

# PUBLIC DOMAIN IN CHINA: A HISTORICAL AND EMPIRICAL SURVEY

KEN SHAO\*

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## I INTRODUCTION

The concept of the public domain has been central to the global discourse of intellectual property law for over two decades. James Boyle, in one of his landmark papers, expressed his concerns over what he called ‘the second enclosure’ of the public domain in information society, as privatization of knowledge may lead to diminished access to the knowledge crucial to public interest, continuous creativity, and individual and social development.<sup>1</sup> There appears to be no single definition of the public domain, or the commons. The origin of such a notion can be traced back to John Locke’s argument about tangible property.<sup>2</sup> Locke argues that each individual can convert natural resources into private property by exerting his labour upon them.<sup>3</sup> It is, under the Lockean Proviso, a prerequisite that privatization is justified only when

\* LLB (Nanjing), LLM, PhD (Lond). Professor of Law, The University of Western Australia. Prof Shao’s research interests cover intellectual property, innovation and China-related issues in an interdisciplinary context of law, politics, economy, history and culture.

<sup>1</sup> James Boyle, ‘The Second Enclosure Movement and the Construction of the Public Domain’ (2001) 66 *Law and Contemporary Problems* 33, 37.

<sup>2</sup> This paper does not attempt to differentiate the public domain and the commons. For further studies see Andreas Rahmatian, *Copyright and Creativity: The Making of Property Rights in Creative Works* (Edward Elgar, 2011) 113.

<sup>3</sup> Justin Hughes, ‘The Philosophy of Intellectual Property’ (1988) 77 *Georgetown Law Journal* 287, 299-300.

*enough and as good* is left for others.<sup>4</sup> The *enough and as good* properties therefore become the commons for all to access. A Lockean perspective of the public domain is rather narrow. For instance, according to Wendy Gordon, if a new creation renders the common less valuable, the Proviso gives people a privilege to use the new creation to the extent necessary to make themselves as *well off* as they previously were.<sup>5</sup> This approach does not include scenarios under which the public domain is constructed by a set of new knowledge eligible for, but free from, a Lockean-style privatization. Two well-known examples of this are free software and the Creative Commons.

I have no intention to provide a new definition of the public domain in this article. It appears that the easiest way is to follow Jessica Litman's succinct definition made in 1990, which describes the public domain as 'a commons that includes those aspects of copyrighted works which copyright does not protect'.<sup>6</sup> This definition can be extended to cover other facets of knowledge creativity, such as technologies that usually fall within the protection of patent or know-how. For the purpose of this article, my interpretation of Litman's definition is literal and descriptive, that is, the public domain examined in this article is about the set of knowledge existing out of the realm of privatization, regardless of why it exists in this way or if it is justifiable based on conventional norms and principles. I will now proceed to examine the existence of the public domain in three different parts of China's long history. Part I discusses how knowledge creativity was protected and distributed in imperial China. Part II provides a brief survey of foreign-China disputes over foreign copyright and patent claims in late imperial and early Republican China. Part III explores the public domain and piracy issues in contemporary China.

<sup>4</sup> John Locke, 'Second Treatise of Government' § 27, in Peter Laslett (ed), *Two Treatises of Government* (Cambridge University Press, 1988) 27.

<sup>5</sup> Wendy J. Gordon, 'A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property', (1993) 102 *Yale Law Journal* 1533, 1561-62.

<sup>6</sup> Jessica Litman, 'The Public Domain' (1990) 39 *Emory Law Journal* 965, 968. For a similar definition, see Yochai Benkler, 'Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain' (1999) 74 *New York University Law Review* 354, 361-362.

## II IMPERIAL CHINA

Sometime around the year of 1172, a Chinese scholar was writing to one of his best friends on a piece of fine calligraphy paper. He was Zhu Xi (1130-1200), the third most creative and successful Chinese philosopher after Confucius. In his letter written to Lü Zuqian (1137-1181), a renowned historian, Zhu asked Lü to be an efficient messenger. Zhu had just completed one of his landmark monographs, *Essence of The Analects and The Mencius*, and was able to detect through well-established information channels that a pirate might have already begun to print his book. Zhu did not immediately resort to litigation, although he did so several years later. Rather, he believed that delivering the message to the pirate via Lü would offer a decent way out. Zhu wrote confidently: the pirate “will definitely listen” and “if he is stopped before too much is spent, both he and I would not be hurt”.<sup>7</sup> In another scenario, however, he volunteered to give up his copyright over an important publication and suggested that it should be widely published and written on all the notice boards on the roads.<sup>8</sup> He even bought back his prints from a pirate and offered him a new book title for publishing as he believed that the publisher’s original intention was to promote the public access to knowledge.<sup>9</sup> The above scenarios are not anecdotes. They are recorded in detail in Zhu’s own published works. Few people either in China or in the West have heard of them. Yet, these historical facts are crucial, for Zhu’s thought represents some of the most distinctive characteristics of Chinese cultural, intellectual and political tradition. Unlike Charles Dickens (1812-1870) who was unable to claim his copyright in the United States, then a developing country that refused to protect foreign copyright law, Zhu lived in the Song Dynasty, China’s most civilized era, where the protection of legal rights was stable and maturely developed.<sup>10</sup> Similarly unlike John Locke (1632-1704) who greatly condemned the English copyright monopoly and censorship, Zhu could enjoy a golden

<sup>7</sup> Zhu Xi, *Zhuzi Wenji* (Defu Wenjiao, 2000) 1305.

<sup>8</sup> Qiu Jun, *Daxue Yanyi Bu* (vol 48) 22a.

<sup>9</sup> Susan Cherniack, ‘Book Culture and Textual Transmission in Sung China’ (1994) 64(1) *Harvard Journal of Asiatic Studies* 5, 65.

<sup>10</sup> For Charles Dickens’s story, see James J. Barnes, *Authors, Publishers and Politicians: The Quest for an Anglo-American Copyright Agreement 1815-1854* (Routledge & Kegan Paul, 1974) 70.

period where art, education, creativity and freedom of publishing flourished.<sup>11</sup> Both a productive author and an educator, Zhu appeared to have little concern over the relationship between copyright and the public domain. In fact, these two interests had worked together in China's historical context quite well.

The scale of imperial China's publishing industry, such as that of Zhu's time, was fairly large. Publishers in the Song dynasty were able to print myriad of pages daily and normal people could collect rare books housed by the royal family. In the Ming Dynasty (1368-1644), the scale of publishing was so significant that, as joked by Ming scholars, 'if books were used as charcoal, the price of firewood would fall sharply', and 'books will not be able to be stored even if we make the whole earth as a bookshelf!'<sup>12</sup> When Italian Jesuit priest Matteo Ricci (1552-1610) arrived in China in the late sixteenth century, he was surprised that there were an exceedingly large number of books available at affordable prices on the market.<sup>13</sup> By 1644, in cities Nanjing and Suzhou alone there were 200 publishers.<sup>14</sup> Around the same time, the English publishing industry was formed by only 23 London-based publishers with each hiring two to three workers.<sup>15</sup>

The formidable size of imperial China's publishing industry and its prosperity over centuries was paralleled not only by copyright practice but also by a robust exercise of the public domain. To understand the public domain in China's historical context, one should start from the three conduits that supported the flourish of publishing in imperial China: official publishing (*guanke*), scholarly publishing (*sike*) and commercial publishing (*fangke*). In most cases, official publishing focused mainly on the Confucian classics. Scholarly publishing printed both the classics and contemporary works of scholars. Commercial publishers literally printed everything, such as the

<sup>11</sup> Mark Rose, *Authors and Owners: The Invention of Copyright* (Harvard University Press, 1993) 44. For the Song's achievements, see Dieter Kuhn, *The Age of Confucian Rule: The Song Transformation of China* (Harvard University Press, 2009).

<sup>12</sup> Cai Cheng, *Jichuang conghua* cited from Zhang Xiumin, *Zhongguo yinshua shi* [China's Printing History] (Shanghai renmin chubanshe, 1989) 338.

<sup>13</sup> Timothy Brook, *The Confusions of Pleasure: Commerce and Culture in Ming China* (University of California Press, 1998) 169.

<sup>14</sup> Zhang, above n 12, 343-348, 365-372.

<sup>15</sup> For the number of publishers, see Helen Smith, 'The Publishing Trade in Shakespeare's Time' in Andrew Murphy (ed), *A Concise Companion to Shakespeare and the Text* (Blackwell, 2010), 19. For the number of employees, see John Feather, *Publishing, Piracy and Politics: A Historical Study of Copyright in Britain* (Mansell, 1994) 41.

classics, poetries, dictionaries, school primers, medical texts, encyclopedias, plays and novels.<sup>16</sup> Overall copyright did not apply to official publishing but existed with both scholarly and commercial publishing, provided the book in question was written by contemporary authors and contained a high degree of originality.<sup>17</sup>

Before printing technology was invented in China, China had already enjoyed over a millennium of knowledge-based civilization. In the Chinese tradition, the zest for writing and publishing is cultural. Scholars view making their works available as one of the most important tasks in their intellectual life. Due to the number of books accumulated, from time to time the Chinese had to compile ancient books into large collections. For instance, in 984AD, the Song government compiled the renowned *Taiping Yulan* (the Imperial Readings of the Taiping Era), which was a massive 1000-volume encyclopedia with reference to over 1600 books. Song Emperor Taizhong, reading three volumes per day, took an entire year to complete the reading.<sup>18</sup> One of the most spectacular governmental publishing ventures of ancient books was the fifteenth-century *Yongle dadian* (the Encyclopedia of Yongle Emperor's Reign), which contained 370 million words and over 22,000 volumes compiled from 3461 different books with a further list of 6793 uncollected book titles.<sup>19</sup> These books, printed by official publishing, usually had no copyright restrictions.

The literary public domain, supported by the availability of a formidable amount of ancient books thus became less of a concern for Chinese civilization. This sharply contradicted with seventeenth-century England and France where early-modern copyright practices and laws emerged from printing guilds, which were given exclusive rights over the publishing of all titles, including ancient books. The English and French publishers were only permitted to

<sup>16</sup> 'Appendix A: Selected List of Song and Yuan Jianyang Imprints' in Lucille Chia's book. For the contents of the printed books, see Lucille Chia, *Printing for Profit: The Commercial Publisher of Jianyang, Fujian (11th-17th Centuries)* (Harvard University Press, 2002) 5.

<sup>17</sup> For further studies, see Ken Shao, 'Alien to Copyright?: A Reconsideration of the Chinese Historical Episodes of Copyright' (2005) 4 *Intellectual Property Quarterly* 400-431; Ken Shao, 'The Promotion of Learning in Chinese History: to Discover the Lost Soul of Modern Copyright', (2010) 24(1) *Columbia Journal of Asian Law*, 63-85.

<sup>18</sup> Song Minqiu, *Chunming Tuichao lu*, (Zhonghua Shuju, 1980) vol 2, 46.

<sup>19</sup> Song Yuanfang and Li Baijian, *Zhongguo chubanshe shi* [China's Publishing History] (Zhongguo shuji chubanshe, 1991) 107. Zhang, above n 12, 549.

practice in the capitals – London and Paris.<sup>20</sup> In comparison, not only did ancient books belong to the public domain in imperial China but the publishing industry flourished in many different cities. Whether a city became a publishing centre was dependent upon its cultural, economic and educational competitiveness, as well as its access to natural resources and transportation network which was crucial for maintaining a low printing cost. The reputation of a publishing centre was solely determined by quality and price, not by monopoly.<sup>21</sup> As a Song scholar Ye Mengde (1077-1148) wrote:

Hangzhou printed the finest books, Sichuan the second and Fujian the worst. Printing blocks carved in the Capital are equal to those of Hangzhou but the papers are inferior. Fujian blocks are made from soft wood, making the delicate inscriptions difficult. They are most popularly sold everywhere because they are easy to be produced.<sup>22</sup>

Access to knowledge, both that in the public domain and that with high originalities, was a robust phenomenon in China's history. Although copyright was in place, it was only for certain printed books. Joseph McDermott reminds us that transcription and borrowing books were a very firm tradition in China's book history and contributed substantially to learning, especially for those who could not afford purchasing books.<sup>23</sup> They were not restricted by the existence of copyright in printed books. In addition, copyright did not cover music and performance. Chinese lyricists depended greatly on singers to widely circulate their works, as such circulation could increase the value of their works substantially.<sup>24</sup> Poems created by famous authors could become popular overnight, usually through transcription.<sup>25</sup> Knowledge sharing was a profound

<sup>20</sup>John Feather, *A History of British Publishing* (Routledge, 1988) 17, 41. Carla Hesse, *Publishing and Cultural Politics in Revolutionary Paris, 1789-1810* (University of California Press, 1991) 8-17.

<sup>21</sup>For further details, see Ken Shao, 'The Promotion of Learning in Chinese History: to Discover the Lost Soul of Modern Copyright', (2010) 24(1) *Columbia Journal of Asian Law* 63, 80-81.

<sup>22</sup>Ye Mengde, *Shilin yanyu* Vol 8 cited from Lin Zhengqiu, 'Songdai chengzhen shi da shangdian chutan' [A Brief Study on Ten Forms of Shops in the Song Cities and Towns] (1999) 2 *Shangye jingji yu guanli* [Commerce, Economy and Management] 67, 72-73.

<sup>23</sup>Joseph McDermott, 'The Ascendance of the Imprint in China' in Cynthia J. Brokaw and Kai-wing Chow (eds), *Printing and Book Culture in Late Imperial China* (University of California Press, 2005) 55-104. Joseph McDermott, *A Social History of the Chinese Book: Books and Literati Culture in Late Imperial China* (Hong Kong University Press, 2006).

<sup>24</sup>Luo Ye, *Zuiweng Tanlu*, Binji Vol II (Gudian wenxue, 1957) 32.

<sup>25</sup>Wang Mingqing, *Huizhu Lu*, Houlu Vol 7, (Shanghai Shudian, 2001) 134.

cultural tradition of China. Chinese scholars viewed those who kept their library collections to themselves as a moral sin.<sup>26</sup>

Prosecuting copyright across China could be very costly due to the large size of the country. Publishers had to weigh the costs and benefits prior to taking such action. After all, publishing was a lucrative business, with profit since the Song dynasty being between 50% and 100%.<sup>27</sup> Publishing in the Ming dynasty was tax free so even a small book store in a less developed region could profit from book trade.<sup>28</sup> The flourish of pirated works therefore did not cause too much trouble to genuine publishers unless the author's reputation was severely violated. Affordable and quality pirated copies served certain groups well, as they made access to knowledge easier.

As far as inventions were concerned, there was no such a thing as a patent in imperial China. The alternative was a dual system that combined know-how protection and a government-driven reward system for inventions and their distributions. The principle of legitimacy of Chinese dynasties was meritocracy. A fundamental Confucian value, it requires the rulers to look after the people via their knowledge, which includes both self-cultivation at high standards and effective ways of governance. Technologies, especially new ones and their dissemination, were one of the most important indicators of meritocracy, where many aspects of daily life such as agriculture and medical services required useful inventions and their effective dissemination.

Once the government obtained a new invention or commissioned an inventor to invent, the invention in question would be acquired by the government and became part of the public domain. They were consequently distributed without the restriction of patent or know-how.<sup>29</sup> Many of these technologies were those crucial to the improvement of living standards. For instance, in 828, Tang Wenzong emperor was personally involved in organising the distribution of the models of a newly invented waterwheel to every city and

<sup>26</sup> Huang Jianguo and Gao Yuexin (eds), *Zhongguo gudai changshu lou yanjiu* [Studies on Chinese Book-collecting] (Zhonghua shuju, 1999) 16.

<sup>27</sup> For profit calculation, see Yuan Yi, 'Tang Song Yuan Shuji Jiage Kao' [Book Prices in Tang, Song and Yuan Dynasties] (1993) 2 *Bianji zhiyou*, Vol 2, 1993, pp. 65-66.

<sup>28</sup> Li Bozhong, 'Mingqing Jiannan de Chuban Yinshua Ye' [Publishing and Printing Industries in Jiangnan in Ming and Qing Dynasties], (2001) 3 *Chinese Economic History Forum* 94, 107.

<sup>29</sup> For various examples, see for example Zhu Cishou, *Zhongguo gudai gongye shi* [History of Traditional China's Industry] (Xuelin chubanshe, 1988) 465, 477, 518, 523-25, 531-32, 669.

ordered the devices to be reproduced according to the models.<sup>30</sup> In 1012, Song Zhenzong emperor sent a commissioner to Fukien province to take the seeds of a newly introduced Vietnamese rice variety *Zhancheng dao* (Champa rice) and distributed them immediately to three provinces with details of planting techniques.<sup>31</sup> Agricultural officers were appointed at village level to teach farmers about new plant varieties and techniques.<sup>32</sup> Today, unrestricted and effective dissemination of crucial technologies remains an important but unsolved agenda for many developing countries. Inventors who submitted their inventions to the government for unrestricted dissemination were rewarded in various ways. For instance, shipbuilding technologies were encouraged in the Song dynasty because of their importance to naval wars. Various types of ships were thus invented and monetary rewards and career opportunities were made available to the inventors.<sup>33</sup> It is worthy to note that not only the invention but also the dissemination of new technologies was rewarded. In agriculture, sericulture and other important sectors, the dissemination of new technologies was widely encouraged and rewarded. Local government officials viewed such dissemination as part of their core responsibilities. By doing so, they were deemed as good performers and were highly praised by the people.<sup>34</sup> New technologies, especially those concerning agriculture and medicines, were widely published. The Song government was in particular active in printing medical books and supervising their printing qualities.<sup>35</sup>

In addition to the public domain of new technologies, technical know-how had widely existed in the form of family-inherited secrets. Such practice appeared in ancient times in various civilizations, including Chinese. For instance, glass-making as the major industry of thirteenth-century Venice was kept in secrecy by the Venetian government, which prohibited the export of such know-how.<sup>36</sup> In imperial China, the model of family-based know-how was

<sup>30</sup> *Hequ er, Cefu Yuangui*, Vol. 497 cited from Zhu Cishou, *Zhongguo gudai gongye shi* [History of Traditional China's Industry] (Xuelin chubanshe, 1988) 359-60.

<sup>31</sup> Tuo Tuo (Toktoghan), *Song Shi* [History of Song] (Zhonghua shuju, 1977) 154.

<sup>32</sup> S. A. M. Adshead, *China in World History* (St. Martin's Press, 1988) 110.

<sup>33</sup> Jung-Pang Lo, 'The Emergence of China as a Sea Power during the Late Sung and Early Yuan Periods' (1955) 14(4) *The Far East Quarterly* 489, 502-03.

<sup>34</sup> For example, see Zhu Xinyu, *Zhongguo sichou shi* [The History of Chinese Silk] (Zhongguo fangshi, 1997) 47-52.

<sup>35</sup> Chia, above n 16, 133.

<sup>36</sup> Pamela O. Long, *Openness, Secrecy, Authorship: Technical Arts and the Culture of Knowledge from Antiquity to the Renaissance* (The Johns Hopkins University Press, 2001) 90-95.



a widely adopted social custom. Even today, the Chinese people continue to view traditional Chinese medicine brands that claim family inherited techniques as superior.<sup>37</sup>

To understand the legitimacy of family-based know-how, one should recognize that the hand down of pre-modern technologies was inherently linked to the day-to-day practice of handicraftsmen. As renowned economic historian Kenneth Pomeranz exemplified, the nature of pre-modern handicraft technology meant that these technologies were not easily copied by those without practical experience.<sup>38</sup> Progression and innovations occurred often not in laboratories but over generations. This made a family-based know-how model workable because family members have the best opportunities to comprehend the practical skills in the long run. As the famous ancient Chinese reformist Guanzhong (c. 725 BC-645 BC) noted:

[Fathers] teach their sons from childhood so the sons can learn the skills with unfaltering and devotional mood. This makes it easier for the knowledge to be transmitted. So the sons of the artisans always become artisans.<sup>39</sup>

By its nature, know-how is not very friendly to the public domain. The risk of practicing know-how is that unlike a patent that requires the publication of the invention, technologies kept in secrecy may become lost over time. In addition, exclusive rights and the profit associated with the rights may be perpetually held within a family for hundreds and even thousands of years. In imperial China however, the above-mentioned public model of invention and technological dissemination driven by the government largely offset the potential risk of know-how, with crucial technologies often publically available. Leading Sinologist William Rowe and expert of European technology history Pamela Long both believe that in the process of urbanization and commodification, Europe was more interested in controlling technology dissemination by various means; China, by comparison, was very enthusiastic in sharing knowledge and compiling them into widely circulated technical

<sup>37</sup> These records can be commonly found in historical literatures. See Li Zhisheng, 'Tangdai gongshang yezhe hunyin zhuangkuang chutan [Marriage of the Merchants and Craftsmen of the Tang Dynasty]' (1997) 3 *Renwen zazhi* [Journal of Humanities] 66.

<sup>38</sup> Kenneth Pomeranz, *The Great Divergence: China, Europe, and the Making of the Modern World Economy* (Princeton University Press, 2000) 66.

<sup>39</sup> Quan Hansheng, *Zhongguo hanghui zhidu shi* [History of Chinese Guild System] (Shihuo, 1978) 6.

books.<sup>40</sup> As the public domain of technologies and inventions were robustly kept in imperial China, the existence of know-how became a less important concern.

### III LATE IMPERIAL AND EARLY REPUBLICAN CHINA

In the late nineteenth century, the expansion of colonial order and trade started to make knowledge as a commodity an international phenomenon. Industrialized nations when selling goods globally, started to demand copyright, trademark and patent protections beyond their own territories. British author Charles Dickens, for instance, travelled in 1842 to America to plead for the protection of his copyright, a claim which the US refused.<sup>41</sup> The core argument raised by the Americans, as affirmed by the US Senate in 1838, was that '[i]nternational copyright, in strict sense, has no existence' because [the right of the author] 'has never been regarded as property standing on the footing of wares or merchandise, nor as a proper subject for national protection against foreign spoliation'.<sup>42</sup> Similar scenarios occurred in the Netherlands and Switzerland where patent laws were abolished from the mid-nineteenth century to the early twentieth century, allowing the copying of foreign technologies to grow epidemically.<sup>43</sup> The main argument for supporting this abolition was that local industries did not want to 'give up the freedom to make use of the improvements of foreign competitors as they see fit'.<sup>44</sup>

Regardless of their nature, the above two arguments are ultimately about a public domain perspective which attempted to free patented or copyrighted foreign knowledge into a domestic public domain. Similar arguments began to become extremely relevant to the Chinese from the late nineteenth century, a

<sup>40</sup> William Rowe, 'Political, Social and Economic Factors Affecting the Transmission of Technical Knowledge in Early Modern China' and Pamela Long, 'Technological Transmission in China and Europe: A Comparative View', in Dagmar Schäfer (ed), *Cultures of Knowledge: Technology in Chinese History* (Brill, 2012) 43, 77.

<sup>41</sup> James J. Barnes, *Authors, Publishers and Politicians: The Quest for an Anglo-American Copyright Agreement 1815-1854* (Routledge & Kegan Paul, 1974) 75.

<sup>42</sup> The U.S. Government Printing Office, *Congressional Serial Set* (Blair & Rives, 1838) vol 6, 494-1 - 494-2.

<sup>43</sup> For the detailed study, see Eric Schiff, *Industrialization without National Patents: The Netherlands, 1869-1912; Switzerland, 1850-1907* (Princeton University Press, 1971).

<sup>44</sup> Edith Tilton Penrose, *The economics of the international patent system* (Johns Hopkins Press, 1951) 122.

period when China, under the rule of the Manchu Qing dynasty (1644-1911), was enthusiastic about printing foreign books and copying foreign machines. It was an extraordinary period of Chinese history. The Qing, which was declining into a serious socioeconomic crisis since the early nineteenth century, suddenly encountered the industrialized West, initially through the Opium War of 1839-42 with Britain. In the next seventy years, the Qing had to sign many unequal treaties with foreign powers and at the same time attempt to modernize China. Consequently, efforts in industrialization began to emerge in the 1860s, followed by political, legal and cultural changes in the coming decades.<sup>45</sup> All these changes could not have happened without robust access to new knowledge that flooded in from industrialized nations.

Nevertheless at the dawn of the twentieth century, foreign claims of intellectual properties in late Qing China started to appear as a vital component of the Great Power's trading strategies. The Boxer Protocol (1901) signed after the Qing was defeated in the Eight-Nation Alliance's intervention of 1900 prescribed in Article 11 that 'the Chinese Government has agreed to negotiate the amendments deemed necessary by the foreign Governments to the Treaties of Commerce and Navigation'.<sup>46</sup> Article 11 applied to various agendas, including trademark, copyright and patent. From 1902, the US started to negotiate copyright and patent clauses with the Qing government, whilst Japan argued for copyright. The main argument put forward by the Qing government was that China needed effective access to foreign knowledge for self-strengthening purposes and patents and copyrights for foreigners could create cost barriers to the Chinese access to new knowledge.<sup>47</sup> After much debate, it was agreed in Sino-Japan and Sino-US commercial treaties that only American and Japanese books, maps and works of engraving and lithography 'exclusively prepared for Chinese citizens or Chinese translations which are authored' by American or Japanese authors could enjoy copyright in China, whilst the

<sup>45</sup> For a brief history, see Immanuel C. Y. Hsü, *The Rise of Modern China* (Oxford University Press, 2000).

<sup>46</sup> Wang Tieya, *Zhongwai jiyue zhang huibian* [Compilation of Past China-Foreign Treaties] (Beijing: Sanlian shudian, 1957) vol 1, 1007.

<sup>47</sup> Wang Shuzhan (ed), *Zhang wenxiang gong quanji* [Complete Works of Zhang Zhidong] (Wenhai, 1966) vol 187, 13433-44.

matter of patent would be discussed at a later stage when industrialization grew further in China.<sup>48</sup>

The above commercial treaties created a massive public domain for late Qing China and gained it opportunities to access foreign knowledge with maximum freedom. In 1911, the Qing was overthrown by the Republic of China but the process of legal modernization initiated in the late Qing period continued. The *Copyright Act of the Great Qing* (1910) was inherited and amended to become the *Copyright Act of the Republic of China* (1915). While many Chinese authors were active in claiming their copyrights, foreign authors and publishers were restricted by both the late Qing commercial treaties and Republican China's copyright law that implemented those treaties.

In the *G. & C. Merriam Company* case (1923), an American publisher known for publishing Webster's *An American Dictionary of the English Language*, sued The Commercial Press Shanghai for copyright infringement. The defendant argued that the words 'exclusively prepared for' prescribed in Articles 10 and 11 of the *U.S.-Qing Commercial and Navigation Treaty of 1903* made it clear that only works exclusively prepared for Chinese citizens were entitled copyright protection in China. The defendant's lawyer also argued that the US did not protect foreign copyright in much of the nineteenth century and the public interest of China should be respected.<sup>49</sup> The plaintiff lost the case in front of a powerful public domain defence that was fashionable in the nineteenth and early twentieth centuries. Clearly this public domain defence, widely used in the US, Europe and then China, was based not on the Lockean Proviso but on the fundamental principles of sovereignty and a common need of national development.

#### IV CHINA SINCE MAO

The public domain argument, which played a major role in the late Qing and early Republican periods, charted into a very different territory in 1949 when the People's Republic of China (PR China) took over the Republic of China on 1 October 1949. The PR China government, founded on communism,

<sup>48</sup> See Articles 10 and 11 of the *U.S.-Qing Commercial and Navigation Treaty of 1903*. Wang Tieya, *Compilation of Past China-Foreign Treaties* (Sanlian shidian, 1959) vol 2, 186-187.

<sup>49</sup> Zhou Lin and Li Mingshan, *Zhongguo banquan shi yanjiu wenxian* [Historical Materials for the Studies of China's Copyright History] (Zhongguo Fangzheng chubanshe, 1999) 199-202.

abolished all previous laws of the Republican period. In the 1950s, however, copyright was recognized and practiced by many publishers. Copyright agreements between a publisher and an author usually detailed how remuneration was to be paid.<sup>50</sup> As all foreign treaties signed between foreign powers and the Qing and Republican governments were abolished by the PR China, previous arrangements such as those set in Articles 10 and 11 of the *U.S.-Qing Commercial and Navigation Treaty of 1903* no longer applied. In 1954, a policy was issued to regulate payment to foreign copyright owners. The policy prescribed that a copyright may be granted if the foreign owner claims so in China. It was proposed that foreign works such as a book written by the American Marxist, Victor Jerome, should receive copyright royalty. PR China however had no obligation to protect foreign copyright as it was not a member of any international copyright agreement.<sup>51</sup> In 1957, based on the Soviet copyright law, an interim copyright regulation was issued. The regulation provided a wide scope for fair use so that the public could have better access to new works.<sup>52</sup>

The copyright practice in the 1950s focused much on proper remunerations to authors. As a consequence, popular works generated for their authors huge amounts of profits, which started to increase the income gap between popular authors and the rest. This was soon viewed as anti-communist, for equalitarianism was deemed to be crucial.<sup>53</sup> In 1960, the Ministry of Culture submitted a report to the central government. In that report, it claimed that it is necessary to abolish the Soviet copyright model, under which an author's remuneration grows in proportion with the number of copies printed and sold. The report argued that such a copyright system was inherently capitalist and could not promote the interaction between intellectuals and the working class. In 1964, one year before the Cultural Revolution, the Ministry of Culture issued a policy under which authors will only be paid a one-off payment for their publications.<sup>54</sup> Copyright was still claimed by various publishers during the Cultural Revolution. It is not clear whether the reduction of payment to authors was based on a substantial public

<sup>50</sup> For various sample agreements, see *ibid* 267-281.

<sup>51</sup> Li Mingshan and Chang Qing, *Zhongguo jindai banquan shi* [Modern China's Copyright History] (Henan Daxue, 2003) 12.

<sup>52</sup> *Ibid* 34-42.

<sup>53</sup> *Ibid* 47-64.

<sup>54</sup> Zhou and Li, above n 50, 321-324, 329-329.

domain argument. The arguments were about the extent to which the level of remuneration should be regulated for the purpose of reducing the rich-poor gap. They seemed to be less relevant to the explicit relationship between copyright or a one-off payment, which was deemed to be an incentive for creativities, and the public domain.

As far as patent is concerned, in 1950, the PR China adopted a Soviet-style twin-track approach enacting a patent law and an inventor's certificate system. Prior to the Cultural Revolution, patents for inventions were discontinued and the previous certificate system replaced by an award system that offered lower levels of financial remuneration based on fixed sums to be paid once.<sup>55</sup> This reward-based model is similar to the model practiced in imperial China. It is not entirely clear whether inventions free from patent restrictions belonged to the public domain, as communist China employed a highly regulated planned economy. Nevertheless, all properties were said to belong to the public.

In 1978, Deng Xiaoping re-opened China's door to the world. In 1979, the Washington-Beijing diplomatic relations were established, followed by the U.S.-China Agreement on Trade Relations (1979), in which China was required to establish intellectual property laws and join international IP agreements.<sup>56</sup> Unlike the *U.S.-Qing Commercial and Navigation Treaty of 1903* which allowed China to keep a public domain that could freely use foreign knowledge, this time the US asked China to recognize all types of foreign intellectual property rights. In the 1990s, China signed various MOUs with the US. This was followed by China's accession to the World Trade Organization (WTO) in 2001. As part of China's obligations under the WTO, its intellectual property (IP) laws were further amended to comply with the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) that exercises high standards in favour of developed nations. It seems that China, with its knowledge foundation being destroyed by the Cultural Revolution,

<sup>55</sup> Peter Drahos, *The Global Governance of Knowledge: Patent Offices and their Clients* (Cambridge University Press, 2010) 224-225.

<sup>56</sup> See further Li Mingde, *Tebie 301 tiaokuan yu zhongmei zhishi chanquan zhengduan* [Special 301 and China-U.S. Intellectual Property Disputes] (Shehui kexue wenxian, 2000) 173-250; Peter Yu, 'Piracy, Prejudice, and Perspectives: An Attempt to Use Shakespeare to Reconfigure the U.S.-China Intellectual Property Debate' (2001) 19 *Boston University International Law Journal* 1, 136-54.

could no longer enjoy robust access to foreign knowledge in the form of the public domain.<sup>57</sup>

Despite China's compliance with international IP agreements, copying foreign intellectual properties has remained vibrant in China. Each year the US releases an Annual Special 301 Report on Intellectual Property Rights pursuant to Section 182 of the US Trade Act of 1974, as amended by the Omnibus Trade and Competitiveness Act of 1988 and the Uruguay Round Agreements Act. China usually appears on the Priority Watch List of the Special 301 Report. According to the 2015 Report, 'a wide range of U.S. stakeholders in China continue to report serious obstacles to effective protection of IPR [intellectual property rights] in all forms', and 'sales of IPR-intensive goods and services in China remain disproportionately low when compared to sales in similar, or even less developed, markets that provide a stronger environment for IPR protection and market access'.<sup>58</sup>

It is under this context that we see the rise of various innovation leaders in China represented by WeChat, Alibaba, Xiaomi and Huawei. These powerful Chinese enterprises specialize either in E-commerce or in telecommunication technologies and occupy a vast market in China and beyond. An interesting characteristic of some of these innovation leaders is their crowd-sourced approach that is very different from Apple's secretive, top-down tradition.<sup>59</sup> Their innovation is driven by the needs of their consumers. A 'Need Seekers' innovation strategy, as PricewaterhouseCoopers's *2014 China Innovation Survey* reveals, is more likely to be the case with Chinese companies than others.<sup>60</sup> A fundamental question therefore is why these Chinese consumers of high-tech products, whose number reached 618 million in 2013, are so picky and experienced that they have even developed the capacities to guide and drive innovation?<sup>61</sup> In other words, how do young Chinese cybercitizens, with low or

<sup>57</sup> Ken Shao, 'History is a Key Decoder: Why China Aims at Re-emerging as a Global Leader of Innovation' (2013) 29(1) *Law in Context* 117, 125.

<sup>58</sup> United States Trade Representative, *2015 Special 301 Report*, 32.

<sup>59</sup> Parmy Olson, 'How China's Xiaomi Does In A Week What Apple Does In A Year: Update Devices', *Forbes*, Oct 22, 2013 (<http://www.forbes.com/sites/parmyolson/2013/10/22/how-chinas-xiaomi-does-in-a-week-what-apple-does-in-a-year-update-devices/#61db69602aef>) accessed on 15 March 2016.

<sup>60</sup> PwC Strategy&, *China's Innovation is Going Global: 2014 China Innovation Survey*, 6.

<sup>61</sup> China Internet Network Information Center, *Statistical Report on Internet Development in China 2014*, 15.

moderate incomes, develop their high expectations of innovative products and services?

When describing the importance of the public domain to creativity, Julie Cohen held that ‘creative practice is determined in large part by the content of the immediate artistic environment, and more generally by the entirety of an individual’s cultural conditioning’.<sup>62</sup> This means that the cumulative nature of innovation processes requires robust access to new knowledge including that existing in the public domain, at an affordable cost. The wide availability of pirated foreign cultural goods in China since the 1990s has created an abundant public domain that has driven Chinese consumers’ experience and consequently expectation of quality innovation. Great affordability to the public domain, therefore, leads to better accessibility and in turn an extremely rich knowledge environment in which Chinese creative minds can ‘seize inspiration where they find it and pursue it wherever it leads’.<sup>63</sup>

## V CONCLUSION

As I wrote in the beginning of this article, my historical and empirical survey of China’s public domain intends only to examine what has been put in the public domain at China’s different periods. It does not ask why it is so and if it satisfies our conventional norms and principles of intellectual property. The conclusion of this historical and empirical survey is that the public domain not only has played an important role in China’s development throughout history but that it can operate in forms beyond the Lockean-style definition of the public domain. This article demonstrates that any orthodox attempt to perpetuate the definition of the public domain is potentially harmful, in that any such attempt is deeply rooted in our conventional – yet narrow – perspective of intellectual property. This perspective defines the public domain in accordance with the prescriptions given by our existing intellectual property laws, which are indeed a result of the radical process of consolidation since eighteenth-century

<sup>62</sup> Julie E. Cohen, ‘Copyright, Commodification, and Culture: Locating the Public Domain’ in Lucie Guibault and Bernt Hugenholtz (eds), *The Future of the Public Domain: Identifying the Commons in Information Law*, (Kluwer Law International, 2006) 148-149, 153.

<sup>63</sup> Ibid 153. For a detailed discussion, see Ken Shao, ‘Taobao, WeChat and Xiaomi: How Innovation Flourishes in China’s “Fertile Land of Intellectual Property Piracy”’, *Kritika: Essays on Intellectual Property* (2016), forthcoming.



Britain.<sup>64</sup> It is inflexible to the rapid changes of human society where many technological, social and environmental conditions require fundamental structural changes in intellectual property law. As Peter Drahos has articulated, such changes can only happen when the ‘ghost’ of ideological debates over intellectual property is removed.<sup>65</sup> In a recent interview Professor Zhang Ping, Dean of Intellectual Property School at Peking University, warned that if the current licensing system of intellectual property is not to be relaxed, litigations concerning millions of patent licenses will be endless, resulting in unbearable legal and governance costs to both firms and the society. Professor Zhang’s comment is a critical response to the current changes of human society where big data and the internet economy have become the dominant features of how societies organize themselves in China and beyond.<sup>66</sup> The formidable scale of the internet economy in China, which is unimaginable by most people who have little understanding of the matter, requires a far more relaxed approach to the public domain. Knowledge sharing, as Professor Zhang advocated, is the only solution for the future. The conventional definition of privatization based on existing laws and precedents should no longer be orthodox. Needless to say, new public domain models do not mean entirely free. But if there is a cost, quoting Lawrence Lessig, it has to be ‘neutrally imposed, or equally imposed’.<sup>67</sup>

<sup>64</sup> Brad Sherman and Lionel Bently, *The Making of Modern Intellectual Property Law: The British Experience, 1760-1911* (Cambridge University Press, 1999) 159.

<sup>65</sup> Peter Drahos, ‘The China-US Relationship on Climate Change, Intellectual Property and CCS: Requiem for a Species?’ [2009] *The WIPO Journal* 124, 126.

<sup>66</sup> Zhang Ping, ‘Human Societies Will Restrict themselves if Intellectual Property Licenses are to be Continued’, *Caijin News*, 19 Nov 2015. (<http://economy.caijing.com.cn/20151119/4013845.shtml>) accessed on 15 March 2016.

<sup>67</sup> Lawrence Lessig, ‘Code and the Commons, Keynote Address at the Conference on Media Convergence’ (paper presented at Fordham University Law School, 9 February 1999). It is noteworthy that James Boyle inclines to adopt Lessig’s notion of the commons. James Boyle, ‘The Second Enclosure Movement and the Construction of the Public Domain’, (2003) 66 *Law & Contemporary Problems* 33, 64.

