HOW THEORY DOES—AND DOES NOT—MATTER: AMERICAN APPROACHES TO INTELLECTUAL PROPERTY LAW IN EAST ASIA

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I. INTRODUCTION

Less than a decade ago, most observers would have thought it odd to convene a multi-day international conference in order to examine intellectual property protection in East Asia. East Asia, so the conventional way of such wisdom went, provided precious little in the way of such protection, while the field of intellectual property generally, many thought, was hardly one of the more dynamic in legal academe.

Today, few would doubt the value of drawing together the impressive array of scholars that Charles McManis and William Jones have brought to the Washington University School of Law to consider intellectual property protection in East Asia. Indeed, I suspect that many observers would share my conviction that it would be difficult now to do justice to this complex topic absent an assemblage of the type gathered here—comprised of scholars trained in law, economics, political science, sociology, international relations, literature, and East Asian Studies and representing such jurisdictions as China, Japan, Korea, Taiwan, and the United States.

It is, therefore, a distinct privilege to have been asked to deliver this keynote address to so accomplished a group, including, as it does, many scholars whose knowledge, experience, and wisdom far exceed my own.

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† Henry L. Stimson Professor of Law and Director of East Asian Legal Studies, Harvard Law School. I wish to dedicate this essay to two scholars whose examples have exerted a powerful influence on my life and that of many others—the late Professor Melville Nimmer of UCLA and Professor William Jones of Washington University. Each has blended academic excellence and humaneness in ways that we would all do well to emulate.

I would like to take this opportunity in order to raise, but by no means pretend to answer, what I see as some of the many important issues that this conference is likely to address. I will try to eschew the highly technical—to the limited extent that I even know what it is—and instead search for those common themes and concerns that I hope will enable us to bring our varied expertise to bear on the topic of intellectual property protection in East Asia.

My analysis is divided into four parts. I want first to offer a quick tour of the treatment of the field of intellectual property law in American academic and public life, looking in particular at why there was such inattention to this area prior to the 1980s and then at why this has begun significantly to change over the past decade. With this background in hand, next I will endeavor—again far too briefly—to suggest some of the ways in which recent scholarship in this field aids us in understanding issues of intellectual property at controversy between the United States and the nations of East Asia while still leaving many central questions unanswered. In the third part of my discussion, I will focus more fully on the way such issues are treated in our public life. I conclude by providing a sampling of the concerns that I hope we will be able to keep in mind during this conference and beyond.

II. NEGLECT AND DISCOVERY

Let us turn first to the modern history of the treatment of intellectual property law in this country. It is scant exaggeration to suggest that until the 1970s, American legal academe generally regarded intellectual property law as a subject of modest intellectual merit, at least compared to such mainstays as constitutional law or contract. As a consequence, with a few notable exceptions such as Professors Melville Nimmer of UCLA and Edmund Kitch of the University of Virginia, courses in this area were typically taught on a part-time basis by adjuncts and addressed, if at all, in important scholarly journals in a highly doctrinal or technical manner. Relatively little of the economic, philosophical, or other extra-legal disciplinary frameworks that had already begun to inform other areas of the law was brought to bear in this area.

Nor, it seems, was there appreciably more interest in intellectual property issues in other parts of the university where one might have anticipated it, such as in faculties of economics, history, history of science, business, and public administration. This is not to deny that there were some who explored this area fruitfully. Washington University's new Nobelist, Douglass North, for example, was arguing more than two decades ago that strong,

clear patent rights were a central factor in the rise of certain jurisdictions in the West to world economic dominance[1]—to which theme I shall return later. But such voices were in a distinct minority.

The relative inattention in American academe to the field of intellectual property was mirrored in this nation's public arena. To be sure, there had long been concern about science policy. But whether due to arrogance about our technological superiority, a relative indifference to improper use of our intellectual property other than by those immediately affected, or a failure to appreciate how much more crucial such issues would be as we lost our manufacturing base, public policy paid scant heed to the international dimensions of intellectual property law through the 1970s.[2] And in neither academe nor government was there any sustained attention to the intersection of intellectual property and East Asia.[3] Indeed, as I suggest in my book, even American publishers who one would think would have had a strong self-interest in such matters, failed in many instances to take even modest steps to secure at least nominal protection for their property in that part of the world.[4]

By the late 1970s, this began to change. In our universities, scholars of varying philosophical and methodological stripes began to see what an extraordinarily rich subject intellectual property might be. Accordingly, they proceeded to tap into it, both bringing to bear analytical frameworks borrowed from other disciplines and using patent and copyright to ask broader questions about law. The charge was led, in turn, by scholars versed in economics, including Professor Kitch,[5] Professor Richard Posner of the University of Chicago, who is now sitting on the United States Court of Appeals for the Seventh Circuit,[6] and Professor Richard Levin, who is now President of Yale.[7] Applying economic analysis to intellectual property law, these individuals and others working in a similar vein raised so many insightful questions that it is hard, in retrospect, to understand how scholars—

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

2. *See, e.g.*, DOUGLASS C. NORTH & ROBERT P. THOMAS, THE RISE OF THE WESTERN WORLD: A NEW ECONOMIC HISTORY (1973).

3. *See, e.g.*, CURTIS G. BENJAMIN, U.S. BOOKS ABROAD: NEGLECTED AMBASSADORS (1984).

4. ALFORD, *supra* note 1, ch. 5.

5. *See, e.g.*, Edmund Kitch, *The Nature and Function of the Patent System*, 20 J.L. & ECON. 265 (1977).

6. *See, e.g.*, William H. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325 (1989).

7. *See, e.g.*, Richard Levin et al., *Appropriating the Returns from Industrial R & D*, 3 BROOKINGS PAPERS ON ECON. ACTIVITY 783 (1987).

no matter what their intellectual orientation—could for so long have ignored this important set of tools.

The economists have not been alone, however, in coming to appreciate the potential of this field. Let me briefly make mention of three other approaches toward intellectual property issues, acknowledging that the allocation of particular persons to particular schools is mine, rather than theirs. What one might term public policy buffs—such as my former colleague Stephen Breyer, who now sits on the United States Supreme Court,[8] my colleague Professor Arthur Miller,[9] and Pamela Samuelson of the University of Pittsburgh,[10] among many others—began to raise important questions with direct regulatory implications about the state's role in according quasi-monopolistic status to intellectual property holders. A second group of scholars—such as my colleagues Terry Fisher[11] and Lloyd Weinreb,[12] and Professor Wendy Gordon of Rutgers[13]—working in a more philosophically oriented mode, have sought to shed light on what may entitle certain individuals to claim ownership interests in particular articulations of ideas. And academics associated with deconstructionism—such as legal scholars Peter Jaszi[14] and James Boyle[15] of the American University and literary scholars Martha Woodmansee of Case Western Reserve[16] and Mark Rose of the University of California, Irvine[17]—have begun to inquire as to how we should think of intellectual property in a world in which the very idea of authorship itself is seen as something of an En-

8. *See, e.g.*, Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281 (1970).

9. *See, e.g.*, Arthur R. Miller, *Copyright Protection for Computer Programs, Databases, and Computer-Generated Works: Is Anything New Since CONTU?*, 106 HARV. L. REV. 977 (1993).

10. *See, e.g.*, Pamela Samuelson, *CONTU Revisited: The Case Against Copyright Protection for Computer Programs in Machine-Readable Form*, 1984 DUKE L.J. 663.

11. *See, e.g.*, William W. Fisher III, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1661 (1988).

12. *See, e.g.*, Lloyd L. Weinreb, *Fair's Fair: A Comment on the Fair Use Doctrine*, 103 HARV. L. REV. 1137 (1990).

13. *See, e.g.*, Wendy J. Gordon, *An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent, and Encouragement Theory*, 41 STAN. L. REV. 1343 (1989).

14. *See, e.g.*, Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of "Authorship,"* 1991 DUKE L.J. 455.

15. *See, e.g.*, James Boyle, *A Theory of Law and Information: Copyright, Spleens, Blackmail, and Insider Trading*, 80 CAL. L. REV. 1413 (1992).

16. *See, e.g.*, Martha Woodmansee, *The Genius and the Copyright: Economic and Legal Conditions for the Emergence of the "Author,"* 17 EIGHTEENTH CENTURY STUD. 425 (1984).

17. *See, e.g.*, MARK ROSE, AUTHORS AND OWNERS: COPYRIGHT IN EIGHTEENTH-CENTURY BRITAIN (1993).

lightenment era construct, rather than an absolute, impervious to particular social circumstances.

The academy was not alone in its growing attention to intellectual property. During the 1980s, intellectual property issues, including those having international implications, began to elicit significant concern in public circles. Indeed, it is in these circles, rather than in the scholarly world, that we find serious attention first focused in this country on the intersection of intellectual property and East Asia.

In our public life, intellectual property went from being a back to front burner issue in part because of a growing realization of our dependence upon it. This dependence has emanated not only from the fact that ours is increasingly a service oriented economy, but also as a result of our growing understanding of the importance of new technologies. These days, for example, one can not even eat a simple breakfast without immersing oneself in intellectual property. Or, at least, so I am regularly reminded, as I pour what I fear may be genetically enhanced milk over my trademarked bananas and flakes made of hybrid corn and sold in trademarked packages covered with copyrighted advertising blather.

But intellectual property issues also came to prominence in our public life because of the link forged between them and the growth of our trade deficit during the mid-1980s. To be sure, the United States had begun to experience trade problems from the days of the Vietnam War. They continued to grow, especially vis-à-vis Japan, irrespective of steps we took. What was to change in the 1980s, however, was the assertion by intellectual property producing industries—later picked up by the government—that the unlawful appropriation by others of our intellectual property could in important measure explain our burgeoning trade deficit. If only those making unauthorized use of our intellectual property would instead pay retail price for it, so this thinking went, the revenues so generated would in effect wipe out much of our deficit.[18]

As was the case with that non-genetically engineered apple that started humankind down the path of ruin, this thinking had a certain allure. Yet, attractive though it may have been, it was premised on a somewhat faulty assumption: namely, that if precluded from making unauthorized copies, alleged infringers would certainly purchase the item at its full retail price, rather than, for example, negotiating a discount, purchasing cheaper alternatives, developing their own surrogates, or simply forgoing it

18. This argument is examined in William P. Alford, *Intellectual Property, Trade, and Taiwan: A GATT-fly's View*, 1992 COLUM. BUS. L. REV. 97.

altogether. Proponents of the notion that intellectual property leakage is a central factor in explaining our trade deficit seemed not to understand how unlikely a citizen of the People's Republic of China (P.R.C.) earning fifty dollars a month would be to fork out more than a month's salary to buy even such an outstanding work as Melville Nimmer and Paul Geller's treatise on world-wide copyright.[19] And they slighted the fact that any responsible effort to balance the books would need to take account of the foreign intellectual property that we Americans historically have used without authorization.[20]

Despite its many limitations, however, this vision of reality had a great deal of appeal in government and media circles. For one thing, it was most seemingly cogent in the very parts of the world—East Asia and especially Japan—where we were experiencing many of our largest deficits. For another, it spoke to some of our less attractive, subconscious fears, offering a possible explanation of why people with traditions different from our own—who some here considered less creative and capable than ourselves—were besting us at our own game.[21] And, neatly enough, it did all this by turning one of our greatest vulnerabilities, our seemingly unquenchable thirst for imported goods, into a weapon—namely access to our market—that we could then use against the very people who had purloined our intellectual property, all of whom needed to sell their wares here.

This link between intellectual property and trade, especially concerning East Asia, soon became more than just rhetorical. Indeed, by the mid- to late 1980s, it had become an important element of our public policy. So it was that in the Omnibus Trade Act of 1988, the United States created so-called Special 301.[22] This is not a breakfast cereal, but rather a measure that requires the United States Trade Representative (USTR) each year to promulgate a list of what it unilaterally decides are offenses committed against our intellectual property by our trading partners and to initiate actions—potentially in contravention of our obligations under the General Agreement on Tariffs and Trade (GATT) and certainly contrary to its spirit—against such countries unless they make satisfactory amends on our timetable

19. MELVILLE B. NIMMER & PAUL E. GELLER, INTERNATIONAL COPYRIGHT LAW AND PRACTICE (1988).

20. American piracy is discussed in ALBERT J. CLARK, THE MOVEMENT FOR INTERNATIONAL COPYRIGHT IN NINETEENTH CENTURY AMERICA (1960).

21. Subcommittee on Oversight and Investigation of the Committee on Energy and Commerce, "Unfair Foreign Trade Practices Stealing American Intellectual Property: Imitation is Not Flattery," 98th Cong., 2d sess., Feb. 1984.

22. For a thorough discussion of this measure, see Judith Bello & Alan Holmer, "SPECIAL 301": ITS REQUIREMENTS, IMPLEMENTATION AND SIGNIFICANCE, 13 FORDHAM INT'L L.J. 259 (1989-90).

in our way. And so it was on the multilateral front that, as Professor Jerome Reichman discusses in an appreciably more learned fashion, the United States demanded that the Uruguay Round of the GATT produce a code authorizing trade sanctions in response to intellectual property violations. The United States championed this cause even though many of our trading partners argued that such a step both diminished the authority of existing international bodies in this area—such as the World Intellectual Property Organization and the United Nations Economic, Social and Cultural Organization—and took GATT off in wholly new directions that were not necessarily consistent with its basic purposes and premises.[23]

If anything, this attention to intellectual property in our public arena has become even more conspicuous in recent years. First the Bush administration and now the Clinton administration elevated it into one of the central objectives of American foreign policy generally, and particularly concerning East Asia. Lest you think I am exaggerating, consider, as Paul Liu discusses,[24] the enormous impact that intellectual property issues have had in relations between the United States and the Republic of China (ROC) over the past five years, as well as the implications that this bilateral dispute has, in turn, had internally for relations between the ROC's executive and legislative branches.[25] Keep in mind also that while he was Secretary of State, James Baker informed the leadership of the P.R.C. that there were three issues of equal importance that would determine the fate of U.S.-P.R.C. relations: the spread of weapons of mass destruction, human rights, and trade—of which protection for American intellectual property headed the list. Much the same message has been since reaffirmed by the Clinton administration.[26]

I like Mickey Mouse as much as next red-blooded American—indeed, I hope that I can convince the Stanford University Press to have him adorn the cover of my book. However, there is something somehow out of whack about putting the little rodent up there with nuclear war and torture. In this vein, I would note that P.R.C. acquaintances, including some not unsympathetic to the need for more intellectual property protection, have expressed amazement to me at the fact that U.S. officials have be-

23. *See, e.g.*, Jerome H. Reichman, *The TRIPS Component of the GATT's Uruguay Round: Comparative Prospects for Intellectual Property Owners in an Integrated World Market*, 4 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 171 (1993).

24. Paul C.B. Liu, *U.S. Industry's Influence on Intellectual Property Negotiations and Special 301 Actions*, 13 UCLA PAC. BASIN L.J. 87 (1994).

25. *See* ALFORD, *supra* note 1, ch. 5.

26. Simon Pritchard, *Mainland "Must Give More Ground" If It Expects to Reenter GATT*, CHINA MORNING POST, July 24, 1994, Money Section, at 1.

gun a number of the most important meetings between the two nations' senior officials in recent years, and expended a considerable portion of America's leverage vis-à-vis their nation, on the issue of protection for Mickey Mouse and his brethren.

III. WHAT THEORY DOES—AND DOES NOT—TELL US

Interestingly, the link forged in the public arena between intellectual property and East Asia by and large has not found a counterpart in academe in this country or elsewhere in the West. With very few exceptions—of whom Dennis Karjala[27] and Charles McManis[28] are among the most notable—American scholars, whether in law or other fields, have simply not paid much heed to this topic.

This notwithstanding, I believe that the principal schools of thought of which I spoke earlier can be of help in our effort to understand more about intellectual property in East Asia and about U.S. interaction therewith, even if it is in most instances more in a heuristic, rather than definitive, fashion. Accordingly, I would like to try to sketch out very briefly some of the ways in which three of these schools of thought might illuminate topics before us, and some of the questions they do not answer—at least at this stage of the inquiry. I will keep these comments relatively short because they, too, are intended to be heuristic, rather than definitive.

Let me turn first to economic analysis. As suggested earlier, the introduction of economic analysis has clearly been a boon to the study of intellectual property. One is hard put to look at intellectual property in East Asia without recognizing the importance of economic considerations. To put it in its starkest terms, for example, those nations in East Asia that are the least developed economically are generally those that accord the least protection to intellectual property, while those that are highly developed economically are, for the most part, the most faithful adherents to something approaching international standards of protection.

Having guided us to this level of insight, however, there are many more particular, but highly significant, questions that economic analysis leaves unanswered, at least to the extent it has

27. *See, e.g.*, Dennis S. Karjala, *Copyright, Computer Software and the New Protectionism*, 28 JURIMETRICS J. 33 (1987).

28. *See, e.g.*, Charles McManis, *International Protection for Semiconductor Chip Designs and the Standard of Judicial Review of Presidential Proclamations Issued Pursuant to the Semiconductor Chip Protection Act of 1984*, 22 GEO. WASH. J. INT'L L. & ECON. 331 (1988).

been applied to this field of inquiry. Let me pose one or two, perhaps in overly simplistic form, to make my point. I begin with perhaps one of the starkest: is respect for intellectual property rights the result of economic development, a principal cause thereof, or both? If it is the result of economic development, how, for example, does one explain the virtually total absence of any concept of such rights in Tang Dynasty (618-906) and Song Dynasty (960-1279) China—for a goodly portion of which China was the world's most economically developed and technologically advanced nation?[29] Our examples need not be only historical. How, for instance, does one explain the ongoing problems that many foreign firms and even some small and middle-sized Japanese enterprises claim to experience in securing their rights in Japan, although it has one of the world's most developed economies?[30]

If, on the other hand, respect for intellectual property rights is most noteworthy as a stimulus,[31] what are we to make of the possibility that Japan, and now China, are flourishing economically because at particular stages of their economic development they liberally made unauthorized use of foreign technology?[32] Indeed, much the same point might be made regarding the United States a century ago. And what are we to make of the fact that Hong Kong, Korea, and Taiwan are far more vibrant economically than Great Britain, Portugal, and Ireland even though ideas of intellectual property rights are far more deeply entrenched, and means of protecting them are far better established, in the latter rather than the former group of nations? Nor need our data in this regard all be modern. We should not forget that it was East Asia—first Korea and then China—that gave the world the printing press and yet neither has done much with copyright until quite recently.[33]

But as interesting as these matters may be, there are even more fundamental issues raised as we think of applying tools of

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29. *See* ALFORD, *supra* note 1, ch. 2.

30. *See, e.g., Intellectual Property Rights: U.S. Companies' Patent Experiences in Japan* (GAO/GGD-93-126) (July 1993).

31. This view is suggested by the work of Richard Adelstein and Steven Peretz—whose work might be seen as an elaboration of North and Thomas on the indispensability of clear property rights to economic development. *See* Richard P. Adelstein and Steven I. Peretz, *The Competition of Technologies and the Market for Ideas: Copyright and Fair Use—An Evolutionary Perspective*, 5 INT'L REV. L. & ECON. 209 (1985).

32. On Japan, see Duane W. Layton, *Japan and the Introduction of Foreign Technology: A Blueprint for Less Developed Countries?*, 18 STAN. J. INT'L L. 171 (1982). On China, see ALFORD, *supra* note 1, chs. 4 & 6.

33. For a discussion of Korea's treatment of copyright, see Sang-Hyun Song & Seong-Ki Kim, *The Impact of Multilateral Trade Negotiations on Intellectual Property Laws in Korea*, 13 UCLA PAC. BASIN L.J. 120 (1994).

economic analysis. In casting economic considerations—and at their heart, property rights—in a central role, are we not assuming that the definitions and attributes of property rights are uniform world-wide? Is that a wholly warranted assumption? Research on Chinese legal history and recent developments in the P.R.C. suggest that we not rush to judgment here.[34] This is so particularly if we break property into its constituent elements, rather than treat it as an undifferentiated whole that one either has or lacks. And it is even more so if we pause to consider how the availability of remedies and the willingness to invoke them—which are two different things—shape rights in very real and important ways. Indeed, scholars of such different orientations as Critical Legal Studies theorist James Boyle[35] and the historian of Chinese science Nathan Sivin[36] at least implicitly raise the suggestion that far from being universal, it is the ideas of ownership embedded in modern Western intellectual property that are the historical aberrations, and that these ideas have achieved the currency they now enjoy internationally as much because they are backed by great economic might as because of their appeal to our common sense or their innate conceptual force.

Although holding very different views than proponents of economic analysis as to what motivates behavior, scholars who seek to understand intellectual property in more philosophical terms also, at least implicitly, share a basic belief not only in universals—as opposed to more culturally specific factors—but in universals comprised principally of rights. Their ideas are certainly useful in helping us appreciate the link between intellectual property and other rights—and particularly political rights. Copyright in the Anglo-American world originated with the granting of a royal monopoly by the British Throne to the London Stationers Company in return for the latter's suppression of controversial texts.[37] Nonetheless, it appears that, as was the case with the correlation between economic development and respect for intellectual property rights, so too, one finds that the greater a nation's commitment to the overall rights of its populace, the more likely it is to have serious protection for intellectual property. In a way, it would be hard for this to be otherwise—for societies that sharply constrain their citizens' rights are likely to tolerate far less in the way of private expres-

34. *See, e.g.*, the work of Andrew Walder and of Cui Zhiyuan on property rights in P.R.C. township and village enterprises.

35. Boyle, *supra* note 15.

36. Letter of Nathan Sivin to the author.

37. The early history of copyright in the British world is treated in Rose, *supra* note 17 and LYMAN RAY PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE (1968).

sive activity, and, in any event, the value of whatever property rights these societies may provide is likely to diminish sharply in the absence of mechanisms for their vindication.

But as with connections between economic development and intellectual property rights, scholarly approaches to intellectual property rights grounded in rights theory leave many questions unanswered, especially as we look to East Asia. If there is a link between political and intellectual property rights, why, for example, is it that problems of piracy have become greater in the P.R.C. as the country has become freer politically and economically?[38] And why is it that today there are probably more instances of infringement in South Korea than in the North? There may well be answers to such questions consistent with a rights-oriented approach, but those working in this field have yet to address such questions. And, as was the case with economic analysis, there are the more basic—and I think more difficult to answer—questions as to how proponents of a vision of society grounded in notions of inalienable rights account for countries in which this type of thinking has only lately taken hold, and then not necessarily in precisely the same ways it has in the West.

At first blush, the deconstructionists would seem to have escaped some of the problems of a universalist posture that arguably afflict both economic- and rights-focused approaches. In seeking to show ways in which ideas of copyright are not absolute or preordained, but contingent upon particular historical circumstances, they too make a valuable contribution. Their work makes less inexplicable the fact that Tang China could reach and stay at the pinnacle of the world economically, politically, technologically, and militarily for more than a century without anything resembling intellectual property rights. And although not focused on contemporary U.S.-East Asian relations as such, the abiding lessons of the Critical Legal Studies movement about the linkage of power and legality are instructive as to why intellectual property issues are so prominent on the American diplomatic agenda and why so many East Asian jurisdictions now are adopting such law.

Caution is, however, no less warranted with regard to the deconstructionists than any of the other schools I have been examining. For one thing, notwithstanding their attacks upon Eurocentrism, their work is almost exclusively grounded in the historical experience of Western Europe and the United States. This foundation is then treated, essentially without qualification,

38. *See* ALFORD, *supra* note 1, ch. 4.

as if it were common for all humankind.[39] But if our modern Western conception of authorship is, as Woodmansee, Rose, and others suggest, so clearly a product of Romantic conceptions of individual genius, what are we to make of authorship in East Asian societies which did not experience the Enlightenment, at least directly? How does one account for images of the author, whether in historical times or at present? Are such scholars being sufficiently careful not to project themselves—or an idealized statement of their hopes for their own society—on East Asia? In short, until deconstructionists move beyond a rhetoric of inclusiveness and begin to take other societies more seriously, it may not be unfair to ask whether their vision of the contingent nature of authorship and its concomitant critique of copyright tells us as much about the historical circumstances of a part of today's professorate as it does about the birth of notions of intellectual property rights.

Along these lines, I can not resist discussing briefly a conference put together by Professors Jaszi and Woodmansee. The conference gathered together a fascinating array of scholars who attacked the concept of authorship, and with it, the notion of copyright as societal constructs. One participant after another rose, each more strenuously than the one before, to denounce such conceits as holding an exclusive property interest in particular expressions of ideas. Ironically, the conference's keynote speaker was U.S. Commissioner of Copyrights Ralph Oman who arrived without any warning of the tenor of the gathering and proceeded to deliver a rather straightforward account of recent changes in copyright law. As the conference's question and answer period began, I shuddered, expecting to see Commissioner Oman deconstructed limb by limb. Instead, to my amazement, he was besieged with even more strenuous questions from the very same conference participants about how they might block unauthorized reproduction of their writings, secure full protection for their interests, and collect royalties. And this from folks who tell us the personal is professional and vice versa.

IV. OF MICKEY (MOUSE AND KANTOR) AND GOOFY

If each of the schools of thought I have briefly sketched above has shortcomings, each, nonetheless, gets us much further than the thinking embodied in U.S. governmental policy toward

39. The implications of this problem are treated at greater length in William P. Alford, *The Inscrutable Occidental: Roberto Unger's Uses and Abuses of the Chinese Past*, 64 TEX. L. REV. 915 (1986) and William P. Alford, *On the Limits of "Grand Theory" in Comparative Law*, 61 WASH. L. REV. 945 (1986).

these issues. In a sense speaking of the "thinking embodied in U.S. policy" is something of a misnomer because our government's concern understandably has been with results rather than philosophical musings. Still, underlying U.S. policy is a vision distinct from any of those already described.

American policy has proceeded on the underlying assumption that a society's commitment to intellectual property protection is not contingent on its level of economic development, commitment to basic rights, or even particular historical circumstances. Rather, it is essentially a question of will. That is, if governments are so inclined or can be sufficiently pressured if they are not so inclined, adherence to something approximating an international standard of intellectual property protection will be relatively forthcoming.

As flawed as this vision is, it seems to me that one cannot dismiss it out of hand as one seeks to understand intellectual property in East Asia. The history of the West's relations with East Asia over the past century and a half is replete with examples of the impact of might, even when it has not made right.[40] And one would be disingenuous when assessing intellectual property developments in the ROC and Korea—and even in Japan and the P.R.C.—to ignore the impact of threats to limit access to the American market.[41]

Once again, however, caution is warranted. Perhaps it is an indication of my naivete, but I sometimes think that the last two bastions of positivism worldwide are to be found within a mile each of the White House and Zhongnanhai. Judging by their public words and actions, both the supposedly street-smart pols and Washington lawyers and lobbyists who fill top positions at the USTR's office and elsewhere in our government and their counterparts in the P.R.C. display an extraordinary faith in formal legality and a corresponding inattention to what motivates behavior. Each, in their own way, even if only for political effect, vests enormous significance in the mere articulation of new rules—as if promulgating new intellectual property laws and exhortations to follow them from Beijing were tantamount to changing the way in which people in the provinces conduct themselves on a daily basis.[42] Indeed, in my more perverse moments,

40. *See, e.g.*, JOHN K. FAIRBANK, THE GREAT CHINESE REVOLUTION: 1800-1985 84-99 (1986).

41. The impact of American pressure is discussed in Liu, *supra* note 24 and Song, *supra* note 33.

42. Of late, in its dealings with the P.R.C., the USTR has begun to emphasize enforcement—but again with the assumption that Beijing has the capacity readily to control economic activity in Guangdong and other distant areas. The fallacy of that

I am tempted to write an article entitled "Why China Has Too Much Law—And Too Little Legality."

The folly in believing that the rapid-fire issuance of an elaborate web of formal new rules on intellectual property, brought about chiefly through external pressure, will swiftly transform long-standing attitudes and practices comes into sharper focus if we consider recent Chinese trends. A good case can be made that since the United States began to apply considerable pressure to the P.R.C. on this front, infringement of American copyrighted and trademarked items has at least held steady, if not increased significantly. However, in fairness, it should be noted that the reasons for this may have as much to do with the P.R.C.'s liberalization—which has been substantial with respect to markets and more modest politically—as with U.S. policy as such. In fact, to provide you with a graphic example of the activity, I have today worn one from among my vast collection of fake Mickey Mouse neckties. I wear it, of course, for educational purposes only, having purchased this ghastly and sloppily printed tie late in 1993 for the equivalent of a quarter but a few steps from the office of U.S. Embassy officials charged with responsibility for keeping an eye out for American intellectual property interests in the P.R.C.

But the real deficiencies of vision in U.S. policy are not those of our harried embassy staff nor even those of the policy's inability to deliver promised results. They are even more fundamental, lying in this policy's utter failure honestly and carefully to think through what might engender a genuine and sustained respect for intellectual property or any other type of rights in China—or, for that matter, anywhere else. The effort to foster serious, widespread, long-term adherence to something approximating an international level of protection for intellectual property, after all, entails significant transformations in a people's attitudes toward intellectual creation, toward property, toward rights, toward the vindication of such rights through formal legal action, toward government, and so forth. Without apologizing for indifference or deception on the Chinese side, how can we realistically expect that such attitudes will change overnight or that the institutions needed to nurture and support them will suddenly emerge, particularly if there is any truth to suggestions that adherence to intellectual property is correlated either to economic development or political openness or is shaped by culture. Even in our own society, which is economically mature, politically open, and born of the very culture that gave the concept of

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assumption is discussed in William P. Alford, *Underestimating a Complex China*, CHI. TRIB., May 24, 1994, at 23.

intellectual property to the world, respect for such rights was a long time in coming and is still far from being universal. Indeed, as Dennis Karjala suggests, there remain very real and legitimate disagreements amongst us as to how to balance protection for intellectual property with the access to data needed to spur further innovation and ensure the citizenry's full participation in our democratic polity.[43]

These, however, are not the only costs to an American policy that consists of little more than crude threats and to the psychology that underlies it. Our policy on intellectual property toward China, or other parts of East Asia, does not occur in a vacuum. The tactics we have been using—and even celebrating—resonate all too much of a past in which the United States and other foreign powers undertook many an act having a great impact on the nations of East Asia in the name of making the world safe for our concerns, including intellectual property. Some such measures were no doubt of value to all involved, but others were of questionable morality and limited efficacy. Without suggesting history will necessarily repeat itself, it might not be a bad idea for our policy makers to look at why earlier foreign efforts at the turn of the century and again in the 1920s and the 1940s through the 1980s to press Chinese society to adopt an idealized version of intellectual property law were failures.[44]

If our policy makers had a better appreciation of the historical context of their actions, they might not only be more tactically adept, but they might also more fully comprehend the depth of bitterness that recent U.S. measures evoke and therefore better understand the impact of our intellectual property policy on broader relations between our nation and those of East Asia. To make this point is not to subscribe to a victimization theory that seeks to excuse any and all Chinese actions today because of what may have happened a century ago. Instead, it is to urge that we take full heed of the impact of what we are doing. To give but one example, when I spoke on U.S.-ROC intellectual property negotiations at National Taiwan University in 1991, the topic prompted an extraordinary reaction: senior government officials cried publicly in frustration at the humiliation they believed they had experienced at the hands of U.S. negotiators, and serious lawyers and scholars castigated prominent Chinese attorneys who assisted U.S. interests as traitors to Taiwan (*Taijian*).[45]

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43. *See* Karjala, *supra* note 27.

44. *See* ALFORD, *supra* note 1.

45. The standard Chinese phrase for traitor, *hanjian*, literally means "traitor to the Chinese." The cited adaptation suggests the deep fissures that course through the ROC and its legal profession.

Clearly, our government's determination to place so much emphasis on intellectual property issues and so readily to resort to pressure to achieve objectives in this area limits what it can expect to achieve in other crucial dimensions of our relations—particularly when dealing with a nation as powerful as the P.R.C. It was saddening to see the Bush administration—which staunchly resisted efforts to address strongly human rights problems in China on the grounds that we should not be interfering in their sovereign affairs—threatening the Chinese with almost one billion dollars of punitive tariffs, opposition to the P.R.C.'s GATT bid, and an end to most favored nation (MFN) status if they did not agree to revise their intellectual property law to our satisfaction and on a schedule essentially of our liking.[46] Much the same point can be made regarding the present administration which, within weeks of backing off of its own required linkage of MFN status and human rights for fear of offending Beijing, has begun to threaten hundreds of millions of dollars of trade sanctions and opposition to the P.R.C.'s GATT bid if we do not get our way regarding intellectual property matters.[47]

V. CONCLUSION

So, having bad-mouthed at least three major schools of legal thought and two Presidents, one drawn from each major party, where would I leave us?

As I suggested above, I do in fact think that each of these major scholarly approaches toward intellectual property already contains certain instructive lessons for the subject matter at hand and may well hold many more as they, and other important theoretical perspectives, are applied somewhat more specifically to the East Asian situation. I do hope, however, that we will remain vigilant as to the basic terms we use and take nothing for granted. Let me provide a few examples. When we mention property, we should be mindful of which of its many attributes or constituent elements we are speaking. When we endeavor to explain a phenomenon by reference to culture, let us not take it as a static monolith throughout East Asia, but instead realize its immense variety over time, across national boundaries, and among different people within any country. When we speak of interests, whose interests are we concerned with and at what cost to those of others? And when we refer to intellectual property law, do we

46. *See* William P. Alford, *Perspective on China: Pressuring the Pirate*, L.A. TIMES, Jan. 12, 1992, at M5.

47. William P. Alford, *MFN Fiasco Exposes Need for Better China Policy*, CHRISTIAN SCI. MONITOR, July 8, 1994, at 19.

mean formal doctrine or the manner in which the law plays itself out in society—and if the latter, how are we to measure it?

The foregoing are but a sampling of the many types of questions we should be asking ourselves as we seek during this conference and beyond to learn from each other about intellectual property law in East Asia.