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BOOK REVIEW

THE EMPIRE STRIKES BACK: PIRACY WITH CHINESE CHARACTERISTICS

Glenn R. Butters†

TO STEAL A BOOK IS AN ELEGANT OFFENSE: INTELLECTUAL PROPERTY LAW IN CHINESE CIVILIZATION. By *William P. Alford*.[‡] Stanford: Stanford University Press. 1995. 222 pp. \$39.50.

In the early 1920s, the American publisher G. & C. Merriam, having made a hefty investment in a bilingual version of its celebrated Webster's Dictionary for the Chinese market, discovered that a Shanghai publisher had distributed its own unauthorized Chinese version of the dictionary even before Merriam's had been released. Merriam sued in a Chinese court under the copyright and trademark provisions of a 1903 treaty between the U.S. and China, but got no satisfaction: it received a modest damage award but was unable to prevent continued publication of the offending Chinese work.¹ This is an old, and classic, Sino-American case of infringement of intellectual property rights. Nearly a century later, things have only gotten worse. Today, theft through piracy or counterfeiting is rampant in China. The long list of injured parties includes such household names as Microsoft, Apple, Disney, Paramount Pictures, and Mars, and the copied materials include such highly profitable items as Windows software, the M & Ms logo, Mickey Mouse figures, Terminator II videocassettes, and Madonna CDs.

The history of intellectual property relations between the U.S. and China over the last century has been a tortured one, and the Webster's case is but one telling episode. William P. Alford recounts this and other colorful cases in a wide-ranging work on intellectual property law in Chinese civilization. Alford, who currently serves as the Director of East Asian Legal Studies at Harvard Law School, has produced a carefully crafted analysis which is historically rich and full of important new material. This is serious scholarship, yet the author's

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¹ WILLIAM P. ALFORD, *TO STEAL A BOOK IS AN ELEGANT OFFENSE: INTELLECTUAL PROPERTY LAW IN CHINESE CIVILIZATION* 43 (1995).

thoroughness is engaging rather than tedious, his style lively, not anti-septic. The book is also timely. For those who have followed America's trade wars in the headlines—with either lay interest or expert insight—this accessible and authoritative work will add sense to the sometimes shrill rhetoric that has flowed from such U.S. trade warriors as Charlene Barshefsky, Mickey Kantor and Carla Hills.

As the U.S. trade deficit with the rest of the world began to balloon dramatically during the Reagan years, policy makers focused on the widespread piracy of U.S. intellectual property abroad, the bulk of which occurred in the Third World. The assumption that came to shape Washington's trade posture—one which Alford and others question—was that enforcement of U.S. intellectual property rights abroad could be achieved by exerting pressure in the form of trade sanctions; once piracy was extinguished, or at least sharply reduced, Third World markets thus freed from inexpensive counterfeits would be ripe for genuine, Made-in-the-U.S.A. goods with prices to match, which would help balance the U.S. trade deficit.²

In the late 1980s, China became the world's leading pirate, leapfrogging other notorious offenders such as Taiwan, South Korea, Brazil, India, Thailand, Indonesia and Hong Kong. More recently, the destinations of Chinese counterfeits have become of even greater concern than their mushrooming volume. China has become an export platform for piracy, especially illicitly copied compact discs, which have become huge cash cows.

Today China remains the world's pre-eminent pirate, despite signing—under threat of quite substantial trade sanctions—two major agreements with the U.S. in 1992 and 1995. In those agreements, China pledged to undertake stiff measures to curb piracy, make deep reforms in its domestic intellectual property laws, and accede to leading international intellectual property conventions. Ironically, even though the Middle Kingdom followed through on many of these commitments, piracy has not abated, and China now appears to be an incorrigible international outlaw. Why should this be?

In a book-length answer, Alford argues that brute attempts to transplant alien private property and rule-of-law concepts from the U.S. into the cultural and legal environment of mainland China are bound to fail. He explains, in a discussion that spans Chinese history from the beginning of the imperial era (221 B.C.) to modern times, how Chinese culture in key respects is very different from our own. Three elements figure prominently: Confucian tradition, resentment of foreigners, and the oppressive character of Communist Party rule, both past and present.

² *Id.* at 113-15.

Confucian China, in both the content and administration of its laws, was family-centered. Many laws were deeply concerned with offenses against the family, while in administration the law relied for its execution on family structures and relationships largely unknown in the West. In general, problem-solving and dispute resolution took place informally within the family or in extended family environments such as the guild or the larger community, not formally through Western-style government-sponsored courts or agents.³ Historically, the Emperor did not, and logistically could not, provide an administrative infrastructure capable of coping with such problems.⁴ Thus, Western-style legal institutions and rule-of-law traditions played at most a marginal role in motivating and rationalizing conduct in Confucian China. Inasmuch as contemporary international intellectual property standards rely on those Western institutions and traditions, Chinese with a Confucian world view will find them at best alien and at worst entirely opaque.

A related Confucian element that Alford finds important to the Confucian world view is a backward-looking custom of literary reference to ancestors, past values, and institutions.⁵ Copying or imitation in this fashion is commonplace in classical Chinese poetry and literature and is mirrored in Chinese painting and calligraphy. Such behavior is construed not as it might be in the West as plagiarism or piracy or the unauthorized use of private property, but as the expression and reinforcement of community values.

As for Chinese resentment of foreigners, the second of the more prominent elements in Alford's analysis, he sketches a tidy historical framework that begins with the 1744 establishment in Canton and Macao of part-time official enclaves for foreign traders ("barbarians"), followed by the Qianlong Emperor's famous 1793 rebuff of an attempt by King George III to establish formal diplomatic and trade relations: "We possess all things. I set no value on objects strange or ingenious, and have no use for your country's manufactures."⁶ British traders, frustrated by their inability to sell manufactured goods to the Chinese, initiated profitable sales of Indian opium, wholly ignoring the entreaties of the Chinese government to quit the drug trade. Following a decisive Chinese defeat in the Opium War of 1839-1842, Britain and other nations gained important concessions. Notably, a system of extraterritoriality was established under which foreigners accused of crimes against Chinese subjects would be tried according to their own nation's laws by representatives of their home government

³ *Id.* at 10-12.

⁴ *Id.* at 11.

⁵ *Id.* at 25-29.

⁶ *Id.* at 30.

resident in China.⁷ The injustices that extraterritoriality perpetrated on the Chinese left them with considerable resentment toward foreign, particularly Western, legal systems.

Foreign claims of infringement of intellectual property rights began to mount in the late nineteenth century with the steady expansion of trade. In a series of agreements negotiated in 1902 and 1903, the Chinese, wooed by the prospect of terminating extraterritoriality, agreed to provide protection for foreign trademarks and, for the United States, patents as well.⁸ But for years afterward the Chinese resisted pressure from the U.S. to implement the treaties. Alford argues that China lost its enthusiasm for enacting implementing legislation when it became apparent that the foreign powers had no interest in hastening the demise of extraterritoriality.⁹

The third prominent element in Alford's analysis belongs to the Communist portion of the modern era. During the rule of the Kuo-mintang, following the 1911 revolution, ambitious but unsuccessful attempts were made to create effective Western-style statutes. However, under the Communists, who seized power on the mainland in 1949, Chinese intellectual property law took a predictably different tack, aptly expressed in a popular folksaying of the late 1960s: "Is it necessary for a steel worker to put his name on a steel ingot that he produces in the course of his duty? If not, why should a member of the intelligentsia enjoy the privilege of putting his name on what he produces?"¹⁰ Mimicking legal developments in the Soviet Union, the Chinese began to establish a statutory framework for intellectual property law incorporating material incentives as early as 1950,¹¹ but even this Marxist creation disintegrated in the course of the rabid political campaigns of the Cultural Revolution (1966-76) when piracy was rife, and lawyers and legal institutions were abolished.¹² In 1975, even before the end of the Cultural Revolution, substantial efforts were made to begin rebuilding the country's legal infrastructure, and, by 1977, its intellectual property laws as well. In 1979 the world witnessed the initiation of Deng Xiaoping's sweeping economic reforms and, in the decade and a half since, a breathtaking Chinese economic expansion, which has carried such official labels as "socialist market economy" and "socialism with Chinese characteristics." Shadowing that expansion has been a similarly dramatic growth in what one might call piracy with Chinese characteristics.

⁷ *Id.* at 33.

⁸ *Id.* at 36-49.

⁹ *Id.* at 49.

¹⁰ *Id.* at 56.

¹¹ *Id.* at 56-61.

¹² *Id.* at 63-65.

If residues of Confucianism and xenophobia do linger in the contemporary Chinese sensibility, how do they dovetail with modern foreign efforts to bring Chinese intellectual property practices up to world standards? In Alford's view, recent U.S. strategies have failed to curb Chinese piracy because they have relied on pressure tactics—threats of trade sanctions, and the withdrawal of support for Chinese accession to GATT and the World Trade Organization—and succeeded only in coercing China into making superficial changes in its laws and institutions, rather than deep changes in its political and social culture.¹³ Despite the dramatic socio-economic reforms that have so altered the face of Chinese culture since 1979, ordinary citizens remain subject to an intensely politicized world. Under their own domestic law, for example, the Chinese do not enjoy freedom of expression or full Western-style rights to possess and manipulate property, including intellectual property. Instead, the state determines which property may be possessed and which ideas may be disseminated. Moreover, citizens appearing in court enjoy no fundamental procedural rights, and rulings of the Chinese judiciary are made not independently but at the direction of state and Party officials. As a result, the Chinese lack the "rights consciousness" within which it makes sense to respect and protect the intellectual property rights of individuals.¹⁴

To exacerbate the problem, much of the general population has become quite disenchanted with the Communist Party, owing to a mind-numbing fatigue borne of endless political campaigns, and is therefore bound to be deeply cynical about the true aims behind any new law or pronouncement. Indeed, the perception is widespread that the East-West ideological struggle has long since vanished, that the Party has become thoroughly corrupt, and that the leadership makes its decisions not on the basis of what is good for the country but on the basis of how it will most likely retain political power. Most Chinese, being savvy and pragmatic, have concluded that they, too, had better get what they can, when and how they can, even through piracy or other illegal means. In such an environment, believes Alford, it makes little sense to ask ordinary Chinese to adhere to a system of abstract laws governing patents, copyrights, and trademarks whose main purpose is to protect the rights and increase the wealth of foreigners.¹⁵

¹³ *Id.* at 117-18. For commentary on recent efforts to impose such sanctions through denial of Most Favored Nation trading privileges, see Glenn R. Butters, *Renew MFN for China? Right Decision, Wrong Reasons*, CHI. TRIB., July 3, 1996, at 27.

¹⁴ ALFORD, *supra* note 1, at 117-20.

¹⁵ *Id.* at 118-19.

Thus, even though China has reformed its domestic intellectual property laws and signed a host of international intellectual property agreements, it has not developed the kinds of institutions and values in its citizenry that will lead to meaningful and lasting changes in their behavior. In Taiwan, by contrast, Alford observes that piracy has been considerably curtailed and argues that this is a result of deep changes in political institutions and the creation of indigenous intellectual property industries.¹⁶ He concludes, in effect, that unless U.S. negotiators change their tactics in hopes of bringing about similar and enduring changes in Chinese practices and attitudes, they will be left with still more superficial agreements and little else.

Some readers may be left questioning the true impact of Confucianism and nineteenth century xenophobia on modern day Chinese sensibilities, and some may believe the Chinese to have made more progress than Alford suggests on the road toward creating institutions and values that will engender respect for intellectual property, foreign and domestic.¹⁷ But virtually all readers will likely find that he has produced a unique and thought-provoking work, one which is an exceptionally valuable contribution to the literature on Chinese law, intellectual property, and international trade.

¹⁶ *Id.* at 107-11.

¹⁷ I have discussed these matters at length elsewhere. See Glenn R. Butterson, *Pirates, Dragons and U.S. Intellectual Property Rights in China: Problems and Prospects of Chinese Enforcement*, 38 ARIZ. L. REV. (forthcoming 1996).