, para 3.

⁴⁸ These two Chinese concepts are translated by Max Ko-wu Huang. See *Huang* (n 45) 91-2.

⁴⁹ Yan Fu, "Lun shibian zhiji (The Moment of Social Changes)," *Yan Fu ji* (The Collection of Yan Fu's Works) para 3-4, translated in *Huang* (n 45) 92.

⁵⁰ Yan Fu, "Yuan Qiang (On the Foundation of National Strength)", translated in *Huang* (n 45) 92.

⁵¹ *ibid* 92-3.

Huxley's *Evolution and Ethics* into Chinese as *Tiyananlun*.⁵² The unexpected popularity of *Tiyananlun* in China was such that Schwartz describes it as the biggest success of Yan Fu's career of being a translator, and it had a huge influence on the young generation of early twentieth century.⁵³ Professor Billy So has similar perspective—he argues that, although Herbert Spencer's works had the greatest influence on Yan's thought, the Social-Darwinist theory presented by Huxley had a more significant impact on Chinese society.⁵⁴ This book was even selected in the reading list suggested for middle school students at that time.⁵⁵

Tiyananlun, rather than a literal translation of *Evolution and Ethics*, was a combination of the translation of original text and Yan's interpretation on Huxley's and Spencer's thoughts regarding natural selection and survival of the fittest in sociology.⁵⁶ Yan Fu felt closer to Spencer's ethics of self-interest, which is consistent with the law of evolution. In his commentary on *Tiyananlun*, responding to Huxley's original text regarding self-assertion ("It is further to be observed that, just as the self-assertion, necessary to the maintenance of society against the state of nature, will destroy that society if it is allowed free operation within; so the self-restraint, the essence of the ethical process, which is no less an essential condition of the existence of every polity, may, by excess, become ruinous to it.⁵⁷"), Yan evaluated that,

⁵² Yan studied at the Royal Naval College at Greenwich from 1877 to 1879, almost twenty years prior to the time that he started to translate *Evolution and Ethics*. However, no evidence shows how he got this book to read.

⁵³ Schwartz (n 15) 99.

⁵⁴ Jikang Su (Billy So), 'You fa wu tian? Yan fu yi 《tiyananlun》 dui 20 shijichu zhongguo falv de yingxiang (Have Law without Nature? The Influence of *Tiyananlun* translated by Yan Fu on Chinese Laws in the Early 20th Century)' (2012) 6(5) *Tsinghua Law Journal* 128, 130. For Benjamin Schwartz, the thought of latter was to dominate Yan's whole subsequent development after he translated Spencer's book *A Study of Sociology*. See Schwartz (n 15) 33-4.

⁵⁵ See *A Handout of Kaiming Middle School* (1933) Volume 6, Issue 2, 896. Also, see Schwartz (n 15). The author quotes a statement of Hu Shi from his work *Autobiography at Forty*, addressing that, *Tiyananlun* became popular around the whole nation in a few years after it was published.

⁵⁶ See Fei-Hsien Wang, *Pirates and Publishers: A Social History of Copyright in Modern China* (Princeton University Press 2019) 97.

⁵⁷ Chapter XI, *Prolegomena to Evolution and Ethics* <<https://ocw.mit.edu/courses/literature/21l-448j-darwin-and-design-fall-2003/readings/lecture19.pdf>> accessed 21 November 2019.

The purpose of this proposal that we should not get rid of self-assertion is to maintain the society; nevertheless, it was very narrow-minded as what he said had nothing to do with the principle - 'Man has freedom, but the limit on his freedom must arise out of the right that others equally have to enjoy freedom' ... which was presented in Spencer's *The Ethics of Social Life: Justice*.⁵⁸

It is fair to conclude that, although Yan Fu had translated *Evolution and Ethics*, he did not advocate and adopt Huxley's ideas wholesale, and even misunderstood some of them.

Zhang Baixi, a minister for Education of Qing Dynasty and the president of the Imperial University of Peking (the forerunner of Peking University), had ever written an official document titled *Xue wu gang yao (The Outline of School's Management)*, published in 26 November 1903, in which he explained the meaning of *rights* and *liberty*.⁵⁹ He stressed that, "*rights*" is opposite to "*obligations*" while "*liberty*" is opposite to "*laws*", resulting in a rule that only can people be entitled to rights and freedom after they have already complied with their obligations.⁶⁰ In addition, Zhang addressed that people have to enjoy their liberty within the scope of law, otherwise, a country would end up in chaos.⁶¹ In summary, in his views, the entitlement of liberty is conditional—after his obligations have been done—and limited.

Admittedly, both Yan Fu and Zhang Baixi discussed the liberty/freedom in a community rather than treat it as personal freedom per se, as well as emphasising (perhaps over-emphasising) the influence of these ideas on a community.⁶² However, they did accept the western concept of *liberty*, and Yan even attempted to find the similarity between it and traditional Confucian ideas, which shows that, like Wong and de Bary suggest, the notion of liberty/freedom does not go against the traditional values of Confucianism.

⁵⁸ Yan Fu, *Tianyanlun* (World Publishing Corporation 2013) 91-2.

⁵⁹ Collected in *The Complete Work of Zhang Baixi* (Yuelu Press 2007) 38.

⁶⁰ *ibid.*

⁶¹ *ibid.*

⁶² In Chinese language, the term *liberty* and the term *freedom* are interchangeable.

3. For innovation or mind control?

Like the concept of *liberty*, there is no counterpart of the western concept of *copyright* in Imperial China. Therefore, the same approach will be adopted in this section on Confucian attitudes to copyright. In particular, it will examine the writings of Yan and Zhang Yuanji to look at how they understood the system of copyright derived from the West in order to explore whether the people living in Imperial China had already realised the instrumental function of copyright protection in promoting innovation and disseminating ideas, and whether the censorship and social control always the primary consideration for government to limit the unauthorised copying of books.

3.1 Yan Fu's justifications on copyright

In a letter sent to Zhang Baixi emphasising the importance of having a copyright system in China, Yan Fu pointed out that copyright protection is necessary to remunerate the authors' labour, due to the difficulties in writing and translating—even “spending two to three decades in exploring and thinking about” an arcane work in depth.⁶³ He further presented his reasoning by indicating that, the absence of copyright system would pose threats to authors' motivation, which is not only harmful to education but also the appearance of good Chinese books which are comparable with western masterpieces in the future.⁶⁴ Although there is no specific newspaper article or book chapter, written by Yan discussing copyright protection, his perspectives regarding copyright are scattered across his twenty published letters to Zhang Yuanji, a well-known educator and leading publisher.⁶⁵ Yan pointed out China's urgent demand for translating western books.⁶⁶ He believed that, as long as Chinese people had not been enlightened, China would perish, regardless whether a reform took place or not.⁶⁷ In addition, as a

⁶³ Yan Fu, *Collection of Yan Fu's Works (Part 3)*, (Zhonghua Book Company, 1986) 577.

⁶⁴ *ibid*, 578.

⁶⁵ For detailed introduction on Zhang Yuanji, see Manying Ip, *The Life and Times of Zhang Yuanji, 1867-1959: from Qing Reformer to Twentieth-century Publisher* (Commercial Press 1985).

⁶⁶ He considered it as “the urgent mission ranked in the first place”, see his letter to Zhang Yuanji, written on 29th March to 5th April 1899 in *Yan Fu Quan Ji (A Complete Work of Yan Fu)* 129.

⁶⁷ *ibid*, 142. See Yan's letter written to Zhang Yuanji on 11th June 1901.

translator, he knew that translating English works into Chinese was a time-consuming and effort-demanding process.. He reasoned that, in order to produce a high-quality translation of a book, he had “exhausted all efforts” and had to “revise them three times” to make difficult foreign ideas readable and intelligible to his readers.⁶⁸ When Yan requested a share of economic interests gained from selling his translation book titled *The Foundation of Wealth*, from the *Nanyang Gongxue Yishuyuan (The Translation House of Nanyang College)*, he pointed out that he had spent five years in producing this best-selling book of several hundred thousand words.⁶⁹ For Yan, the difficulty of creating good translations was one of three factors leading to the scarcity of western works translated into Chinese. The other two factors, shown in his letter written to Zhang Yuanji on 5th April 1899, are the scarcity of experts in translating foreign languages plus the mismatch between translator’s income in return and his or her effort that was consumed in translating.⁷⁰ However, Yan’s arguments were not limited to translations. He used two stories—one is *Zilu Jiuren* (Zigong secured a slave) and another is *Zilu Shouniu* (Zilu accepted an ox as a reward) recorded in a Confucian classic, *The Annals of Lü Buwei* to demonstrate the importance of copyright and patent protection for stimulating creation.⁷¹ Following a traditional technique of Confucian classics, such as *The Analects of Confucius*, Yan used short didactic stories to “teach” his readers that encouraging the dedication of authors and inventors would harm public interest from a long term perspective, rather than demonstrating it in a form of inductive reasoning, a western approach. It reflects that his way of thinking was still had deeply grounded in his Confucian education. Also, as both of the payment from the treasury and the ox from

⁶⁸ *ibid*, 130-4. See Yan’s letter to Zhang Yuanji, written on 5th April 1899.

⁶⁹ *ibid*, 145. See his letter written to Zhang Yuanji on 18th September 1901.

⁷⁰ *ibid*,132-3.

⁷¹ See *The Annals of Lü Buwei*, translated by John Knoblock and Jeffrey Riegel (Stanford University Press 2000) 394: “According to the laws of Lu, if a native of Lu was a servant or concubine to another feudal lord and could be purchased out of bondage, the purchase price would be recompensed from the Lu state treasury. The disciple Zigong purchased a Lu native from a feudal lord; but when he returned from his mission, Zigong refused the payment of recompense from the treasury. Confucius said, “Si [Zigong’s first name, it should be ‘Ci’] made an error in doing this. Henceforth people of Lu will never again purchase others out of bondage. Obtaining money for such a purpose does not damage moral conduct; but if the price is not recompensed, no one will ever again purchase the freedom of others.” Zilu rescued someone who was drowning, and the man rewarded him with an ox, which he accepted. Confucius said, “People of Lu will certainly come to the aid of the drowning.” Confucius realised what the end result would be from the very beginning, because his ability to perceive future development was far-reaching.”

the person rescued in these two stories are a reward, it indicates that, in Yan's understanding, copyright protection is perceived as a reward in nature, unlike Spencer, who relied primarily on labour theory. Apart from quoting classical Chinese examples, he also discussed western practice in reality. Yan had already realised that Western countries disfavoured monopoly most; however, they tolerated copyright and patent protection as an exception.⁷² He observed:

(The reason) is, rather than their failure to recognise (copyright and patent monopoly) as private interests, the consideration that, without giving skilled people rewards, a nation must suffer great losses.⁷³

3.2 Zhang Yuanji's opinions on copyright protection

Unlike Yan Fu, Zhang Yuanji is a historical figure little known to the West but had a profound influence on early modern China.⁷⁴ Although he is familiar to Chinese scholars, they mainly focus on Zhang's substantial contributions to China's modernisation in the twentieth century: promoting modern education, supporting a flourishing publishing industry, preserving and researching rare prints of classics and histories, and driving political reforms.⁷⁵ The historical evidence, including publishing agreements signed by the Commercial Press and Zhang's diaries reflecting his practice in dealing with copyright disputes, clearly indicate that Zhang Yuanji was also an advocate for copyright.

⁷² In Yan's letter to Zhang Yuanji, written on 13th October 1901, available in *Yan Fu Quan Ji (A Complete Work of Yan Fu)*, p147.

⁷³ *ibid.*

⁷⁴ The only English work talking about Zhang is written by Dr Manying Ip, titled 'From Qing Reformer to Twentieth-century Publisher: The Life and Times of Zhang Yuanji 1867-1959', submitted to University of Auckland as her PhD thesis. See <<https://researchspace.auckland.ac.nz/handle/2292/1993>> accessed 10 February 2019.

⁷⁵ For a detailed literature review on academic research regarding Zhang, see Yu Yongqing, 'Reviewing the Research on Zhang Yuanji in Recent Three Decades' (2010) 18(1) *Journal of Chengdu University of Technology (Social Sciences)* 96. He also points out the weaknesses of current research on Zhang. First, major academic works merely present and state historical facts without considering background characteristics. Second, in terms of comparative study involving Zhang Yuanji, recent research is restricted to the areas of culture, education and publishing industry. Furthermore, these studies appear to end in simple comparisons or even in the introduction on relationship between Zhang and his counterparts (100).

In 1093, the Commercial Press published a book *Ban Quan Kao (Study on Copyright)*, which was translated from a British book introducing the system of copyright.⁷⁶ Zhang wrote a preface to this book and pointed out the importance of copyright system and why he chose to translate and publish this book. This preface reflects three points. First, Zhang had already acknowledged that intellectual property laws are products of balancing self-interest with other interests, and from a long-term perspective, protecting authors' self-interest is more beneficial to the flourishing of civilisation. Second, he justified that the lack of copyright protection would spoil the authors' initiative. In other words, Zhang was in favour of an instrumental justification that focuses on the fact that copyright system encourages desirable activities—providing people with an incentive to write as such works are generally labour-costly to create while they can often be readily copied once made available to the public. Third, he raised concerns about national consciousness and identity—; with the absence of domestic copyright law, Chinese authors might give up their original citizenship for the sake of enjoying copyright protection offered to foreigners.⁷⁷

In addition, Zhang's written suggestions on the draft of Great Qing Copyright Law also provide us with some valuable ideas in finding out the answer. A significant point is that, Zhang Yuanji doubted the necessity of the administrative examination on all literature and drawings before publishing, due to the practical difficulties in examination.⁷⁸ He argued that, although the government should censor publications to avoid people being exposed to misleading works, this aim could hardly be achieved by relying on this method as it was impossible to examine each new book without negligence and few

⁷⁶ See Li Mingshan, *History of Copyright in Ancient China* (Social Science Academic Press 2012) 254-5; see also Wu Handong and Wang Yi, 'Discussion on Chinese Traditional Culture and Copyright System' (1994) 4 Chinese Journal of Law 23.

⁷⁷ According to unequal trade treaties between China and other countries, foreign companies and foreign individuals enjoyed many privileges – such as favourable tax treatment and examination-free – in China, leading to the fact that passing foreign companies off and changing nationality were very common in late Qing Dynasty. See Cai Xiaorong and Sun Baogen, 'On the Phenomenon of Some Chinese Merchants' Seeking for Possessing Western Nationality in Late Qing Dynasty' (2007) 23(2) Journal of China University of Petroleum (Edition of Social Science) 63.

⁷⁸ Zhang Renfeng and Song Lirong (eds) *Zhang Yuanji's Arguments on Publishing* (The Commercial Press 2011) 6-8.

illegal books would be submitted by their authors, who were more concerned about dissemination of their works than they were about copyright protection.⁷⁹

To conclude, both Yan Fu and Zhang Yuanji had recognised the benefits that copyright system would pose to society—encouraging authors to write and translate, and thus promoting innovation and culture. Although Zhang Yuanji still insisted on the importance of literary censorship, it was not one of the primary considerations, let alone being the dominant one, for his support of the establishment of a copyright regime.

3.3 Copyright and freedom

Nevertheless, it is worth noting that, at the turn of twentieth century, none of the elite of Chinese society attempted to use the notions of freedom/liberty or natural rights to justify copyright protection. The Chinese sources do not use a Lockean theory of property—that emphasises on the connection between an individual and the things created by the exertion of his or her labour—in order to theoretically explain or justify the protection of IPRs. By contrast, the dominion which a person claim and exercise over his creation, and therefore enjoy the fruits—mainly, the profits—of his or her labours, lies at the heart of the legal definition of many property entitlements in Anglo-American law. For example, the New York Court of Appeals explained in 1856, “Property is the right of any person to possess, use, enjoy and dispose of a thing. ... A man may be deprived of his property in a chattel, therefore, without its being seized or physically destroyed, or taken from his possession.”⁸⁰ The concept of property on the basis of natural rights theories provides a justification for why copyright is in nature property, instead of a monopoly, privilege or reward granted by the authority.

Spencer, the Western writer who had the greatest influenced on Yan Fu and his thought, also preferred to use labour-theory-based argument to justify intellectual property rights. In Chapter XI (“The right of property in ideas”) of *Social Statics*, Spencer believed that material property theory was

⁷⁹ *ibid.*

⁸⁰ 13 NY 378 (1856) 433, cited in Adam Mossoff, ‘Is Copyright Property?’ (2005) 42 San Diego L Rev 29, 41

still applicable to the property of ideas.⁸¹ He argued that, “a man’s right to the produce of his brain is equally valid with his right to the produce of his hands” and an invention represents a person’s accumulated labour in collecting information, doing experiments and studying.⁸² It indicates that, he treated intellectual property rights—copyright, patent rights and design rights—as a right rather than a “privilege”, a “reward” or a “sort of modified monopoly”.⁸³ Spencer expressed clearly his disagreement with legal authorities’ utilitarian perspectives that the enactment of intellectual property laws is due to trade policy and the consideration of stimulating “industry and talent”.⁸⁴ In contrast, a close review of Chinese newspapers and periodicals published before 1911 reveals no evidence of Chinese society viewing copyright as a natural property right. As noted above, even Yan Fu, for a great admirer of Spencer’s thought and the first person to introduce many of these Western ideas into China, still regarded copyright and patent as rewards awarded by the state to authors and inventors for the benefit of the public.

It has long been received that a free society proposed by libertarians are built on the basis of private property rights, an institution enabling people have the freedom to transfer a thing that they have laboured upon—which is crucial to free market system—and access to the substantial materials necessary to conduct productive and survival activities and even accomplish their personal life goals. Rawls is a significant philosopher who highlighted a person’s relation to material resources and how they are essential for a person’s capacity to form and pursue a wide range of life plans. For the importance of property rights in the achievement of basic liberties, Rawls emphasised the requirement “to allow a sufficient material basis for a sense of personal independence and self-respect.”⁸⁵

⁸¹ Herbert Spencer, *Social Statics: The Conditions Essential To Human Happiness Specified, And the First of Them Developed* (Robert Schalkenbach Foundation 1995) 136.

⁸² *ibid* 137.

⁸³ *ibid*.

⁸⁴ *ibid*.

⁸⁵ John Rawls, *Political Liberalism* (2nd ed, Columbia University Press 2005) 298.

However, when it comes to intangible properties, since intangibles can be transferred simultaneously, there can be a conflict between copyright and freedom of speech. Copyright's basis in nature as a propriety concept is that a person's creations belong exclusively to himself or herself through ownership. Meanwhile, it also has a regulatory basis as these copyrighted creations "become part of the stream of information" whose unobstructed flow over the community provides the foundation for a free society; however, the owners of copyrighted works are entitled to control the disposition of their creations—determining who can access to before and after publication.⁸⁶ As Melville Nimmer, argued, "It cannot be denied that the copyright laws do in some degree abridge freedom of speech, and if the first amendment were literally construed, copyright would be unconstitutional."⁸⁷ Similarly, some Chinese commentators also acknowledged the potential conflict between copyright and personal freedom. In 1920, an article of a periodical, *Copyright Ownership and the Freedom of Press*, criticised copyright system by arguing that it prevented people from writing freely and accessing to information.⁸⁸ It demonstrates that, why some Chinese people at the early twentieth century opposed copyright protection in China, not because the notion of *freedom* went against their communitarian values, but to the contrary, because of their consciousness that copyright could conflict with other rights associated with personal freedom and the dissemination of information.

Conclusions

⁸⁶ L Ray Patterson, 'Free Speech, Copyright, and Fair Use' (1987) 40 Vand L Rev 1, 5. For detailed discussion on the conflict between two provisions of the US Constitution – the copyright and free speech clauses, see Erwin Chemerinsky, 'Balancing Copyright Protection and Freedom of Speech: Why the Copyright Extension Act is Unconstitutional' (2002) 36 Loy L A L Rev 83; Pamela Samuelson, 'Copyright and Freedom of Expression in Historical Perspective' (2003) 10 J Intell Prop L 319; Melville B Nimmer, 'Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press' (1970) 17 UCLA L Rev 1180.

⁸⁷ Melville B Nimmer, 'Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press' (1970) 17 UCLA L Rev 1180, 1182. The first amendment tells us that "Congress shall make no law ... abridging the freedom of speech, or of the press."

⁸⁸ Xuanlu, 'Copyright Ownership and the Freedom of Press' (1919) 36 Xingqi Pinglun (Weekly Review) 4.

The positive attitude of Yan Fu and Zhang Baixi towards the western concept of liberty, albeit through a Confucian lens, demonstrates that Imperial China, which was dominated by Confucian tradition, could and did provide a congenial home to the concepts of liberty and freedom. With regard to intellectual property and copyright specifically, Yan Fu's and Zhang Yuanji's stated justifications for copyright protection illustrate that—contrary to Alford's assumptions—at least in Qing Dynasty, Imperial China had already recognised the instrumental function of copyright to a society, which shows that controlling the flow of ideas was no longer the dominant consideration for pre-modern China at the turn of twentieth century. Furthermore, Confucian philosophy had not only influenced their understanding of the concepts of liberty and copyright but had also been used as a tool to justify the necessity of copyright system in China. The historical realities suggest that Confucianism is not fundamentally incompatible with Western notions of copyright. The fact that some eminent Confucian thinkers were able to find support for copyright within the framework of Confucian ideology, strongly suggests that Confucian thought itself was not the main barrier for China's development of copyright protection.