

BOOK NOTE

TO STEAL A BOOK IS AN ELEGANT OFFENSE: INTELLECTUAL PROPERTY LAW IN CHINESE CIVILIZATION

By William P. Alford.¹

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Perhaps the most prominent issue in American foreign trade policy this year was the trade war between the U.S. and China over protection of American intellectual property against infringement by Chinese entrepreneurs. Historically, China has allowed massive infringement of copyrights (e.g., compact discs, software), trademarks (most notoriously Disney characters), and patents. By U.S. government estimates, this pirating of American intellectual property costs domestic companies \$1 billion per year.² Better protection of American intellectual property would open up a market of 1.2 billion consumers.³

William P. Alford's book *To Steal a Book Is an Elegant Offense* deals with the troubled history of this long-running Sino-Western battle and its possible causes, and offers a policy analysis of the conventional American tactic of achieving "compliance" using massive trade sanctions. The author states from the outset that in writing the book he has attempted to shed his Western thinking about intellectual property and genuinely understand the Chinese viewpoint (pp. 4-6).

Professor Alford makes four propositions in the Introduction: first, there is no counterpart in Chinese culture to our concept of intellectual property; second, early attempts at intellectual property law "reform" in China at the turn of the century failed due to the inherent ineffectiveness of coercion to affect true change; third, attempts to reconcile Chinese intellectual property law with that of the West failed to address differences in legal systems; and fourth, despite conspicuous bilateral agree-

1. Professor of Law and Director, East Asian Legal Studies Program, Harvard University.

2. James Gerstenzang & Rone Tempest, *China Pact Leaves Many Questions*, L.A. TIMES, Feb. 27, 1995, at A1, A13.

3. *Id.*

ments reached between the U.S. and China, problems are bound to continue due to fundamental misconceptions about the nature of legal development (p. 2).

The book begins by tracing the historical development of intellectual property in imperial China. Professor Alford states that to understand Chinese culture's views on intellectual property we must look back over a millennium to the appearance of printing in China during the Tang dynasty (618-906 A.D.) (p. 9). The Chinese government's attitude towards intellectual property is strikingly similar in origin to that of the Anglo-American legal system. Both originally used patent and copyright to further their own ends. The Chinese government, whether by popular consensus or by will of the sovereign, was seen as being a fiduciary to the people; it was up to the monarch to keep heterodox and unworthy ideas from the people (p. 20). Copyright law served the dual purpose of entrenchment of the monarchy and "protection" of the people by allowing for prepublication review of printed materials (pp. 12-13).

This paradigm changed in the West in the 17th and 18th centuries as evidenced, for example, by the U.S. Constitution (p. 18). Patent and copyright law began being viewed as a tool of the government to promote research and development by rewarding inventors and authors with monopolies (p. 18). Professor Alford asserts that this shift in paradigms simply never occurred in China (p. 19). Consequently, the Confucian disdain for the profit motive prevailed over the capitalistic drive which propelled intellectual property reform in the West (p. 29).

In a chapter entitled "Learning the Law at Gunpoint," Professor Alford goes on to describe early Western attempts to "reform" intellectual property law in China during the turn of the century. After China's defeat in the Opium Wars, the West was in a position to demand concessions in the form of such legal change (pp. 32-34). With the United States and the United Kingdom at the forefront, such demands were made with considerable force (p. 36). This degree of intervention shocks contemporary sensibilities, yet in drawing parallels to modern treatment of the same problem, Professor Alford successfully emphasizes the flaws of this "solution."

In his description of turn-of-the-century China, the author paints a vivid picture of a nation quixotically attempting to cling to fundamental traditional values in the face of the then-budding globalism which, perhaps prematurely, exposed it to foreign cultures. The reader is sympathetically struck by the Chinese government's attitude of perfunctory compliance with Western demands, like a child pinned to the ground

forced to say "uncle." Professor Alford describes Westerners' impatience with Chinese ways and their inability, or unwillingness, to understand Chinese legal institutions (p. 45). There is a background feeling of regret that had they formulated policy with Chinese cultural and legal history in mind, Western diplomats would have seen how foreign our concept of intellectual property seemed to the Chinese, and perhaps acted less imperialistically. This perception is heightened when Professor Alford points out that it never occurred to Western diplomats to explain to their Chinese colleagues the advantages of protecting intellectual property (p. 49).

The book goes on to bring the reader up to speed with respect to developments of intellectual property law in the framework of China's modern-day controlled economy. The chapter is shrouded in confusion, not by any fault of the author's, but because of the tangled, amorphous mass of law that governed this area during the greater part of communist rule. To confuse matters further, application of the law seems to have been so arbitrary and sporadic as to have caused more confusion than reassurance (p. 58). The recurring theme, again, is the cycle of Western pressure, change of formal law, confusion in application, and Western outrage.

The chapter is replete with colorful instances of infringement that are entertaining yet disturbing in that they show the degree to which intellectual property is still a foreign concept in China. One ironic example is the publication of a book purporting to be a *Complete Book of Intellectual Property*, which was so complete that it incorporated without permission or acknowledgment portions from the works of Professor Zheng, a leading Chinese scholar in the field (p. 88). Other examples illustrate that corruption in the legal system is another reason for lack of copyright enforcement (p. 93). The local courts are simply not independent enough to pass judgment on pirating industries which, at times, practically comprise the entire local economy (pp. 91-92).

In contrast to China's problems with this matter, the author brings the example of Taiwan, which shares much ancient history with the People's Republic of China, yet in recent years has succeeded in developing a respectable budding intellectual property law both on the books and in practice (pp. 107-08). Professor Alford characterizes Taiwan's new law not as mere capitulation to the West, as most Chinese legal concessions have been, but rather as true change (p. 110).

The author convincingly attributes this change to factors linked to political and technological development (p. 108). An awareness of the

need to foster the domestic technological industry was a major force in this transformation (p. 108). Once Taiwan began to produce intellectual property, internal forces demanded its protection, and Taiwan needed a legal system to accomplish this (p. 108). Since, as the book consistently points out, intellectual property law is unlikely without the rule of law, this too needed to be developed. Professor Alford attributes the legal change in Taiwan to a genuine commitment to pluralism and multiparty democracy (p. 109). In other words, the reason recent legal change in Taiwan was not superficial, is because it came from *domestic* political and industrial forces.

Finally, the author analyzes American foreign policy regarding enforcement of intellectual property rights in the People's Republic of China. American policy is viewed as a reflection of the priorities our government has attached to various goals we have sought to achieve abroad (p. 113). Two chief issues that United States foreign policy has sought to affect in China are human rights and intellectual property. While most policy analysts view the two separately, or even diametrically opposed to one another (i.e., industry vs. individual), Professor Alford demonstrates that the two problems emanate from the selfsame phenomenon in Chinese government—the absence of the rule of law (pp. 119-20).

Without our concept of the rule of law, a country cannot guarantee the protection of either life or property as we know them. Therefore, the argument goes, it is futile to demand formal protection for these rights when the legal framework and political culture were simply not designed to ensure them (p. 119). By showing a fundamental connection between progress in intellectual property protection and humanitarian advances in the legal realm, Professor Alford implicitly demonstrates that the virtual delinking of most-favored-nation status from human rights advances is a serious misunderstanding of the core problem. The foreign policies of recent administrations which have pressured China for reform in intellectual property law and have neglected the human rights issues have mistaken the symptom for the malady. By ignoring or being lax on the human rights issue while pressing the intellectual property issue, American government and industrialists are shooting themselves in both feet. Firstly, by focusing on the wrong area for reform, and secondly, by choosing a means (coercion) that negates the ends sought (respect for another's rights). Encouraging a more liberal legal culture would solve both intellectual property and human rights problems.

While this analysis is convincing, and most likely correct, it is a song played in a very different key than the rest of the book. One of Professor

Alford's theses throughout *To Steal a Book Is an Elegant Offense* is that law is more than a conglomerate of formal statutes or decrees enacted by a country's legislature or sovereign. The purpose of the ancient history lesson, for example, was to show contemporary Chinese attitude to law in general and as it relates to intellectual property as a direct outgrowth of the history of the culture. Law is so directly linked to a country's culture and history that transplanting law, as the U.S. and other Western countries have been doing with intellectual property protection for almost a century, is not only ineffective but perhaps deleterious as well. Another theme in the book denounces American legal and cultural imperialism as insensitive to that history and tradition. There is considerable tension between the ideals of preserving Chinese legal culture on one hand and conforming it to American culture on the other.

Using Taiwan as the exemplar of genuine legal change, it is clear that China will not be ready for such change until it desires it of its own volition. The trouble lies in translating this understanding of the paradigm to constructive criticism for American policymakers. It is unclear what Professor Alford proposes we do. Several crucial questions are left unanswered in the last chapter. For example, is it appropriate for us to meddle with another sovereign's legal framework to insure our interests? If so, how should we limit the degree of intervention in Chinese affairs? If not, are there other ways to protect our property rights within the existing framework? The dilemma is brought out sharply both in current events and in the history of the conflict. However, a response that is both effective from an American viewpoint yet not excessively Western-centric seems to elude Professor Alford as well.

Most of the book points to the suggestion that China will enact protection for intellectual property when it has developed sufficiently to require such for its own constituents, yet the last chapter points out that perhaps it is up to us to speed this process. In all, the book proposes an excellent theory of legal history in China and of legal change in general. The book's style is lucid, entertaining, and colorful. Anyone with an interest in understanding the cultural and legal core of the intellectual property dispute between China and the West should certainly read this book.

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