

**SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION'S
SUBCOMMITTEE ON TRADE, TOURISM, AND ECONOMIC DEVELOPMENT**

WRITTEN STATEMENT OF

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Mr. Chairman and Distinguished Members of the Subcommittee:

I want to thank you for inviting me to appear. My name is Bill Alford and I am the Director of East Asian Legal Studies at Harvard Law School.

I have been studying the law of the People's Republic of China since before there was much to study (i.e., in 1970), and I first began to focus on intellectual property issues there in the 1980s—initially as a practicing lawyer at a law firm in Washington representing American companies doing business in China, and subsequently as a scholar who has both taught in China (I was a co-founder in the early 1980s of the first academic program in American law in the PRC) and conducted research there. Indeed, my interest in writing about intellectual property law issues in China as a professor grew out of the challenges I had to deal with as a practitioner. What I would like to do today is to share with you some of what I have learned about the setting that gives rise to the problem of intellectual property infringement in China (the subject that brings us here), and to offer a few comments about its implications.

To do so is not to offer an apology for it. The scale of the problem, as we all know, remains massive, and harmful to Chinese and Americans alike. Beyond economic harm, fake medicines and counterfeit auto and airplane parts, by way of illustration, have the potential to cause grave, if not fatal, injury. Indeed, at a much less important level, I am a victim myself. Significant parts of my book on the subject—entitled *To Steal a Book is an Elegant Offense: Intellectual Property Law in Chinese Civilization*¹—have recently been reproduced commercially without authorization, attribution or compensation—by no less than a professor of intellectual property at one of Beijing's leading universities!

¹ Stanford University Press (1995).

Rather, I want to discuss the broader context because I believe that understanding it is crucial if we are to appreciate the nature of the problem and what part our government might play in addressing it.

China today has a fairly complete set of intellectual property laws—most observers agree that in terms of law on the books, China for the most part has met its obligations under the TRIPS agreement of the World Trade Organization. As the United States Trade Representative noted less than year ago in announcing the results of its “out-of-cycle review” of China vis-à-vis intellectual property matters, “China’s central government has made largely satisfactory progress in bringing China’s IPR laws and regulations into line with China’s WTO obligations.”² To be sure, there are calls for a number of further refinements, including stiffer penalties and greater ease of action against wholesalers and re-sellers of infringing items,³ and the Chinese government has announced that it is contemplating some noteworthy provisions—including possibly simplifying the patent application and examination process, increasing penalties for infringement, and establishing specialized intellectual property courts.⁴ But still, by and large, China’s laws are, on their face, not the principal problem.

What China lacks is uniform, effective enforcement of those laws, resulting in the large intellectual property infringement both in China and in the export market that brings us here today.

It is tempting, of course, to view this as a matter of will—or lack of will—which has implications for how we would want the U.S. government to approach the matter. People who hold this view basically believe that if the Chinese authorities were willing to crack down and enforce their laws with sufficient vigor, the problem would largely go away. The logical concomitant of that is that our government ought to be marshalling its energies to bring as much pressure as possible to bear on the Chinese authorities to do just that. And indeed, the U.S. government has been endeavoring to do just that over the past decade and a half, threatening, during the first Bush presidency and the Clinton years, to impose what, at the time, would have been the most substantial trade sanctions in U.S. history.

Will is certainly not irrelevant. On the positive side, the importance of will clearly is evident in the fact that China has established specialized intellectual property chambers at the intermediate

² United States Trade Representative, “Out-of-cycle Review Results,” posted on the USTR website, April 29, 2005 (last visited March 6, 2006). It should be noted that at the end of this review, the USTR elevated China to its Special 301 “Priority Watch” list because these laws were not adequately enforced. The view that China now has a reasonably complete body of intellectual property law at the national level is shared by others. Scott M. Flicker and Matthew S. Dunne, in “China has Stepped up IP Enforcement Recently,” *The National Law Journal*, May 9, 2004, indicate that “China is a party to every major intellectual property convention and treaty, and its laws and regulations are mostly up to the rigorous standards imposed by ...” the WTO’s TRIPS agreement. Also, Alex Scott with Andrew Wood, for instance, in “Intellectual Asset Management,” *Chemical Week*, January 18, 2006, describe “China’s IP regulations...as now among the toughest in the world,” citing Ian Harvey, “chairman of the Intellectual Property Institute (London) and former CEO of pharmaceutical technology transfer company British Technology Group (London).”

³ Joseph Simone, “SPC and SPP Issue New Criminal Liability Standards for IP Crimes,” *China Law & Practice*, February 2005.

⁴ *Xinhua*, “China to Revise Patent Law,” November 24, 2005.

court level in many major urban centers and has chosen to staff these chambers with some of the nation's best trained and most capable judges, including many with advanced degrees. And it is better than not that the State Council—the primary administrative entity in the Chinese government—has recently unveiled a comprehensive 15-year blueprint for scientific and technological development that makes the argument that China needs better legal protection to foster the innovation necessary for continued economic growth.⁵ On the negative side, will—or the lack thereof—clearly helps explain such things as the government's toleration of things like the Chery automobile, the city of Yiwu (in Zhejiang) whose economy was heavily dependent on its being a distribution center for infringing goods, and the fact that the National Copyright Administration continues to be inadequately staffed (having some 200 persons for enforcement issues nationwide).

And yet we would be mistaken if we think that we are here dealing only with a matter of will and that if we bring enough pressure to bear, we can effect the type of change we would like to see. As mentioned, the U.S. has tried that in Republican and Democratic administrations alike to limited avail. There are, I would suggest, very fundamental challenges that are a product of China's history, her present institutional structure, and her course of future development that we need to heed if we wish to enhance the prospects for intellectual property protection in China—and particularly if we hope to contribute to building a China in which more is done through the private sector and through civil society than through the state.

History ought not to be an excuse for inadequate adherence to international obligations nor is it all-determinative—Hong Kong and Taiwan are Chinese, after all, and they each seem to have addressed their infringement problems more effectively—but nor can history be ignored if our goal is a realistic strategy. As I discuss in the beginning of my (pirated) book in detail, there was essentially nothing comparable to our idea of intellectual property protection prior to its introduction by the West in the early 20th century. Confucianism, the pre-eminent ideology in pre-20th century China, venerated the past and extolled its emulation as a way for individuals both to understand its lessons and demonstrate their respect for it. In the words of the Confucian *Analects*, the seminal text of Confucianism, “The Master [Confucius himself] said ‘I transmit rather than create; I believe in and love the Ancients.’”⁶ More practically, the emperors who ruled China prior to the 20th century were, indeed, concerned about unauthorized publication but for the purpose of controlling rather than promoting private expression.⁷

Western ideas of intellectual property rights were introduced early in the 20th century but, unfortunately, much of what was introduced then was done via threats, and intended chiefly to protect foreign property—which has meant that it was and, to some degree, continues to be, readily associated in many Chinese minds with foreign impositions rather than understood as useful for China's own development.⁸ Furthermore, the chaos that characterized much of the first half of the 20th century and the impact of Marxism that marked much of the next three decades, meant that it was not until the 1980s—scarcely more than a generation ago—that one

⁵ *Xinhua*, “China to Accelerate Implementation of National IPR Strategy,” February 9, 2006.

⁶ Arthur Waley, trans., *The Analects of Confucius*, Book 7, Chapter 1 (1938).

⁷ Alford, *To Steal a Book is an Elegant Offense: Intellectual Property Law in Chinese Civilization* (1995).

⁸ *Id.*

began to see the introduction of modern ideas of intellectual property in China, and even now, for many citizens, these remain novel ideas.

Compounding the task of grounding intellectual property in China is the nature of that nation's institutions today more generally. We tend to think that because China is not a democracy, its leaders have the ability fully to assert their will as they wish. It would, however, be more accurate to say that even in areas about which they care deeply—such as endeavoring to control the flow of information—their efforts fall well short of what they would like to accomplish. Beijing can and does assert itself with regard to the internet or the Falungong, often with considerable impact, but still, coercion ultimately is no substitute for effective institutions that run on their own and enjoy popular support. It is hard to think of an area of Chinese law today that routinely operates as intended. The problems of local favoritism, insufficient expertise, and corruption that aggravate enforcement of intellectual property rights also crop up across the board in Chinese legal affairs.

Appreciating the relevance of history and of institutions underscores why pressure alone, especially if principally from outside, is not enough. External pressure has a role (and it would be naïve or disingenuous to suggest otherwise) but I doubt that we (even working with our allies) possess sufficient pressure to get the Chinese authorities to embrace policies that they otherwise would not be inclined to follow and which, in any event, they still lack the institutional infrastructure fully to carry out. Moreover, even if we did possess such pressure, I believe that we are better advised to be at least as concerned with enlisting the support of, and enhancing the capabilities of, non-state actors as we are with encouraging officialdom to exert more control, particularly when it comes to publication and other media of expression.

If we want to create a better climate for intellectual property protection in China, we need, in addition to the type of external vigilance called for in the well-crafted “Top to Bottom Review” of the USTR,⁹ to do what we can to promote better and broader public understanding there of rights generally, and to help build better institutions—even as we appreciate that these entail long-term processes and that their ultimate shape will (and should) rest primarily with the Chinese people. With respect to rights, this means not only working to educate people about intellectual property rights but about rights more generally, for, as I argue in my book, it seems unrealistic to expect that people will heed complex abstract rights of foreigners if they are not accustomed to asserting their own fundamental rights.

This also means that there ought to be more support—from our government and from private sources alike—for programs that foster the development of legal institutions and the growth of civil society, such as, but not limited to, the State Department's rule-of-law initiatives, as well as efforts more specifically tailored to intellectual property. Contrary to the conventional wisdom, a greater attention on the part of the business community to issues of human rights is likely to advance, rather than impede, the realization in China of important economic objectives such as greater protection for intellectual property rights.

⁹ United States Trade Representative, “US-China Trade Relations: Entering a New Phase of Greater Accountability and Enforcement: Top-to-Bottom Review,” February 2006.

The reason for this is that there is a far closer correlation between a strong civil society and strong intellectual property protection than there is between a strong state and strong intellectual property protection. Put differently, intellectual property protection flourishes in states that nurture free expression and free association. This ought not to be surprising when you think that in such states, citizens have more private expression and other private interests to protect, have a greater rights consciousness, are better able to band together to protect their interests, and have more in the way of rights-protecting institutions on which to call.

We are seeing early evidence of this in China. As civil society and private business have started to emerge, we are seeing the beginnings of a domestic constituency with valuable intellectual property and other interests of their own to protect. As *Chemical Week* magazine observes, “China’s efforts to increase IP protection is linked to the fact that the country has increasingly more IP of its own to protect.”¹⁰ Indeed, in 2004, some 95 percent of infringement litigation was initiated by PRC plaintiffs. This phenomenon has the potential to diminish the idea that intellectual property is something foreign at the same time that it is creating allies in the effort to improve enforcement, as the Quality Brands Protection Committee (comprised of foreign-invested firms) has been discovering as it works informally with Chinese companies to seek better protection.

But lest we make too much of this, we need be mindful of two caveats. The first is that even as we see the role of non-state actors growing, we ought not to underestimate the ongoing role of the Chinese state. One hopes that the State Council’s call for more attention to the legal protection of Chinese innovation can be turned to the protection of intellectual property rights in general, but we should also remember that Chinese authorities have also of late been expressing concern that intellectual property rights may account for what some see as an excess flow of royalties out of China.

And secondly, we do need to appreciate that the very same economic changes that are nurturing potential allies, by definition also have the potential to make them strong future competitors. The *Chemical Week* story quoted above also states that “Chinese patented technologies will soon begin to enter the global market, with electronic goods coming in the next five years and pharmaceuticals in up to 15 years, he [Ian Harvey of the Intellectual Property Institute (London)] says. ‘China is on the verge of becoming a major technology and IP generator, creating a tidal wave of patents likely to wash over the US and Europe’s shores in the next decade, enabling China to dominate significant technology areas,’ he adds.” Indeed, we are already beginning to see Chinese companies thinking about how to use intellectual property law, anti-trust law, their economic power, and, of course, the assistance of the state, to protect and advance their own interests against leading foreign companies as well as domestic competitors at home and even abroad.¹¹

In any event, I do hope that these modest observations are of some use to you, and I stand ready to try to answer any questions you may have about them.

¹⁰ Alex Scott with Andrew Wood, “Intellectual Asset Management,” *Chemical Week*, January 18, 2006.

¹¹ An example would be the recent suit by Netac, a Shenzhen producer of flash memory external storage drives, in Texas against a U.S. company alleging infringement of a U.S. patent. AFX News Limited, “China’s Netac Files IPR Lawsuit Against U.S.-based PNY Technologies—Report,” *Forbes*, February 16, 2006.