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Copying, Culture, and Control: Chinese Intellectual Property Law in Historical Context

William P. Alford, *To Steal a Book is an Elegant Offense: Intellectual Property Law in Chinese Civilization*. Stanford: Stanford University Press, 1995. Pp. ix, 222. \$39.50.

Jonathan Ocko*

[O]nly if we have some understanding of why in Chinese civilization it has been an elegant offense to steal a book will China and its foreign friends know how in the future to discern and protect one another's legitimate interests.

William Alford¹

Few people are as well-suited as William Alford to provide this understanding. Now Henry L. Stimson Professor of Law and Director of East Asian Legal Studies at Harvard, Alford studied Chinese history at Yale Graduate School and law at Harvard, then practiced international law before returning to academia. Like his mentors, Jonathan Spence at Yale and Jerome Cohen at Harvard, Alford is adept at producing work that engages and stimulates both China scholars and non-specialists. The book at hand is no exception. Though relatively short in length, it is a rich, pioneering study that sets forth two distinct but closely related arguments. The first, which makes up the core of the book, explains by reference to China's

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1. WILLIAM P. ALFORD, *TO STEAL A BOOK IS AN ELEGANT OFFENSE: INTELLECTUAL PROPERTY LAW IN CHINESE CIVILIZATION* 123 (1995).

political culture why “intellectual property law, and in particular copyright, has never taken hold in China.”² The second, which builds on the first and constitutes the conclusion, seeks to convince American policy makers and diplomats that without “further political liberalization and a greater concomitant commitment [by the Chinese] to the institutions, personnel, interests and values needed to undergird a rights-based legality, detailed refinements in intellectual property doctrine itself will be of limited value.”³ Thus, Alford argues, as difficult as it is for one nation to influence “the enduring values and practices central to [another] nation’s identity,”⁴ the United States ought nonetheless to attempt to nurture a new, more rights-oriented political culture in China.

Alford’s persuasive plea for a values-driven China policy may strike some readers as ironic in light of Alford’s reminder at the outset of this study that, in studying legal developments in China, we should not assume that our own course of history is necessarily “normal” or inevitable.⁵ However, his teleological argument is devoid of the tendentiousness that might weaken its cogency. Alford’s work traces the story of how an enduring, paternalistic, authoritarian Chinese political culture, embodied successively by the commitments of imperial, republican, and socialist states to controlling both the flow and content of information for the purpose of sustaining state power, has impeded the development of intellectual property rights.

This argument is at the heart of each of the four basic propositions the book advances. First, imperial China had no serious indigenous counterpart to Western conceptions of intellectual property because of the character of its political culture. Second, late imperial reforms in the area of intellectual property proved fruitless because the reformers failed to consider whether the Western models they invoked were relevant for China and assumed that foreign pressure would lead to adoption of and adherence to these norms. Third, the current attempts to establish intellectual property law in China, “especially the mainland,” have failed because they have overlooked the difficulty of reconciling Western “legal values, institutions, and

2. *Id.* at 1. Alford uses the term political culture in a general way, without offering his own specific working definition. *Id.* at 119. For a brief discussion of how the concept has been recently employed by others in Chinese studies, see Elizabeth J. Perry, *Introduction* to *POPULAR PROTEST & POLITICAL CULTURE IN MODERN CHINA* 1, 4-6, 10-11 (Jeffrey N. Wasserstrom & Elizabeth J. Perry eds., 2d ed. 1994).

3. ALFORD, *supra* note 1, at 120. Alford uses political culture here in the same way it is employed by Elizabeth Perry. According to Perry, a political culture approach sees change in a culture as “inevitably” drawing “heavily on established cultural repertoires.” Perry, *supra* note 2, at 5.

4. ALFORD, *supra* note 1, at 120.

5. *Id.* at 4.

forms” with the constraints of China’s past and present circumstances. Fourth, despite intellectual property being a central objective of American “diplomatic leverage,” the resulting bilateral agreements have not accomplished their intended goals because of American misunderstanding of legal developments in the mainland and Taiwan.⁶

These propositions are developed in the book’s five topical chapters, which I summarize in Part I of this Review. In Part II, I suggest questions that need attention in future research on intellectual property in China.

I

In Chapter Two, “Don’t Stop Thinking About . . . Yesterday: Why There was No Indigenous Counterpart to Intellectual Property in Imperial China,” Alford touches briefly on trademark, and barely at all on patent, before moving to a nuanced discussion of copyright. He finds that Douglass North’s theory of scientific and technological innovation leading to a heightened concern with property rights⁷ did not apply to China, except perhaps when the state sought to prevent certain technologies and trades from being transferred to peoples outside China who might threaten the empire. And, though the state would sometimes assist guilds and individuals in their efforts to protect trade names and marks, it was concerned less with demarcating and enforcing intellectual property rights than with preserving social order by preventing fraud. However, while Alford acknowledges that “economic and technological factors should not be ignored” in explaining “why the imperial Chinese state did not provide systematic protection for the fruits of innovation and creation,” he locates the principal cause in the political culture of imperial China, particularly “the constitutive role” of a “shared and still vital past.”⁸

As the source of truth, the past validated and legitimated. Poets, painters, and scholars took part in a process of “transformative engagement” with the past. Through the study and mastery of the contents of the Confucian Classics, the citation of which was the “very method of universal speech,”⁹ scholars prepared for the civil service examinations. And just as the state attempted to control publication

6. *Id.* at 2-3.

7. *Id.* at 133 n.2. North argues that new opportunities for profit lead to the creation of new legal institutions, which, in turn, determine the long-term success or failure of a society’s economy. See DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE (1990).

8. ALFORD, *supra* note 1, at 19.

9. The phrase is the late Joseph Levenson’s. See *id.* at 26 n.111.

of materials such as calendars, almanacs, and witchcraft manuals that could be used to challenge its monopoly on ordering the relationship between man and the heavens,¹⁰ so the state also proscribed the printing of unauthorized versions of the Classics and unapproved examination preparation materials. In the “interests of fairness and the maintenance of [social] harmony,”¹¹ the state might intervene to protect a monopoly over a mark or trade name, but Alford cogently asserts, “the need to interact with the past sharply curtailed the extent to which it was proper for anyone other than persons acting in a fiducial capacity to restrict access to its expressions.”¹² In sum, the intellectual property constituted by the common heritage of the past in general, and the enduring social truths of Confucianism in particular, belonged to the state.

Since the general reader may be unfamiliar with Confucianism, it is perhaps appropriate to digress here to offer an explanation. “Confucianism,” explains one of its contemporary practitioners and best scholars, “is a worldview, a social ethic, a political ideology, a scholarly tradition, and a way of life.”¹³ Although Alford does not provide an integrated explanation of Confucianism, he touches on nearly all of these elements while emphasizing the fit between the social ethic and political ideology. For Alford, as for many of us who study China, the Confucian cultural inheritance is characterized by overlapping, interlocking hierarchies of age, gender, and relationship that are encapsulated in the Three Bonds (between ruler and subject, father and son, husband and wife) and the Five Relationships, which add to the Three bonds the relationships between older and younger brother and between friends. When individuals performed the obligations appropriate to their status in these hierarchies, social order was created and maintained. Thus, the family was the matrix for society. As Alford notes, Confucius observed that one contributed to government by being filial to one’s parents and a friend to one’s brother.

Even if “immutable Confucian culture” was not, as Elizabeth Perry colorfully phrased it, “forever lurking like a sea monster beneath the surface of China’s political waters,”¹⁴ this linking of personal to

10. See PHILIP KUHN, SOULSTEALERS: THE CHINESE SORCERY SCARE OF 1768, at 85-91 (1990); RICHARD J. SMITH, FORTUNE TELLERS AND PHILOSOPHERS: DIVINATION IN TRADITIONAL CHINESE SOCIETY 39-40, 87-91 (1991).

11. ALFORD, *supra* note 1, at 25.

12. *Id.*

13. Tu Wei-ming, *The Confucian Tradition in Chinese History*, in HERITAGE OF CHINA: CONTEMPORARY PERSPECTIVES ON CHINESE CIVILIZATION 112, 112 (Paul Ropp ed., 1990).

14. Elizabeth J. Perry, *Casting a Chinese “Democracy” Movement: The Roles of Students, Workers, and Entrepreneurs*, in POPULAR PROTEST & POLITICAL CULTURE IN MODERN CHINA, *supra* note 2, at 74, 86. Perry’s quip was directed at the “unchanging China” arguments of

political values and of morality to politics has served the interests of China's leaders regardless of political regime. After the fall of imperial China in 1912, the Nationalist Party leaders, who established the Republic of China (R.O.C.), employed these linkages both on the mainland and, after 1949, in Taiwan. Finally, not only have these connections often been at the center of the political movements mounted by the Communists on the mainland since 1949, but elements of Confucianism itself are now seen by some in the People's Republic as the source of Taiwan's, South Korea's, Singapore's, and Hong Kong's economic success.¹⁵

However, in the late-nineteenth and early-twentieth centuries, a fragile Qing Dynasty (1644-1912) concentrated on the immediate problem of dealing with the West. In Chapter Three, Alford focuses on the foreign powers' turn-of-the century introduction into China of intellectual property ideas, a process he calls "learning the law at gunpoint,"¹⁶ though the implied threat of force figured more prominently than overt military pressure. Intellectual property was of negligible consequence until the 1880's, when Chinese merchants' appropriation of foreign brand names to avoid transit taxes and combat the popularity of imports led to demands for trademark protection. Bilateral treaties in 1902 and 1903 with Britain and the United States satisfied no one, and the Chinese rebuffed self-serving, foreign-directed efforts to draft more comprehensive regulations. Before new rules in 1923 afforded some protection, foreigners' accomplishments were limited to merely periodic successes at persuading local officials to use their discretionary power to prevent trademark and copyright piracy and agreement among themselves on a set of rules to protect against infringing each other's intellectual property in China. Less intimidating to local officials than foreigners, the Chinese fared even worse in defending their intellectual property against piracy.

Why did China make so little progress? Alford describes both internal and external reasons, but on balance lays greater weight on indigenous barriers. Chinese officials, Alford notes, comprehended that intellectual property fostered commerce, and anti-foreign boycott organizers used brand-name consciousness to mobilize and direct their

Lucian Pye. I want to thank Wendie Schneider for reminding me of this passage.

15. See generally *Confucianism: New Fashion for Old Wisdom*, *ECONOMIST*, Jan. 21, 1995, at 38 (citing Lee Kuan Yew, Senior Minister of Singapore, on Confucianism as a positive element in Chinese development and the rise of the Four Tigers); *Beijing Hosts Seminar on Confucianism, Market Economy*, *Xinhua* [New China News Agency], Aug. 3, 1995, available in LEXIS, Nexis News, *Xinhua* File; *Li Ruihuan: Confucianism Could Serve Practical Activities*, *Xinhua* [New China News Agency], Oct. 5, 1994, available in LEXIS, Nexis News, *Xinhua* File.

16. ALFORD, *supra* note 1, at 30.

supporters. Despite this awareness of intellectual property, Alford acknowledges, there was some merit in foreigners' complaints that the Chinese lacked a thorough understanding of intellectual property law. However, most crucial, Alford argues, was foreigners' own failure either to explain the utility of intellectual property or to train Chinese in how to enforce relevant laws. Still, even, after the R.O.C. had promulgated a Copyright Law and Measures to Encourage Industrial Arts in the early 1930's, little enforcement of any intellectual property rights occurred. Like its imperial predecessor, the R.O.C. focused primarily on controlling the content and flow of information. It had no tolerance "of the formalities of law when they interfered with its political agenda."¹⁷ Even if the R.O.C. had been more favorably disposed toward protecting intellectual property, its struggles against the Communists and the Japanese sapped its resources and attention, its administrative and judicial systems were inadequately funded, competent personnel, and professional integrity, and its citizens lacked an appropriate legal consciousness.

Chapter Four's title, "Squaring Circles," aptly conveys the dilemmas of intellectual property policy in the People's Republic of China (P.R.C.) since 1949. Finding in the Soviet Union's Marxist model an echo of the Confucian view that intellectual creation is "a product of the larger society from which it emerged,"¹⁸ the young P.R.C. replicated the Soviet disinclination to establish purely private ownership interests in intellectual property. In order to rebuild the economy after the Civil War, the P.R.C. came to an accommodation with individual patent holders. By the mid-1950's, however, the socialist transformation of the economy essentially eliminated private ownership and made such compromise unnecessary. Over the next decade, trademark legislation became a vehicle for supervising quality, not for granting exclusive rights. By the mid-1960's, increasingly radical policies led to attacks on property rights and material incentives in intellectual property as well as more generally to assaults on professionalism and the formal legal system itself. If a steel worker need not put his name on an ingot he had produced, "why," asked a popular Cultural Revolution saying, "should a member of the intelligentsia enjoy the privilege of putting his name on what he produces?"¹⁹

As China reformed its economic system and opened to the outside world in the wake of the Cultural Revolution, domestic and foreign pressures led, by the mid-1980's, to the promulgation of trademark,

17. *Id.* at 54.

18. *Id.* at 57.

19. *Id.* at 65.

patent, and copyright laws putatively intended to stimulate and protect creativity and innovation. Critics warned against an anti-socialist, initiative-squelching, rent-collecting “literary industrial complex”²⁰ and suggested that China freely—albeit illegally—import needed technology. Eventually Deng Xiaoping oversaw a compromise: a socialist legality with Chinese characteristics that granted rights circumscribed by responsibility to the state, and, more importantly, as Alford notes, rights all too often unenforceable for lack of adequate remedies. As Alford observes, the widespread stories in the press of infringement actions (brought by both foreign and domestic parties against domestic violators) might be better seen as evidence of the law’s ineffectiveness than as proof of its thorough enforcement. In all aspects of intellectual property, but especially in copyright, where, like previous Chinese states the socialist regime uses the law primarily to control the flow of ideas to the populace, the state’s conundrum has been how to generate laws that “create new forms of property without compromising basic state interests.”²¹

Chapter Five describes the process by which Taiwan has moved from pirating other nations’ intellectual property to being a substantial owner itself. Though the Guomintang regime exercised tight control of content, it condoned unrestrained reprinting of acceptable foreign titles. In the late 1950’s, pressure from American publishers led Taiwan, still financially dependent on the United States, to make some attempts to rein in piracy, but the situation had not improved appreciably by the 1970’s. Moreover, by the 1960’s and 1970’s, a global survey of five industries reported that 60 percent of all counterfeits originated in Taiwan. Highly publicized reforms in the mid-1980’s again had little effect. In 1989, concern over the role of piracy in its trade imbalance with Taiwan led the United States to place Taiwan on the Special 301 priority watch list.²² Taiwan and the United States reached an agreement requiring Taiwan to enforce, as well as to expand, existing intellectual property legislation. Still, infringement in computer and electronics continued unabated, and in an increasingly democratized Taiwan, voices of resentment against American infringements of sovereignty slowed implementation of the agreement. To a large extent, Alford argues, only after the 1992 designation of Taiwan as a center for piracy and counterfeiting, and the attendant threat of losing American markets and alienating

20. *Id.* at 67.

21. *Id.* at 76.

22. “Special 301 is a variant of Section 301 of the 1974 Trade Act that requires the USTR [United States Trade Representative] both to notify the Congress regularly of ‘priority foreign countries’ failing adequately to protect American intellectual property and to take all measures needed to address these deficiencies within statutorily mandated guidelines.” *Id.* at 102.

American political support, did Taiwan begin to make substantive legislative changes. Yet, indigenous forces also played a role. Courts broadened their mandate beyond “the maintenance of order,”²³ and all elements of the legal system improved in quality. Moreover, as Taiwanese manufacturers like Acer began to become technical innovators rather than contract manufacturers, Taiwan’s leaders realized that without a commitment to intellectual property, Taiwan could not implement its “industrial upgrading.”²⁴

In his concluding chapter on American policy, Alford vehemently argues that the United States has misplaced its priorities by making intellectual property the centerpiece of its relations with Taiwan and the P.R.C. He sardonically notes that, while reluctant to “interfere in China’s internal affairs” by speaking out on Tiananmen, the Bush administration had no such qualms regarding intellectual property. Driven by concern that piracy was undermining the capacity of the entertainment and software industries to close the trade gap with Asia, the Clinton administration has maintained the pressure, eliciting various Memoranda of Understanding, but no tangible results. In sum, our threats extract short-term concessions but are “incapable of generating the type of domestic rationale and conditions needed to produce enduring change.”²⁵ In clear, forceful strokes, Alford reiterates his picture of change impeded by China’s political culture: “A system of state determination of which ideas may or may not be disseminated is fundamentally incompatible with one of strong intellectual property rights in which individuals have the authority to determine how expressions of their ideas may be used and ready access to private legal remedies to vindicate such rights.”²⁶ Yet, as Alford acknowledges, we may be sorry if we get what we want. For if in the P.R.C., as in Taiwan, real protection of American intellectual property awaits “further development of Chinese-generated intellectual property of commercial importance,” American companies will find the problem to be not pirates, but “technologically sophisticated” competitors.²⁷

II

To Steal A Book’s power and elegance arise from its arguments’ clarity. Alford lays out his propositions concisely and develops them relentlessly. By the end, the reader is persuaded that China’s political

23. *Id.* at 110.

24. *Id.* at 107.

25. *Id.* at 118.

26. *Id.* at 119.

27. *Id.* at 123.

culture largely explains the absence in China of intellectual property ideas as conceived in the West. To achieve this clarity, however, Alford inevitably has had to make choices about which aspects of his own broad knowledge of a complex culture to share with readers. Without, I hope, falling into the reviewer's trap of telling the author what book he should have written, my comments in this Part speak to these choices and suggest areas of research and avenues of thought that future scholars can pursue as they build upon the superb foundation laid by Alford.

The Question of Property

For nearly three hundred years, Western jurisprudence and scholarship about intellectual property have been inextricably linked to debates about the nature of real and personal property.²⁸ Similar connections are not as easily made in the Chinese context because the Chinese tradition lacks the essential starting point, a tradition of explicit analysis of property and property rights.

Certainly, the fourth-century B.C.E. writings of Mencius and Shang Yang emphasize that social order cannot exist without properly drawing and protecting land boundaries.²⁹ Surviving written materials reveal changing regimes of land ownership;³⁰ and court cases from the Qing period not only contain a rich lode of litigation over property, but also demonstrate that, as in the West, both law and custom recognized the principle that adding value by applying labor could establish an ownership claim. Yet, there is no discrete body of analytical writing on the subject until the twentieth century, when Chinese writers began to explore not only common and civil law traditions, but also Marxist theories. Thus, if we are to refine our understanding of property (and subsequently intellectual property) in Chinese culture, we must tease out of concrete historical experience what is unavailable to us in abstract tomes.

Over the last decade, social and legal historians have extended anthropologists' pioneering work on family division of land by examining other forms of property and ownership disputes. Alford

28. See generally PAUL GOLDSTEIN, COPYRIGHT'S HIGHWAY 37-53 (1994); Wendy J. Gordon, *An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent, and Encouragement Theory*, 41 STAN. L. REV. 1354, 1354-64 (1989); Grant Hammond, *The Legal Protection of Ideas*, 29 OSGOODE HALL L.J. 93, 99-106 (1991); Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 287-366 (1988).

29. Chang Wejen, *China's Legal Tradition*, at 235, 341 (Class materials for course on China's Legal Tradition, New York University Law School, Spring 1995, on file with author) (citing discussion by classical Chinese philosophers on the benefits of clarity in land ownership).

30. See ZHANG JINFAN, *ZHONGGUO GUDAI FAZHI ZHIDU* [CHINA'S ANCIENT LEGAL SYSTEM] *passim* (1992).

cites some of the most recent work from one project,³¹ but much remains to be done in the increasingly open legal archives that contain materials on both the late imperial and Republican periods. We need to ask whether there was a common core of attitudes or a bundle of discrete but related attitudes toward property rights. My surmise is that people's attitudes toward ownership, trespass, infringement, piracy, counterfeiting, and smuggling are contingent. It makes a difference who owns property and whether property is rural or urban, moveable or not. If a necessary commodity is available only through a government monopoly (e.g., salt in imperial China) or priced high as a consequence of government import controls (e.g., foreign software, cd's, and audio tapes in the P.R.C.) or in a situation of market domination by a single producer (e.g., Microsoft), there seems to be less respect for the commodity owner's rights. That both Americans and Chinese who would never shoplift a pack of gum cavalierly copy each other's software suggests that property-rights consciousness is extremely dependent on the situation. However, to move beyond surmise and the anecdotal will, as I have argued above, require extensive scholarly analysis of the exact nature of property rights thinking, as revealed in archival materials.

Moreover, as the socialist market economy develops in the P.R.C., it will be particularly challenging, but essential, to track through cases the interaction between evolving ownership forms and evolving attitudes toward intellectual property. A 1988 patent infringement case from Shenyang illustrates the nature of the problems that have been encountered. The case concerned collective factories that once "belonged" to supervisory "companies"—but which are now behaving as independent actors who seek competitive advantage, instead of as "siblings" who share everything.³² This dispute demonstrates that an intellectual creation is no longer regarded as the "product of the larger society from which it emerged,"³³ but the legitimate possession of its creator. As the report of the patent dispute editorialized in its

31. ALFORD, *supra* note 1, at 134 n.6. The papers from the first stage of this project have appeared in *CIVIL LAW IN QING AND REPUBLICAN CHINA* (Kathryn Bernhardt & Philip C.C. Huang eds., 1994) [hereinafter *CIVIL LAW*]. See Mark Allee, *Code, Culture, and Custom: Foundations of Civil Case Verdicts in a Nineteenth-Century Country Court*, in *CIVIL LAW, supra* at 122; Philip C.C. Huang, *Codified Law and Magisterial Adjudication in Qing*, in *CIVIL LAW, supra*, at 142; Melissa Macauley, *Civil and Uncivil Disputes in Southeast Coastal China, 1723-1820*, in *CIVIL LAW, supra*, at 85; Madeleine Zelin, *Merchant Dispute Mediation in Twentieth Century Zigong, Sichuan*, in *CIVIL LAW, supra*, at 249; see also Thomas Michael Buoye, *Violent Disputes Over Property Rights in Guangdong During the Qianlong Reign (1736-1795)* (1991) (unpublished Ph.D. dissertation, University of Michigan); David Ray Wakefield, *Household Division in Qing and Republican China: Inheritance, Family Property, and Economic Development* (1992) (unpublished Ph.D. dissertation, University of California (Los Angeles)).

32. See FAZHI RIBAO [LEGAL SYSTEM DAILY], May 31, 1988, at 3.

33. ALFORD, *supra* note 1, at 57.

conclusion: Methods of administrative interference have to be abandoned and rapidly replaced by new ones. "Otherwise, even if we start out with good intentions, things may go contrary to our wishes."³⁴

Authorship, Priority, and Specialized Knowledge

Justin Hughes has written that, in the West, there has developed a "set of central ideas [that] are never permitted to become private property and are held in a *permanent common*."³⁵ Some of the ideas are ordinary and others are extraordinary, but all are so important and society so dependent on them, both for their content and as signifiers, that they become "de-proprietyed."³⁶ This notion—that an idea becomes too important for it to remain solely the author's—resonates with Alford's argument that, in China, the importance of the past precluded restricting access to its expressions.

Certainly, the concept of the author existed in traditional China. Indeed, the Romantic notion of the author which, according to Peter Jaszi, strongly influenced Anglo-American copyright law,³⁷ had its counterpart in Chinese literati writing about painting. To the Romantics, a "work is an extension of the artist's personality."³⁸ For the Chinese, "to know [a painter's] art was to know the man himself,"³⁹ for "the character of the artist is seen as the core of painting."⁴⁰ Each Chinese painting, and each poem for that matter, was unique, a singular creation and distinctive manifestation of the moral character of the artist. Yet as Alford shows, because literati poets and painters focused on their interaction with the past, innovating "within the bounds of orthodoxy" and the context of past forms,⁴¹ the idea of copyright never blossomed in China. Painters and poets welcomed copying as a compliment, a recognition that their work manifested the power of their moral and artistic mastery. The imitation recognized their success at capturing the essence, or the *dao*, of a subject. Painting "in the manner of" tapped into this moral quality and generated for the subsequent painter his own sense of moral power. The presence of this power and the gentleman's

34. FAZHI RIBAO, *supra* note 32, at 3.

35. Hughes, *supra* note 28, at 319.

36. *Id.* at 320.

37. Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of "Authorship"* 1991 DUKE L.J. 455, 456.

38. *Id.* at 497.

39. SUSAN BUSH, *THE CHINESE LITERATI ON PAINTING: SU SHIH (1037-1101) TO TUNG CH'I-CHANG (1555-1636)* 11 (1971).

40. *Id.* at 182.

41. ALFORD, *supra* note 1, at 26, 29.

resistance to the seduction of money,⁴² separated literati art from that of the mere copyist or the academician who produced work for hire.

Like the artists, Confucian philosophers were in a constant interaction with the past through their predecessors' work and the Classics, "which contained paradigms for social order and had an absolute claim to trans-historical truth."⁴³ They felt bound "to the future by a social obligation to communicate their findings and discoveries"⁴⁴ and, as a public service to others, made available their own collections of rare books by publishing them in anthologies.⁴⁵ In all this, the philosophers' approach paralleled the painters', but the question of who first had an idea or insight appears to have been of more concern to philosophers. Indeed, in the mid-eighteenth century, "evidential scholars wanted to determine fairly and accurately who should be given priority in research."⁴⁶ Some of the scholars who made these breakthroughs developed a proprietary interest in their ideas, treating them as the "cultural property of a particular line within a lineage."⁴⁷ Through lineage schools, they tried to confine generational transmission of these ideas exclusively to their own descent group. Yet more often than not, because of the prestige to be gained by broad dissemination of such ideas, this knowledge passed into "the public domain."⁴⁸

To find stronger proprietary thinking, we must move beyond the world of the literati. Those who derived their social prestige from knowledge more arcane than Confucianism or who earned their livelihoods from technical knowledge must certainly have been less willing to have their "intellectual property" depropriated. Alford notes the efforts of guilds in imperial China to protect trade names and marks, as well as the support they could sometimes elicit from officials concerned with maintaining market stability and social order, but I suspect that there may have been greater popular consciousness of intellectual property rights than we think. Moreover, much of this intellectual property comprised knowledge sufficiently specialized to

42. *Id.* at 29.

43. BENJAMIN ELMAN, FROM PHILOSOPHY TO PHILOLOGY: INTELLECTUAL AND SOCIAL ASPECTS OF CHANGE IN LATE IMPERIAL CHINA 28 (1984).

44. *Id.* at 222.

45. *Id.* at 151. Before the invention of printing, literati made and circulated rubbings of steles on which the Classics had been inscribed. For a brief review of the publishing industry in late imperial China, see Evelyn S. Rawski, *Economic and Social Foundations of Late Imperial China, in POPULAR CULTURE IN LATE IMPERIAL CHINA* 21-28 (David Johnson et al. eds., 1985).

46. ELMAN, *supra* note 43, at 223.

47. See BENJAMIN ELMAN, CLASSICISM, POLITICS AND KINSHIP: THE CH'ANG-CHOU SCHOOL OF NEW TEXT CONFUCIANISM IN LATE IMPERIAL CHINA 6 (1990).

48. *Id.*

fall outside the “permanent common.” Those who owned and mastered sectarian religious texts “acquired considerable religious authority.”⁴⁹ And specialists in geomancy (*fengshui*), fortune-telling, and ritual maintained their position in society even as printed handbooks made much of their subject matter more generally available because they maintained a “large stock of handwritten materials” in which their trade secrets continued to reside.⁵⁰

Among these groups, unlike among the literati, there was nothing to be gained and much to be lost by freely disseminating rather than monopolizing their “cultural property.” The system of transmission from father to son or from master to acolyte might be seen as a self-enforcing intellectual property regime. An apt contemporary example is provided by a privately owned restaurant in Chengdu that sells a particular type of beancurd. Since the 1920’s, the family has carefully guarded its recipes, which the grandson of the creator variously refers to as the family’s trade secrets, intellectual property, and capital. In the 1950’s, the shop was subjected to “socialist transformation” and the family’s specialized knowledge “depropertized” by the state. But since then, the family has returned to its former practice of providing recipes to outsiders only after the “licensee” pays a fee and signs an agreement not to compete.⁵¹

Thus, I would argue, even if one cannot find it inscribed in codes or litigated in courts, an intellectual property rights consciousness, or sensibility, has probably existed in China for a long time. To uncover and understand this sensibility, we must move outside the sphere of literati painters and scholars. We need to attempt to examine under what circumstances various professional texts—coroner’s manuals, contract manuals, magistrate’s handbooks, novels, private editions of the Qing Code—were produced and sold. We need answers to a broad set of questions: Did the spread of newspapers and the development of new forms of literature for the “middling classes” produce new attitudes toward copyright?⁵² Was being first to market the only way publishers could protect themselves against piracy?⁵³

49. Susan Naquin, *The Transmission of White Lotus Sectarianism in Late Imperial China*, in *POPULAR CULTURE IN LATE IMPERIAL CHINA*, *supra* note 45, at 255, 259.

50. See James Hayes, *Specialists and Written Materials in the Village World*, in *POPULAR CULTURE IN LATE IMPERIAL CHINA*, *supra* note 45, at 75, 108. On geomancy, see SMITH, *supra* note 10, at 131-71.

51. Interviews with the owner (July 1993, July 1994) (interviews granted on condition of anonymity). Socialist transformation also meant that the state claimed the rights to use the family name in association with the word for beancurd. When the grandson opened his own shop using his surname as the business name, the city government threatened to bring suit. To avoid litigation, the man simply added a diminutive before the surname.

52. For an illustration of such a phenomenon, see ALFORD, *supra* note 1, at 44-45.

53. We know from Evelyn Rawski about the enormous scope and vitality of late imperial publishing. Rawski, *supra* note 45. We also need to know how, without copyright, publishers

Were the “courts” of the nascent late-nineteenth- and early-twentieth-century chambers of commerce a bridge between the private, guild-based and public, court-based enforcement of intellectual property?⁵⁴ Finally, how influential was the model presented by the enclaves under foreign control?

Confucianism, Political Culture, and the Flow of Ideas

Throughout the text, Alford uses Confucianism as short-hand for a complex body of ideas.⁵⁵ Though Alford surely did not intend it, readers may erroneously infer an enduring solidity to Confucianism. Certainly, there existed a dominant orthodoxy, an “imperial Confucianism” that the state demanded be reproduced in the civil service examination. There also existed among scholars a mainstream interpretation of the past. But we should remember not to take the imperial Confucianism that sought to control the flow of ideas as representative of Confucianism as a whole.⁵⁶ The imperial Confucian state was neither as aggressive nor as successful in controlling the flow of ideas as its twentieth-century successors.

Certainly, the late imperial state sought to maintain both an orthodoxy and an orthopraxy (respectively, correctness in thought and action).⁵⁷ The state could be highly effective in expunging dissidence if it committed substantial resources to a full-scale literary inquisition⁵⁸ or widespread investigation.⁵⁹ However, unless heterodoxy or heteropraxy posed an immediate and concrete threat to social and political order, or a group of scholars appeared to constitute a faction with a distinct political agenda, the state tended not to interfere. On the one hand, it could not regularly expend the

were able to remain profitable and viable.

54. Evidence that chambers of commerce played such a role is provided by a 1921 settlement by the Suzhou Chamber of Commerce of a trademark dispute. *In re Song Zhu Lu Hui*, Yi 2/1/882 (April 2, 1921) (available in Suzhou Chamber of Commerce Archives, Suzhou Municipal Archives). On chambers of commerce, see also sources cited *infra* note 72.

55. For a brief but comprehensive introduction to Confucianism, see Tu, *supra* note 13, at 112-37.

56. Tu Wei-ming, for example, argues that the “Confucianization of Chinese society reached its apex during the Ch’ing . . . which consciously and ingeniously transformed Confucian teaching into a political ideology, indeed a mechanism of symbolic control.” *Id.* at 135.

57. On the interaction of these two concepts, see DEATH RITUAL IN LATE IMPERIAL AND MODERN CHINA 3-34 (James Watson & Evelyn Rawski eds., 1990). On orthodoxy, see, as well, the work of K.C. Liu, who argues that “the state could effectively mold the culture—defined as the pattern of meaning—but perhaps only along the lines on which that culture was already evolving.” *Socioethics as Orthodoxy*, in ORTHODOXY IN LATE IMPERIAL CHINA 53, 54 (Kwang-Ching Liu ed., 1990).

58. See L. CARRINGTON GOODRICH, THE LITERARY INQUISITION OF CH’IEN-LUNG (1966); R. KENT GUY, THE EMPEROR’S FOUR TREASURES: SCHOLARS AND THE STATE IN THE LATE CH’IEN-LUNG ERA (1987); ZHONGGUO JINSHU DAGUAN [A COMPLETE INTRODUCTION TO CHINESE BANNED BOOKS] (An Pingqiu & Zhang Peiheng eds., 1990).

59. See generally KUHN, *supra* note 10.

required money and bureaucratic energy. On the other hand, except in times of extraordinary crisis, the late imperial state, as Alford demonstrates, was highly confident of the hegemonic power of its orthodox Confucian ideology.

Thus, until the Qing dynasty partially blamed the fall of the preceding Ming dynasty (1368-1644) on Wang Yangming's intuitionist attack on conventional Confucianism, other scholars—but not the state—combated Wang's philosophical heresies. The political implications of the views espoused by the late Ming academies, not their unorthodox Confucianism, prompted the government's hostility. In the early Qing, independent writers who prepared study aids published by private bookshops influenced civil service examinations. The government never fully succeeded in having only authorized official selections printed.⁶⁰ By the mid-eighteenth century the *kaozheng* school of evidential scholarship challenged (correctly) the authenticity of the versions of the Classics that undergirded the dominant Confucian ideology, thereby laying the foundation for late-nineteenth- and early-twentieth-century scholars' "rejection of the entire Confucian legacy."⁶¹ Yet until these ideas constituted a manifest threat, the government did not attempt to silence their advocates. In sum, the paternalist political culture of late imperial China accommodated the flow of a broad—albeit not unlimited—spectrum of information.

The political cultures in the party-states of the R.O.C. and the P.R.C. have condoned a much narrower range of views. The R.O.C. benchmark of truth was the thought of Sun Yatsen, its first president and the founder of the Nationalist Party. However, the R.O.C. lacked the capacity to fully control the flow and content of information until after the government fled to Taiwan. There, as Alford shows, it created a system of copyright registration that not only generated funding for censorship administration but also served as a sieve filtering out unwanted ideas. The P.R.C. uses a similar system that withholds copyright protection "from works the publication or distribution of which is prohibited by law"⁶² and permits publication of materials only after the authorities have reviewed the content and issued a "registration number."⁶³

60. Kai-wing Chow, *Discourse, Examination, and Local Elite: The Invention of the Tung-ch'eng School in Ch'ing China*, in *EDUCATION AND SOCIETY IN LATE IMPERIAL CHINA, 1600-1900*, at 185, 192 (Benjamin Elman & Alexander Woodside eds., 1994).

61. ELMAN, *supra* note 43, at 113, 32.

62. PRACTICAL HANDBOOK OF LAWS OF THE PEOPLE'S REPUBLIC OF CHINA GOVERNING INTELLECTUAL PROPERTY 199 (1994) (quoting Copyright Law of the P.R.C., art. 4).

63. A literal translation of the Chinese term is book number. ALFORD, *supra* note 1, at 79. On evasion of this system of control, see ORVILLE SCHELL, *THE MANDATE OF HEAVEN* 293-310 (1994).

Certainly, the primary goal of the P.R.C.'s regulations is to censor,⁶⁴ and, Alford argues, "a system of state determination of which ideas may or may not be disseminated is fundamentally incompatible with one of strong intellectual property rights in which individuals have the authority to determine how expressions of their ideas may be used and ready access to private legal remedies to vindicate such rights."⁶⁵ Yet this process of pre-publication registration suggests how, as the P.R.C. develops a socialist market economy, it intends to create a system of strong intellectual property rights for approved ideas. The key is registration. Just as paying taxes on a land transaction in imperial China made a claim litigable, pre-publication registration is the mark of the socialist state's cognizance of ownership and the right to seek protection of it in the courts. Dissident works, to the extent that they get published at all, are left unprotected; and the Chinese can claim to have created intellectual property rights with "Chinese characteristics."

Precisely because copyright can cut two ways, either opening or closing the flow of information, some scholars are inclined to the view that less, rather than more, copyright is conducive to open society. Peter Jaszi observes that a basic contradiction inheres in copyright: It aims to encourage production and dissemination of works, yet confers on their creators "the power to restrict or deny distribution."⁶⁶ In a talk on the metaphor of the frontier in the information age, James Boyle also touched on this point.⁶⁷ To settle the frontier is to demarcate, enclose, and curtail the very openness, freedom and opportunity that attracted settlers in the first place. Self-policing, decentralized, democratic structures are soon replaced by rule-making, corporate institutions discomfited by the alleged chaos and disorder of the frontier. Boyle was not opposed to rules *per se*, but called for ones that permitted maximum use of society's store of intellectual property—a large "permanent common." Similarly, Rosemary Coombe argues that intellectual property, especially trademark and copyright, by depriving us "of the optimal *cultural* conditions for dialogic practice," impedes debate, thereby producing a less open

64. For example, the Liaoning Provincial Government fined the publisher of an unauthorized translation of a Danielle Steel novel, not for violating the original's copyright, but for bypassing registration in order to sell a text with "inappropriate content." Interview with Chen Dayang, freelance translator, in Raleigh, N.C. (Sept. 1988).

65. ALFORD, *supra* note 1, at 119.

66. Jaszi, *supra* note 37, at 463.

67. James Boyle, *The Frontier as Metaphor in the Information Age*, Address at the Duke University Frontiers of Legal Thought Symposium on Law in the Information Age: The First Amendment, Privacy and Electronic Networks (Jan. 27, 1995).

society.⁶⁸ Strong property rights may be a bulwark for protecting individual liberties against the state. But, if property rights are too strong, powerful individuals or groups may use them to suppress the marginal or powerless.

This notion of wielding intellectual property as a club against the disadvantaged may partially explain the blithe disregard in the P.R.C. and the R.O.C. for American trademarks and copyrights. On both sides of the Taiwan Straits, Alford makes clear, resentment against American bullying runs high. On the mainland, there is strong sentiment that “the world [that is, the West] owes China something” for past humiliations. Scholars see clashes such as the one over intellectual property not as cultural but as economic conflicts.⁶⁹ Thus, intellectual property pirates know full well that their conduct is illegal, but some Chinese may think appropriating American intellectual property is a justifiable act of self-defense against economic imperialism. Or, to put it more colorfully: “To screw foreigners is patriotic.”⁷⁰ A more benign explanation might be that Chinese counterfeiters are simply using the iconographic power of a foreign trademark to lend cachet to their product.⁷¹ But in any case, as Alford emphatically demonstrates, rights consciousness of any sort cannot develop in a political culture that suppresses rather than nurtures negotiation and struggle over meaning.

The Role of Courts

Over the last several years, as case materials from late-imperial and Republican China have become available, American and Chinese researchers have begun to produce a body of archival-based scholarship that demonstrates greater use of courts and quasi-judicial institutions (e.g., the “courts” of chambers of commerce) than previously assumed.⁷² Alford cites this literature, but may underes-

68. Rosemary J. Coombe, *Objects of Property and Subjects of Politics: Intellectual Property Laws and Democratic Dialogue*, 69 TEX. L. REV. 1860, 1866 (1991).

69. Geremie Barmé, *To Screw Foreigners is Patriotic: China's Avant-Garde Nationalists*, 34 CHINA J. 213, 216 (1995).

70. *Id.* at 209. The original use of the phrase denoted the physical act of screwing. Barmé and I use it more generally in the figurative sense.

71. It is important to distinguish among the different kinds of pirating and counterfeiting. For example, several years ago one would see in China t-shirts for teams such as the Houston Bulls with pictures of baseball players. The intent here was to use English names to increase the attractiveness of the shirt, much as putting the Hooters NASCAR logo on baseball caps does today. From conversations with purchasers of these items, it is clear consumers are utterly unaware of any significance or lack thereof in these trademarks. However, purchasers of products with the Motorola, Disney, Casio, or IBM logos or the brand names of high quality Chinese liquors anticipate that the trademark represents value. It is the intent of counterfeiters to use those implications to deceive the customer.

72. See generally Ma Min, *Judicial Authority and the Chamber of Commerce: Merchant Dispute Mediation and Adjudication in Suzhou City in the Late Qing*, Address at Luce

time the extent of this phenomena, especially for the Republican-period.⁷³ The Number Two Historical Archives in Nanjing possesses an enormous documentary record of proceedings from Republican period judicial and quasi-judicial institutions at both the national and provincial levels. My survey of the catalogues and perusal of some cases suggests that these materials can help us understand how the Chinese thought about property and intellectual property issues, how foreign ideas and pressures affected China's legal culture, and how much access there was outside major metropolitan areas to viable courts, competent judges, and Western-trained lawyers. The view of British expatriates in China that courts "reached decisions irrespective of the existence of duly registered trademarks,"⁷⁴ needs to be reviewed in light of the arguments and decisions in these records.

Whatever new findings researchers may make, they are unlikely to challenge Alford's analysis that the Guomindang had little appreciation of a strong, independent legal system. Nevertheless, if courts exist and offer an iota of procedural and substantive justice, the Chinese, just as other people, will turn to them as a last resort to manage conflict. They will turn to them even in chaotic times on the cusp of political change that will render the courts' decisions moot,⁷⁵ and even if the courts cannot fully protect citizens' civil and political rights because property rights take precedence. Either for want of will or capacity, the courts may not be able to enforce these decisions, but use of courts may create habits and expectations that can, in turn, lead to greater civil and political rights.⁷⁶

Conference Symposium at UCLA on "Code and Practice in Imperial Chinese Law" (Aug. 8-10, 1993). Professor Ma also has a forthcoming monograph on the Suzhou Chamber of Commerce. The Suzhou Municipal Archives has compiled an unpublished three-volume set of materials on the Suzhou Chamber. Kwang Man Bun discusses the conflict processing work of the Tianjin Chamber of Commerce in *The Merchant World of Tianjin: Society and Economy of a Chinese City* (1990) (unpublished Ph.D. dissertation, Stanford University). On chambers of commerce in general, see YU HEPING, *ZAOQI SHANGHUI YU ZHONGGUO XIANDAI HUA* [EARLY CHAMBERS OF COMMERCE AND CHINA'S MODERNIZATION] (1993). The Liaoning Provincial Archives contains substantial holdings from the Fengtian Chamber of Commerce. *LIAONING SHENG DANG'AN GUAN ZHINAN* [A GUIDE TO THE LIAONING PROVINCIAL ARCHIVES] 67 (1993).

73. ALFORD, *supra* note 1, at 148 n.154.

74. ALFORD, *supra* note 1, at 53. The public catalogue for the Number Two Archives is a mere hint of the richness of the actual holdings. See *ZHONGGUO DI'ER LISHI DANG'AN GUAN JIANMING ZHINAN* [A BRIEF GUIDE TO THE SECOND HISTORICAL ARCHIVES OF CHINA] 103-07 (1987). Mary Buck is drawing on these materials for a dissertation at Harvard on judicial reasoning.

75. For example, a case of administration litigation over water usage was still being fought out in October 1949. See, e.g., Case 29.147, Administrative Courts, Number Two Historical Archives, Nanjing. Such behavior is of course not peculiar to China. Paul Haagen, my colleague at Duke, has recently come across cases from Atlanta on the eve of its fall to Sherman in which ownership disputes over slaves were still being litigated.

76. Cf. ALFORD, *supra* note 1, at 120. I make this point more fully in Jonathan Ocko, *Introduction to Special Issue on Emerging Framework of Chinese Civil Law*, 52 *LAW &*

This is why it will be important for us to track carefully the decisions on intellectual property that issue from courts in Taiwan and the P.R.C. By looking at those that are solely domestic as well as those that involve American parties, we can begin to construct an understanding of the legal sensibility and reasoning being applied: Is it rights-based; is it being shaped by indigenous or international values; are local courts insulated from domestic administrative pressures and foreign policy concerns; do courts understand what intellectual property is? The evidence to date, ably presented by Alford, is that, in the P.R.C. administrative intervention and unfamiliarity with intellectual property concepts remain major problems. Moreover, on both sides of the Taiwan straits, foreign and domestic parties are victimized by courts' protection of local interests.⁷⁷

The case of Kellogg's Corn Flakes is illustrative on several points.⁷⁸ Soon after successfully establishing the product in southern China, Kellogg's discovered a Chinese company selling a cereal in packaging that was nearly identical to its own. The Chinese brand name, a transliteration of Kellogg's, was written in Kellogg's distinctive script. Every statement on the box, including the copyrighted slogans was precisely replicated. The only visible difference was the picture of the Chinese product, which looked more like Frito's than corn flakes. At the court of first instance, Kellogg's lost its case for trademark infringement. Relying on a tendentious line of reasoning and reading of the evidence, the local court not only found for the defendant, but also ordered Kellogg's to pay court costs and damages. Kellogg's appealed to the provincial high court, which, soon after the U.S. and China signed an intellectual property Memorandum of Understanding in February 1995, overturned the initial decision.⁷⁹ Though it provided sound legal reasons, one also wonders whether the high court acted without instruction from political authorities. At least in this instance, the absence of complete judicial independence may have proved salutary for U.S. businesses.

III

For the China specialist, *To Steal a Book* is a stimulating, challenging work whose findings touch on a number of central questions.

CONTEMP. PROBS. 1, 17-22 (1989). See also Stanley Lubman, *Introduction: The Future of Chinese Law*, 141 CHINA Q. 1, 20 (1995).

77. ALFORD, *supra* note 1, at 91-92. Interview with Supreme Court judge from Taiwan, in Durham, N.C. (Feb. 1, 1996) (interview granted on condition of anonymity).

78. Interview with Li Jingbing, partner in the Beijing Beidou Firm, which represented Kellogg's, in Beijing, China (Mar. 10, 1995).

79. On the MOU, see the testimony to Congress of Deputy U.S. Trade Representative Charlene Barshefsky, NEXIS, News/Cumnews, (Mar. 2, 1995).

Although I have minor disagreements with some conclusions and feel that at times Alford's emphasis on an enduring Chinese political culture leads him to forget briefly his own warning—"at no time is any society's culture monolithic"⁸⁰—I still offer it an academic's highest praise: I commend *To Steal a Book* to the non-specialist as an engaging, reliable guide to complex issues such as Chinese and comparative intellectual property, Sino-foreign legal interaction, and current American trade policy toward China. Alford's work reminds the non-specialist that, despite the current focus on bilateral tensions and American losses, the course of intellectual property law in China has been and will be shaped by *China's* political culture and by the rights and interests of *Chinese* authors, inventors, and companies.

One hopes that when Professor Alford completes his current research on the impact of American legal education on a generation of Chinese lawyers and jurists, he will return to the subject of intellectual property. In the meantime, one expects that many readers, like the Chinese literati Alford discusses, will be paying his book the ultimate compliment, and making "fair use" of it in their own work.

80. ALFORD, *supra* note 1, at 6.