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Peter K. Yu

Texas A&M University School of Law, peter_yu@msn.com

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The Confucian Challenge to Intellectual Property Reforms

Peter K. Yu*

Kern Family Chair in Intellectual Property Law and Director, Intellectual Property Law Center, Drake University Law School

☞ Asia; China; Counterfeiting; Culture; Infringing copies; Intellectual property

Introduction

The protection and enforcement of intellectual property rights concerns not only law and policy, but also a country's political, social, economic and cultural systems. The impact of such protection on cultural development is significant—whether the relevant culture is national, regional or global, parochial or cosmopolitan, traditional or non-traditional. Nevertheless, such impact is often hard to measure. As Raymond Williams observed, the word “culture” is so elusive that it has become “one of the two or three most complicated words in the English language”.¹

In the past decade, the interrelationship between intellectual property and culture has featured with increasing frequency and prominence in the global policy debate. In September 2000, WIPO established the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore to provide “a forum for international policy debate and development of legal mechanisms and practical tools concerning the protection of traditional knowledge ... and traditional cultural expressions (folklore) against misappropriation and misuse, and the intellectual property ... aspects of access to and benefit-sharing in genetic resources”.² As of this writing, the WIPO membership is actively evaluating the need to develop an international instrument (or instruments) to protect traditional knowledge, traditional cultural expressions and genetic resources.

Outside WIPO, important international documents emerged to address issues at the intersection of intellectual property and culture. For example, in 2003, United Nations Educational, Scientific and Cultural Organization (UNESCO) established the Convention on the Safeguarding of Intangible Cultural Heritage to safeguard intangible cultural heritage, ensure its respect and provide appreciation. This instrument sought to raise awareness of the importance of intangible cultural heritage while providing for international cooperation and assistance. Two years later, UNESCO further established the Convention on the Protection and Promotion of the Diversity of Cultural Expressions to “create the conditions for cultures to flourish and to freely interact in a mutually beneficial manner”. The Convention sought to “maintain, adopt and implement policies and measures ... for the protection and promotion of the diversity of cultural expressions on their territory”.

In addition, the General Assembly of the United Nations adopted the Declaration on the Rights of Indigenous Peoples in September 2007. Article 31(1) of the Declaration provides:

* Copyright (c) 2012 Peter K. Yu. This essay draws on research from Peter K. Yu, “Intellectual Property and Asian Values” (2012) 16 Marq. Intell. Prop. L. Rev. 329. The Author is grateful to Erin Cassidy and Lindsey Purdy for excellent research and editorial assistance.

¹ Raymond Williams, *Keywords: A Vocabulary of Culture and Society*, rev. ed. (Oxford: Oxford University Press, 1985), p.87.

² Peter K. Yu, “Cultural Relics, Intellectual Property, and Intangible Heritage” (2008) 81 Temp. L. Rev. 433, 437.

“Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.”

Two years later, the Committee on Economic, Social and Cultural Rights released the General Comment No. 21. This document provided an authoritative interpretation of art. 15(1)(a) of the International Covenant on Economic, Social and Cultural Rights. Paragraph 2 explicitly notes the close interrelationship between the right to “take part in cultural life” and the right to “benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he [or she] is the author”. Understanding this interrelationship is highly important, because the latter provides the human rights basis of existing intellectual property norms.³

Given the many important international developments both inside and outside WIPO, it is high time we pay greater attention to the complex interface between intellectual property and culture. In the past three volumes, this *Journal* devoted the first issue to a special topic: law and policy, economics and politics. Volume 4 will continue this tradition by focusing on the interrelationship between intellectual property and culture.

As an introduction to this special issue, this essay examines the longstanding claim that culture presents a major barrier to intellectual property reforms. In the context of Asia—China, in particular—this claim invokes Confucianism, a non-Western philosophy, to account for the region’s—or the country’s—continued struggle with massive piracy and counterfeiting problems. The claim draws on a century-old tradition of condemning Confucianism for being antithetical to modernity—or, more precisely, Western modernity.⁴ Within China, for example, the May Fourth Movement was characterised by the widespread critique of “China’s Confucian heritage as an obstacle to its modernization and quest for power and wealth in competition with the nations of the world”.⁵

The study of Confucianism in the intellectual property context is important for our purposes because it provides an excellent illustration of the complex interface between intellectual property and culture. The discussion is also timely in light of the growing attention on China’s rapid technological rise,⁶ the rejuvenated interest in Confucianism (due in no small part to the proliferation of Confucius Institutes from around the world),⁷ the ongoing discussions of regional trade matters in Asia, and the negotiation of the Trans-Pacific Partnership Agreement.⁸

The first half of this essay focuses on the Confucian challenge to intellectual property reforms in China. Drawing on the important distinction between the *strong* and *weak* forms of the cultural explanation, this

³ On the Author’s earlier discussions of the latter right, see Peter K. Yu, “Intellectual Property and Human Rights in the Nonmultilateral Era” (2012) 64 Fla. L. Rev. 1043; Peter K. Yu, “Reconceptualizing Intellectual Property Interests in a Human Rights Framework” (2007) 40 U.C. Davis L. Rev. 1039; Peter K. Yu, “Ten Common Questions about Intellectual Property and Human Rights” (2007) 23 Ga. St. U. L. Rev. 709.

⁴ Daniel A. Bell, “Preface” in Daniel A. Bell (ed.), *Confucian Political Ethics* (Princeton: Princeton University Press, 2008), pp.ix-xiv, x.

⁵ Albert H.Y. Chen, “Three Political Confucianisms and Half a Century” in Fan Ruiping (ed.), *The Renaissance of Confucianism in Contemporary China* (Dordrecht: Springer, 2011), pp.205–223, 205.

⁶ Peter K. Yu, “The Middle Intellectual Property Powers” in Tom Ginsburg and Randall Peerenboom (eds), *Law and Development in Middle-Income Countries* (Cambridge: Cambridge University Press, 2013) (forthcoming); Peter K. Yu, “The Rise and Decline of the Intellectual Property Powers” (2012) 34 Campbell L. Rev. 525.

⁷ E.g. Fan (ed.), *The Renaissance of Confucianism in Contemporary China* (2011); Jiang Qing, *A Confucian Constitutional Order: How China’s Ancient Past Can Shape Its Political Future* (Princeton: Princeton University Press, 2012); Yu Dan, *Confucius from the Heart: Ancient Wisdom for Today’s World*, translated by Esther Tyldesley (New York: Atria Books: 2009).

⁸ On the Trans-Pacific Partnership Agreement, see Jane Kelsey (ed.), *No Ordinary Deal: Unmasking the Trans-Pacific Partnership Free Trade Agreement* (Crows Nest: Allen & Unwin, 2011); C.L. Lim, Deborah K. Elms and Patrick Low (eds), *The Trans-Pacific Partnership: A Quest for a Twenty-first Century Trade Agreement* (Cambridge: Cambridge University Press, 2012); Meredith Kolsky Lewis, “The Trans-Pacific Partnership: New Paradigm or Wolf in Sheep’s Clothing?” (2011) 34 B.C. Int’l & Comp. L. Rev. 27; Peter K. Yu, “The Alphabet Soup of Transborder Intellectual Property Enforcement” (2012) 60 Drake L. Rev. Discourse 16, 24–28.

part argues that the latter is more consistent with reality. The second half of the essay expands the discussion to cover other Asian countries. Implicating the decades-old debate on “Asian values”, this part points out how Confucianism provides an even greater mismatch with Asian cultures than with Chinese culture. The essay therefore calls for caution in attributing the piracy and counterfeiting problems in Asia to Confucianism.

China and the Confucian Challenge

In the past two decades, commentators have invoked cultural explanations to account for the massive piracy and counterfeiting problems in Asia. Very typical are discussions of how Asian cultures, in particular Confucianism, have militated against intellectual property reforms.⁹ Similar discussions have also been made of the familial and community values and strong protection of the public interest as embodied in Islam.¹⁰ Although the latter discussions focus primarily on countries in the Middle East, they have high relevance to many Muslim-majority countries in Asia, such as Indonesia, Malaysia and Pakistan.

As far as the Confucian challenge to intellectual property reforms is concerned, the starting point of most discussions is William Alford’s seminal work, *To Steal a Book Is an Elegant Offense*.¹¹ Although this provocative book has inspired a whole generation of intellectual property scholars studying developments in East Asia, myself included, it has also attracted some pointed criticisms. For example, Shi Wei questioned whether the book’s catchy title actually created a misleading impression about the cultural values in China, including Confucianism. As he wrote:

“‘To Steal a Book is an Elegant Offense’ (*Qie Shu Bu Suan Tou*) ... is a concept unknown to Confucianism and was only popularized with the 1919 publication of the popular fictional book *Kong Yi Ji*, written by the famous novelist Lu Xun. In his book, Lu exemplifies his belief that literature should be socially relevant, and attempts to avoid the ‘clichés’ of traditional Chinese linguistics that, in his view, had hampered and restrained people’s creative thinking for centuries. In Lu Xun’s portrayal, Kong Yi Ji was depicted as a poor harlequin, who was ‘a big, pallid man whose wrinkled face often bore scars,’ and was made fun of by everybody. He earned a living from copying manuscripts for rich patrons and sometimes stole books to trade for wine. His behavior drew on his being soundly beaten. ‘To Steal a Book Is an Elegant Offense’ was his argument when he was taunted. His personal character and way of thinking are thus far removed from the Confucian values.... Indeed, the phrase ‘To Steal a Book Is an Elegant Offense’ was unknown to Chinese until Kong Yi Ji as a fictional character appeared in the early twentieth century and, interestingly, it was unpopular with foreigners until Professor Alford’s book ... made its debut in the mid 1990s.”¹²

Ken Shao also reminded us of the many developments in China that Professor Alford did not cover. Questioning whether the latter had presented an incomplete picture, he encouraged us to reassess the

⁹ E.g. William P. Alford, *To Steal a Book Is an Elegant Offense: Intellectual Property Law in Chinese Civilization* (Stanford: Stanford University Press, 1995), pp.19–29; R. Michael Gadbaw, “Republic of Korea” in R. Michael Gadbaw and Timothy J. Richards (eds), *Intellectual Property Rights: Global Consensus, Global Conflict?* (Boulder: Westview Press, 1988), p.275; Patrick H. Hu, “‘Mickey Mouse’ in China: Legal and Cultural Implications in Protecting U.S. Copyrights” (1996) 14 B.U. Int’l L.J. 81, 104; Peter K. Yu, “Piracy, Prejudice, and Perspectives: An Attempt to Use Shakespeare to Reconfigure the U.S.-China Intellectual Property Debate” (2001) 19 B.U. Int’l. L.J. 1, 16–21.

¹⁰ E.g. Lise Buranen, “‘But I Wasn’t Cheating’: Plagiarism and Cross-Cultural Mythology” in Lise Buranen and Alice M. Roy (eds), *Perspectives on Plagiarism and Intellectual Property in a Postmodern World* (Albany: State University of New York Press, 1999), p.66; Richard E. Vaughan, “Defining Terms in the Intellectual Property Protection Debate: Are the North and South Arguing Past Each Other When We Say ‘Property’? A Lockean, Confucian, and Islamic Comparison” (1996) 2 ILSA J. Int’l & Comp. L. 307, 336.

¹¹ Alford, *To Steal a Book Is an Elegant Offense* (1995).

¹² Shi Wei, “Cultural Perplexity in Intellectual Property: Is Stealing a Book an Elegant Offense?” (2006) 32 N.C. J. Int’l L. & Com. Reg. 1, 11. *Kong Yi Ji* was collected in Lu Xun, *The Real Story of Ah-Q and Other Tales of China: The Complete Fiction of Lu Xun*, translated by Julia Lovell (London: Penguin Books, 2009).

impact of Confucianism on intellectual property protection and enforcement in China.¹³ As more research and archival records become available, this spirited debate will likely advance further.

To fully understand the debate Professor Alford's book has sparked, it is important to distinguish the *weak* form of his claim from its *strong* form. The strong form states that Confucianism militates against intellectual property reforms in China. It accounts for the failure of the many reforms pushed by foreign countries and intellectual property rights holders to induce improvements in intellectual property protection and enforcement. Although provocative, the strong form of Professor Alford's claim is unlikely to be supported by the reality on Chinese soil.

As I pointed out in the past, there are striking similarities between Confucianism and what is generally regarded as the public domain in the West.¹⁴ While copying may be an important living process for a Confucian Chinese to understand human behaviour, to improve life through self-cultivation and to transmit knowledge to the posterity, Chinese poets and literary theorists widely disagreed on the appropriate extent of copying.¹⁵ If the Chinese did not subscribe to intellectual property notions, it is only those notions that were derived from a maximalist tradition, where the importance of the public domain is largely ignored.

Moreover, traditional Chinese culture does not always call for verbatim copying, the means by which massive piracy and counterfeiting are often conducted. Rather, Confucianism has called for the transformative use of preexisting works that is tailored to the user's needs and conditions. To be certain, Confucius admitted in the *Analects (Lunyu)*—a record of “selected sayings” collected by his students—that he had only “transmitted what was taught to [him] without making up anything of [his] own” (*shu er bu zuo*).¹⁶ While this admission could have implied his discouragement of creativity, his primary motive was to emphasize his respect for and faithfulness to the *Classics* and the ancient tradition. As he continued in the next four words of the sentence, “I have been faithful to and loved the Ancients” (*xin er hao gu*).

When that sentence is properly understood, it is therefore no surprise that Confucius also declared elsewhere in the *Analects* that “He who by reanimating the Old can gain knowledge of the New is fit to be a teacher” (*wen gu er zhi xin, keyi wei shi yi*).¹⁷ Indeed, as Professor Alford pointed out, through the editing of the *Classics* and his comments in the *Analects*, Confucius demonstrated that “transmission, far from being a passive endeavor, entailed selection and adaptation if it was to be meaningful to oneself, one's contemporaries, and one's successors”.¹⁸ Joseph Chan went even further to note that “it was Confucius who most creatively interpreted the rich tradition that he had inherited, gave it a new meaning, and expounded it so effectively that his views have influenced a great number of generations of *Ru* to come”.¹⁹ As shown by Confucius and others, the ability to make transformative use of preexisting works can demonstrate one's comprehension of and devotion to the core of the Chinese culture as well as the ability to distinguish the present from the past through original thoughts.

To some extent, the need for meaningful transmission in traditional Chinese culture can be analogised to the transformative use doctrine pronounced by the US Supreme Court in *Campbell v Acuff-Rose Music, Inc.*²⁰ In *Campbell*, a music publisher brought a copyright infringement action against the rap band 2 Live Crew for its salacious parody of Roy Orbison's *Oh, Pretty Woman*. Emphasizing that transformative works are socially important and exploring whether fair use covers the contested parody, Justice David Souter noted the importance of transformative works:

¹³ Ken Shao, “The Global Debates on Intellectual Property: What If China Is Not a Born Pirate?” [2010] *Intell. Prop. Q.* 341.

¹⁴ Peter K. Yu, “From Pirates to Partners: Protecting Intellectual Property in China in the Twenty-first Century” (2000) 50 *Am. U. L. Rev.* 131, 224–225.

¹⁵ Alford, *To Steal a Book Is an Elegant Offense* (1995), pp.26–29.

¹⁶ *The Analects of Confucius*, translated and annotated by Arthur Waley (New York: Vintage Books, 1989), Book VII, para.1.

¹⁷ *The Analects of Confucius* (1989), Book II, para.11.

¹⁸ Alford, *To Steal a Book Is an Elegant Offense* (1995), p.25.

¹⁹ Joseph Chan, “Territorial Boundaries and Confucianism” in Bell (ed.), *Confucian Political Ethics* (2008), pp.61–84, 63. As Professor Chan points out, “The Chinese term *Ru jia* means a school of *Ru*, ‘a type of man who is cultural, moral, and responsible for religious rites, and hence religious’”.

²⁰ *Campbell v Acuff-Rose Music, Inc* (1994) 510 U.S. 569.

“Although ... transformative use is not absolutely necessary for a finding of fair use, the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works. Such works thus lie at the heart of the fair use doctrine’s guarantee of breathing space within the confines of copyright, and the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.”

In the end, the Court suggested that 2 Live Crew’s rendition of the song might have constituted fair use and remanded the case to the lower court.

Just as it is important to ask what the Confucian position of copying is, it is equally important to examine the Western position in intellectual property law and policy, if such a position exists at all. Individualism alone, for example, does not fully summarise the Western intellectual property position. In the past decade, intellectual property scholars have widely questioned the narrow and incomplete definition of intellectual property rights advanced by developed countries and their supportive rights holders. As the West develops more sophisticated notions of intellectual property rights, these notions may be more compatible with Confucianism than one anticipates.²¹ Creative Commons and open source licensing, for instance, provide greater compatibility with Confucianism than proprietary models.

Compared with the strong form of Professor Alford’s claim, its weak form seems to be more in line with reality, although native Chinese scholars continue to disagree with such an assessment.²² The weak form of this claim states that Confucianism has prevented Western notions of intellectual property rights from taking root in China. Nevertheless, it does not suggest any incompatibility between the two notions. Nor does it contend that Confucianism will militate against intellectual property reforms. Thus, if reforms are introduced—either internally through the borrowing of foreign ideas or externally in response to foreign pressure—such reforms may help China establish an exogenously developed intellectual property system.

In fact, legal transplants from abroad and trade pressure from the United States were the primary means by which the modern Chinese intellectual property regime was established.²³ It is therefore no surprise that foreign legal transplants were also a key focus of Professor Alford’s book.²⁴ Although the level of overall intellectual property protection in China has yet to satisfy the US government and its rights holders, improvements in such protection have been quite significant in the past two decades.

In sum, although one could not reject outright the challenge Confucianism has posed to intellectual property reforms in China, it is probably incorrect to attribute the country’s massive piracy and counterfeiting problems to Confucianism alone. Confucianism may have prevented Western notions of intellectual property rights from taking root in China (a continuously debated proposition!). However, it certainly does not militate against intellectual property reforms. The country’s many impressive recent developments in the intellectual property arena provide a testament to the success of these reforms.²⁵

²¹ Yu, “From Pirates to Partners” (2000) 50 Am. U. L. Rev. 131, 223–225; Peter K. Yu, “Piracy, Prejudice, and Perspectives” (2001) 19 B.U. Int’l L.J. 1, 76–77.

²² On historical documents on Chinese copyright law, see Zhou Lin and Li Mingshan (eds), *Historical Documents of China’s Copyright Law* (Beijing: Zhongguo Fangzheng Publishing, 1999).

²³ Peter K. Yu, “Building the Ladder: Three Decades of Development of the Chinese Patent System” in Margo Bagley and Ruth Okediji (eds), *Global Perspectives on Patent Law* (Oxford: Oxford University Press, 2013) (forthcoming); Peter K. Yu, “Intellectual Property, Economic Development, and the China Puzzle” in Daniel J. Gervais (ed.), *Intellectual Property, Trade and Development: Strategies to Optimize Economic Development in a TRIPS Plus Era* (Oxford: Oxford University Press, 2007), pp.185–188.

²⁴ Alford, *To Steal a Book Is an Elegant Offense* (1995), pp.30–55.

²⁵ Consider, for example, the developments in the patent area. Today, China is already among the top five countries filing patent applications through the Patent Cooperation Treaty (PCT). In 2011, the number of PCT applications increased by 33.4 per cent to 16,406, earning China the fourth spot, behind only the United States, Japan and Germany. Among all the applicants, ZTE Corp. (formerly Zhongxing Telecommunication Equipment Corp.) and Huawei Technologies, respectively, had the largest and third largest number of PCT applications, with Panasonic ranking in the second.

From Confucianism to Asian Values

When discussing the potential challenge Confucianism has posed to the development of intellectual property rights, some commentators have gone beyond the discussion of reform challenges in China to provide generalization for similar challenges in Asia. Such generalization, to some extent, recalls the decades-old and highly controversial debate on “Asian values”.²⁶ By embracing cultural relativism, that debate “present[ed] a challenge to the normative claim that human rights should be interpreted and implemented in a similar manner everywhere”.²⁷ It also raised challenging questions about whether Asian countries could use their “special” values to provide cultural excuses for disappointing human rights records.²⁸

Although cultural explanations have been advanced in the debate on piracy and counterfeiting in Asia, the previous discussion suggests the challenge of identifying specific Confucian values in the intellectual property debate. That challenge becomes even more acute when “Asian values” are involved. Indeed, regardless of whether one accepts the cultural explanation for China’s massive piracy and counterfeiting problems, four additional reasons exist to explain why it would be ill-advised to generalise the Confucianism debate to cover intellectual property developments in Asia.

First, as pointed out earlier, Confucianism only forms the cultural basis of a small number of countries in East Asia. Islam, for example, is important to countries such as Indonesia, Malaysia and Pakistan. Hinduism is very important to South Asia, covering places such as Bangladesh, India and Nepal. Buddhism is also very important to Southeast Asian countries, such as Cambodia, Laos, Myanmar, Thailand and Sri Lanka. Indeed, as David Kang observed, “the states of Southeast Asia experienced twin cultural influences, from India and from China”.²⁹

Even in China, Confucianism is only one of the three dominant philosophies in traditional Chinese society. Buddhism and Daoism (which drew on the teachings of Laozi and Zhuangzi) had and continue to have very significant influence. Together, these three schools have been described as *sanjiao*.³⁰ As one commentator observed, “the bulk of early book publishing in China was in fact inspired by Buddhism, not Confucianism, and was directed at the acquisition of religious merit that appears to have been unrelated, and was perhaps even antithetical, to what we today would consider a property right”.³¹ Also present in the Chinese territory are many minority cultures and beliefs, including the Zhuang, Hui, Uygur, Yi, Tibetan, Miao, Manchu, Mongol and Buyei.³²

Secondly, even if we focus only on Confucianism, that philosophy continues to evolve. In fact, “views of Confucianism differ according to the level of society and the social class one considers”.³³ What we find in Confucianism today is actually quite different from the teachings of Confucius.³⁴ From the *Analects* to Neo-Confucianism propounded by Zhu Xi (1130–1200) to the living principles used in modern Asian societies, Confucian teachings have undergone many significant transformations. It is therefore no surprise

²⁶ Although it is hard to pinpoint which values are included in these so-called “Asian values”, commentators have generally defined Asian values to include “authoritarianism, cooperation, harmony, and order”. Michael C. Davis, “Constitutionalism and Political Culture: The Debate over Human Rights and Asian Values” (1998) 11 Harv. Hum. Rts. J. 109, 109.

²⁷ Randall Peerenboom, “Beyond Universalism and Relativism: The Evolving Debates about ‘Values in Asia’” (2003) 14 Ind. Int’l & Comp. L. Rev. 1, 7.

²⁸ Simon S.C. Tay, “Human Rights, Culture, and the Singapore Example” (1996) 41 McGill L.J. 743, 747.

²⁹ David C. Kang, *East Asia before the West: Five Centuries of Trade and Tribute* (New York: Columbia University Press, 2010), p.52.

³⁰ John Kieschnick, *The Impact of Buddhism on Chinese Material Culture* (Princeton: Princeton University Press, 2003); Livia Kohn, *Daoism and Chinese Culture* (St. Petersburg: Three Pines Press, 2001); Arthur F. Wright, *Buddhism in Chinese History* (Stanford: Stanford University Press, 1979). On the dominant schools of philosophies in ancient China, see Benjamin I. Schwartz, *The World of Thought in Ancient China* (Cambridge, Mass.: Belknap Press of Harvard University Press, 1985).

³¹ Charles R. Stone, “What Plagiarism Was Not: Some Preliminary Observations on Classical Chinese Attitudes toward What the West Calls Intellectual Property” (2008) 92 Marq. L. Rev. 199, 202.

³² James C.F. Wang, *Contemporary Chinese Politics: An Introduction*, 6th edn (Upper Saddle River: Prentice Hall, 1999), p.176.

³³ “The Confucian Problematic: An Overview” in Tu Weiming, Milan Hejtmanek and Alan Wachman (eds), *The Confucian World Observed: A Contemporary Discussion of Confucian Humanism in East Asia* (Honolulu: East-West Center, 1992), pp.1–13, 5.

³⁴ Wm. Theodore de Bary, *The Trouble with Confucianism* (Cambridge, Mass.: Harvard University Press, 1991), p.xi; Wm. Theodore de Bary, *Asian Values and Human Rights: A Confucian Communitarian Perspective* (Cambridge, Mass.: Harvard University Press, 1998), p.11.

that Arthur Waley noted carefully in the introduction to his widely used translation of the *Analects* that “The Confucius of whom I shall speak here is the Confucius of the *Analects*”.³⁵ He also recalled historian Gu Jiegang’s admonition that scholars should study “one Confucius at a time”.³⁶

Even in the time of Han Feizhi, only two short centuries after Confucius’ death, eight different sects of Confucianism had emerged, with “all of them consider[ing] themselves as faithful followers of Confucius” notwithstanding the fact that they “developed Confucian doctrines in manifestly different directions”.³⁷ In fact, it is worth recalling that Confucianism emerged at a time when “hundred schools” of thought (*zhuzi baijia*) flourished in China, following the decline of the feudal system toward the end of the Western Zhou Dynasty (1122–771 BC). In the last chapter of *Historical Records* (*Shiji*), Sima Qian, the grand historian in the Han Dynasty (206 BC–220 AD), recalled an essay of his late father classifying Chinese philosophies into six dominant schools. In addition to Confucianism and Daoism, these dominant schools included Yin-Yang, Mohism (*Mojia*), Nominalism (*Mingjia*) and Legalism (*Fajia*).³⁸ In the preface to Volume 2 of his famous trilogy, *Confucian China and Its Modern Fate*, noted Confucian scholar Joseph Levenson also reminded us that “Confucianism ... was never alone in the Chinese universe” and that it “interacted [with other bodies of thought and institutions], in a system with a history”.³⁹

As with any cultural tradition that has lasted for such a long period of time, Confucianism has many different strands and variants. The noted Confucian scholar Wm. Theodore de Bary observed that a strong liberal tradition existed in at least one strand of Confucianism, even though commentators generally do not identify Confucianism with liberal theories.⁴⁰ Likewise, Professor Alford reminded us that “approaches rooted in portrayals of culture as essentially impervious to change, whether from within or beyond the society being examined”, run the risk of “being unidimensional”.⁴¹

Within the Asian region, those countries that adopt Confucianism embrace it for different reasons and to varying extents. As Professor Kang noted:

“[T]he main secondary states of East Asia chose Confucianism and Chinese ideas more for their own reasons than from Chinese pressure. In Korea, Vietnam, and Japan, the debate about how to organize government and society occurred between warriors and scholars, with the Confucian literati winning in Korea and Vietnam and the warriors ultimately winning in Japan. Although Chinese ideas were deeply embedded from the founding of these states, just as significantly, Chinese ideas were grafted onto what indigenous cultures, and the two coexisted—sometimes uncomfortably—resulting in only partial Sinicization.”⁴²

One scholar even went further to suggest, somewhat controversially, that Confucianism was a Western construct that Matteo Ricci, Michele Ruggieri and other early Italian Jesuits “manufactured” to facilitate their own adaptation to China.⁴³

Thirdly, by focusing on the discrete values in Asia—whether as Asian values or simply as “values in Asia”⁴⁴—the “Asian values” debate “underestimates both the historical ruptures of colonization and the

³⁵ *The Analects of Confucius* (1989), p.13.

³⁶ *The Analects of Confucius* (1989), p.14.

³⁷ Yao Xinzong, *An Introduction to Confucianism* (Cambridge: Cambridge University Press, 2000), p.27.

³⁸ Fung Yu-lan, *A Short History of Chinese Philosophy: A Systematic Account of Chinese Thought from Its Origins to the Present Day*, translated by Derk Bodde (New York: Free Press, 1948), pp.30–31.

³⁹ Joseph R. Levenson, *Confucian China and Its Modern Fate: A Trilogy* (Berkeley: University of California Press, 1964), Vol. 2, p.vii.

⁴⁰ Wm. Theodore De Bary, *The Liberal Tradition in China* (New York: Columbia University Press, 1983).

⁴¹ Alford, *To Steal a Book Is an Elegant Offense* (1995), p.6.

⁴² Kang, *East Asia before the West* (2010), p.26. On the adoption of Confucianism across Chinese and non-Chinese cultures, see Paul A. Cohen and Merle Goldman (eds), *Ideas Across Cultures: Essays on Chinese Thought in Honor of Benjamin I. Schwartz* (Cambridge, Mass.: Council on East Asian Studies at Harvard University: 1990).

⁴³ Lionel M. Jensen, *Manufacturing Confucianism: Chinese Traditions and Universal Civilization* (Durham: Duke University Press, 1997).

⁴⁴ Daniel Bell, *Beyond Liberal Democracy: Political Thinking for an East Asian Context* (Princeton: Princeton University Press, 2006), p.54; Peerenboom, “Beyond Universalism and Relativism” (2003) 14 *Ind. Int’l & Comp. L. Rev.* 1, 7.

present forces of global interaction”.⁴⁵ In Michael Davis’ view, “cultural relativist theories ... are tautological and overly deterministic because they fail to appreciate the roles of both human agency and institutions in the transformative processes of cultural discourse”.⁴⁶ The “Asian values” debate also ignores the fact that “there are different views of human rights voiced in Asia, by opposition politicians, scholars, and non-government organizations”.⁴⁷

A case in point is the Bangkok Non-Governmental Organizations Declaration of March 27, 1993 (N.G.O. Declaration), which contrasted significantly with the Bangkok Declaration—or, to be more precise, the Bangkok Governmental Declaration. The latter document stated explicitly that, “while human rights are universal in nature, they must be considered in the context of a dynamic and evolving process of international norm-setting, bearing in mind the significance of national and regional particularities and various historical, cultural and religious backgrounds”. As Simon Tay explained:

“[T]he N.G.O. Declaration differs significantly both from the Bangkok Declaration by governments and what ... has, for convenience, termed the ‘Asian view’. This Declaration places a stronger emphasis on civil and political rights than does the Declaration by government representatives. It calls for democracy to be ‘fostered and guaranteed in all countries’ and for Asian governments to ‘lift constraints on political rights ... by repealing repressive laws ... and liberalising the political system.’ Like the Bangkok Declaration by the Asian governments, it calls for cultural rights to be recognized on the basis that ‘there is emerging a new understanding of universalism encompassing the richness and wisdom of Asia-Pacific cultures’. The N.G.O. Declaration explicitly stipulates, however, that ‘cultural practices which derogate from universally accepted human rights ... must not be tolerated.’”⁴⁸

Indeed, the drafters of the Non-Governmental Declaration criticised the Governmental Declaration for “reflecting the continued attempt by many Governments of the Asia-Pacific region to avoid their human rights obligations, to put the state before the people and to avoid acknowledging their obligations to account for their failures in the promotion and protection of human rights”.⁴⁹

Fourthly, as important as the influence of Confucianism is in East Asian countries—or for that matter, Islam in the Middle East and some parts of Asia—one has to wonder whether the discussion of this influence is just based on convenient cultural stereotypes. Communitarian philosophies are not unique to the Chinese or Muslims; they can be found in civilizations around the world.⁵⁰ While most in Western societies would find it misleading or overly simplistic to attribute the massive internet file-sharing in their countries to the communitarian underpinnings of Judeo-Christianity, it is equally problematic to attribute piracy and counterfeiting in Asia to Asian cultures. Simply put, it is just misleading and overly simplistic to describe piracy and counterfeiting as a cultural problem.⁵¹

In sum, the cultures in Asia are just too diverse to be neatly classified into the so-called “Asian values”. Given the considerable mismatch between Confucianism and Asian cultures, it is also logical to question the impact of Confucianism on the development of intellectual property rights in the region. If cultural explanations do not bode well for China, as shown in the first half of this essay, those explanations will do much worse for a complex multi-cultural region like Asia.

⁴⁵ Tay, “Human Rights, Culture, and the Singapore Example” (1996) 41 McGill L.J. 743, 747.

⁴⁶ Davis, “Constitutionalism and Political Culture” (1998) 11 Harv. Hum. Rts. J. 109, 110.

⁴⁷ Tay, “Human Rights, Culture, and the Singapore Example” (1996) 41 McGill L.J. 743, 747.

⁴⁸ Tay, “Human Rights, Culture, and the Singapore Example” (1996) 41 McGill L.J. 743, 747.

⁴⁹ The Nongovernmental Organizations’ Response to the Bangkok Declaration is reprinted in James T.H. Tang (ed.), *Human Rights and International Relations in the Asia-Pacific Region* (London: Pinter Publishers, 1995), pp.208–212.

⁵⁰ Rein Mullerson, *Human Rights Diplomacy* (New York: Routledge, 1997), p.87; Aryeh Neier, “Asia’s Unacceptable Standard”, *Foreign Policy*, Autumn 1993, p.42.

⁵¹ Peter K. Yu, “Four Common Misconceptions about Copyright Piracy” (2003) 26 Loy. L.A. Int’l & Comp. L. Rev. 127, 131–134.

Conclusion

Confucianism provides one of the most widely cited cultural explanations for intellectual property piracy and counterfeiting in Asia. Such an explanation has received renewed attention in light of China's rapid technological rise, the rejuvenated interest in Confucianism, the ongoing discussions of regional trade matters in Asia, and the negotiation of the Trans-Pacific Partnership Agreement. Yet, upon close scrutiny, that explanation has grossly oversimplified the complex interface between intellectual property and culture. Although it is hard to deny that Confucianism has coloured the development of intellectual property rights in China—and, perhaps, even some parts of East Asia—one should be very cautious in using Confucianism as a cultural explanation for the massive piracy and counterfeiting problems in Asia.

Before intellectual property issues enter the mainstream policy debate, most scholars in the area tend to focus on either law or economics. However, as these issues become more important, and as new issues arise, a growing number of scholars have begun to explore the interrelationship between intellectual property and culture. Some emerge from disciplines that do not traditionally conduct intellectual property research, such as anthropology and media and communication studies. Even for those within the discipline of law or economics, they have slowly expanded their research to bring in inter- and multi-disciplinary perspectives. This special issue seeks to capture some of the emerging debates on intellectual property and culture. I hope it will generate greater interest in research in the area.