
Intellectual-Property Laws in the Hong Kong S.A.R.: Localization and Internationalization

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In preparation for the handover, Hong Kong enacted local ordinances in the areas of patents, designs and copyright. A new *Trade Marks Ordinance* is expected after the handover. Interestingly, much of this legislation is based on United Kingdom statutes. The success of this legislation in safe-guarding intellectual-property rights ("IPRs") will depend less upon its contents, and more upon a clear separation of the state and judiciary in the Special Administrative Region ("S.A.R.") of Hong Kong. Despite the absence of a tradition of the formal protection of IPRs, China has identified a need to enact comprehensive intellectual-property legislation. However, the absence of Western-style rule of law in China has contributed to foreign dissatisfaction with the enforcement of IPRs. It is hoped the Hong Kong S.A.R.'s intellectual-property regime can avoid such a fate.

En vue de la rétrocession, l'ancien conseil législatif de Hong-Kong a adopté diverses ordonnances dans les domaines des brevets, du *design* et des droits d'auteurs. On s'attend également à ce qu'une ordonnance sur les marques de commerce soit adoptée peu de temps après la rétrocession. Plusieurs de ces textes législatifs sont basés sur le modèle anglais. Le succès de la protection des droits de propriété intellectuelle dépendra toutefois moins du contenu de ces lois que de la séparation claire entre le système judiciaire et l'État dans la nouvelle Zone administrative spéciale de Hong-Kong. Bien qu'elle n'ait pas de tradition de protection de la propriété intellectuelle, la République populaire de Chine a reconnu la nécessité d'adopter une législation d'ensemble en matière de propriété intellectuelle. Le non respect de la «primauté du droit» à l'occidentale a toutefois entravé la mise en place d'un régime efficace de protection de la propriété intellectuelle, ce qui a contribué à semer l'insatisfaction dans la communauté internationale. Il est à espérer que la régime de protection de la propriété intellectuelle de Hong-Kong pourra éviter cet écueil.

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Introduction

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Introduction

The effective protection of intellectual-property rights ("IPRs") has for some time been viewed as integral to the economic success of Hong Kong.¹ While infringement of IPRs was commonplace in Hong Kong in past decades,² the developing sophistication of Hong Kong society has resulted in a reduction in domestic counterfeiting and pirating activities. However, since the late 1980s, counterfeit products manufactured in the People's Republic of China ("P.R.C.") have been finding their way into the territory, either for resale in the domestic market or for re-export to foreign markets. If Hong Kong is to maintain its favourable position as a jurisdiction where foreigners can expect to obtain redress for infringement of IPRs, it is imperative that as a Special Administrative Region ("S.A.R.") of the P.R.C., Hong Kong's protection of IPRs continues to be reliable, effective and efficient.

The handover of sovereignty to the P.R.C. has provided Hong Kong with a valuable opportunity to modernize and localize its intellectual-property legislation. Comprehensive legislation regarding copyright, designs and patents was passed in late June 1997³ and a draft *Trade Marks Bill*⁴ was released in February 1997. Interestingly, as the Territory prepared to put its colonial history behind it, it chose to base its post-1997 intellectual-property legislation primarily on United Kingdom statutes.

Part I of this article will discuss the provisions of the Basic Law⁵ that deal with intellectual property and the manner in which they have been implemented. The key differences between Hong Kong's new intellectual-property ordinances and the legislation upon which they are based will be described in Part II. In Part III, the role of

¹ In 1996, Christopher Patten, the last Governor of Hong Kong summarized Hong Kong's pre-handover intellectual property policy:

For the preservation of our strong manufacturing base; for the encouragement of our growing international trade in services, and for the security of our position as a trusted trading partner, Hong Kong is committed to the protection of intellectual property in all its forms ...When businesses around the world are becoming more and more aware of the value of intellectual property to their exports, it is a matter of great concern for Hong Kong if our trading partners cast doubt on our commitment to protecting these rights (Rt. Hon. C. Patten, "Protection of Intellectual Property Rights in Hong Kong" (Address to the American Chamber of Commerce in Hong Kong, Intellectual Property Committee Luncheon Meeting, 14 March 1996) <http://www.houston.com.hk/hkgipd/patten.litml> at paras. 6-7 (1 July 1997) [hereinafter "Patten Speech"]).

² M.D. Pendleton, P. Garland & J. Margolis, *The Law of Intellectual and Industrial Property in Hong Kong*, 2d ed. (Hong Kong: Butterworths Asia, 1996) at IV 2.

³ See *Copyright Ordinance* (Ord. No. 92 of 1997), *Registered Designs Ordinance* (Ord. No. 64 of 1997), *Patents Ordinance* (Ord. No. 52 of 1997).

⁴ Hong Kong Government Secretariat, Trade and Industry Branch, "Draft Trade Marks Bill for Consultation" February 1997 [hereinafter draft *Trade Marks Bill*].

⁵ Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, 3d Sess., 7th National People's Congress ("N.P.C."), 4 April 1990, reprinted in 29 I.L.M. 1519 [hereinafter Basic Law cited to I.L.M.]. Also available at <http://www.info.gov.hk/info/bas-law0.htm>.

intellectual property in the P.R.C. will be examined, with a view to identifying three forces that may come to influence the enforcement of IPRs in the Hong Kong S.A.R. Here, Confucian collectivism and Deng Xiaoping's "socialism with Chinese characteristics" will be discussed. In the Conclusion, some predictions will be made regarding the future of intellectual-property protection in Hong Kong.⁶

I. The Effect of the Basic Law on Hong Kong's Intellectual-Property Laws

Pursuant to the Sino-British *Joint Declaration* of 1984,⁷ the Hong Kong S.A.R. will "enjoy a high degree of autonomy" and will maintain its "previous capitalist system and life-style for 50 years [after 1997]."⁸ Further, the common law and legal precedent will be maintained. After the establishment of the Hong Kong S.A.R., "the laws previously in force in Hong Kong ... shall be maintained, save for any that contravene the Basic Law."⁹ These principles were incorporated into articles 2, 5 and 8 of the Basic Law.¹⁰ Articles 118,¹¹ 139¹² and 140¹³ of the Basic Law are a testament to the importance of intellectual property in Hong Kong.

Interestingly, trade marks are not specifically mentioned in the Basic Law. However, it may be argued that articles 118, 139 and 140, when read together with article 105,¹⁴ require the S.A.R. government to protect trade marks by law. The main practical effect of the "one country, two systems" approach embodied in the Basic Law is that IPRs must be registered (where possible) and enforced *in Hong Kong*; any registration or court action taken in China will have no formal bearing on the status of the

⁶ The arguments advanced in this article are based on the premise that strong enforcement of IPRs is both beneficial and desirable in a free market economy such as Hong Kong's. This assumption is not universally accepted; see the sources referred to in note 117, *infra*.

⁷ *Sino-British Joint Declaration on the Question of Hong Kong*, 19 December 1984, U.K.T.S. 1984 No. 26, 23 I.L.M. 1366 [hereinafter *Joint Declaration* cited to I.L.M.].

⁸ *Ibid.* at 1371 (s. 3(2)) and 1373 (Annex I, Part I).

⁹ *Ibid.* at 1373 (Annex I, Part II).

¹⁰ *Supra* note 5. For a general discussion of the Basic Law, see P. Wesley-Smith, *Constitutional and Administrative Law in Hong Kong* (Hong Kong: Longman Asia, 1994) at 50-76 and P. Wesley-Smith, "The Legal System and Constitutional Issues" in P. Wesley-Smith & A.H.Y. Chan, eds., *The Basic Law and Hong Kong's Future* (Hong Kong: Butterworths, 1988) 172 [hereinafter *The Basic Law and Hong Kong's Future*].

¹¹ "The Government of the Hong Kong Special Administrative Region shall provide an economic and legal environment for encouraging investments, technological progress and the development of new industries" (Basic Law, *ibid.* at 1538).

¹² "The Government of the Hong Kong Special Administrative Region shall, on its own, formulate policies on science and technology and protect by law achievements in scientific and technological research, patents, discoveries and inventions" (*ibid.* at 1542).

¹³ "The Government of the Hong Kong Special Administrative Region shall, on its own, formulate policies on culture and protect by law the achievements and the lawful rights and interests of authors in their literary and artistic creation" (*ibid.*).

¹⁴ "The Hong Kong Special Administrative Region shall, in accordance with law, protect the right of individuals and legal persons to the acquisition, use, disposal and inheritance of property and their right to compensation for lawful deprivation of their property" (*ibid.* at 1537).

related IPRs in the Hong Kong S.A.R. Likewise, activity in Hong Kong will not affect the related IPRs in China.

Prior to the handover, of the four main branches of intellectual property, only trade marks enjoyed protection in Hong Kong pursuant to comprehensive local legislation.¹⁵ Patent rights were obtained by re-registering in Hong Kong patents issued by the United Kingdom Patent Office or the European Patent Office (with a designation for the United Kingdom),¹⁶ and the protection afforded designs registered in the United Kingdom was automatically extended to Hong Kong.¹⁷ The United Kingdom *Copyright Act 1956*¹⁸ represented the core legislation concerning copyright in Hong Kong.¹⁹ Accordingly, prior to the handover, Hong Kong was heavily dependent upon acts of the Parliament of the United Kingdom in the areas of patents, designs and copyright.

On 2 November 1995, the Sino-British Joint Liaison Group, which pursuant to the *Joint Declaration*²⁰ was composed of representatives of the British and P.R.C. governments, agreed to the localization of Hong Kong's patent, copyright and design laws and the continued application of the Patent Co-operation Treaty²¹ after the handover.²² As mentioned above,²³ article 8 of the Basic Law states that the common law, rules of equity, ordinances, subordinate legislation and customary laws previously in force in Hong Kong shall be maintained. Since this list does not include laws emanat-

¹⁵ *Trade Marks Ordinance* (Cap. 43), as amended by the *Trade Marks (Amendment) Ordinance* (Ord. No. 3 of 1985); the *Trade Marks (Amendment) Ordinance* (Ord. No. 44 of 1991); the *Intellectual Property (World Trade Organization Amendments) Ordinance* (Ord. No. 11 of 1996) [hereinafter *WTO Ordinance*]; and the *Trade Descriptions Ordinance* (Cap. 362). Hong Kong has also enacted the following intellectual-property-related legislation: the *Layout-Design (Topography) of Integrated Circuits Ordinance* (Cap. 445) and the *Plant Varieties Protection Ordinance* (Ord. No. 21 of 1996).

¹⁶ *Registration of Patents Ordinance* (Cap. 42).

¹⁷ *United Kingdom Designs (Protection) Ordinance* (Cap. 44).

¹⁸ *Copyright Act, 1956* (U.K.), 4 & 5 Eliz. 2, c. 74.

¹⁹ The locally enacted *Copyright Ordinance* (Cap. 39) related primarily to criminal sanctions for copyright infringement.

²⁰ *Supra* note 7.

²¹ *Patent Cooperation Treaty*, 19 June 1970 (WIPO Publication No. 274(E)).

²² The Chinese and British sides have also agreed to the continued application in Hong Kong of the following international agreements: *Paris Convention for the Protection of Industrial Property*, 20 March 1883, 828 U.N.T.S. 305, most recently revised 14 July 1967; *Berne Convention for the Protection of Literary and Artistic Works*, 9 September 1886, 828 U.N.T.S. 221, revised 24 July 1971; the *Universal Copyright Convention*, 6 September 1952 in Geneva, 25 U.S.T. 1341, 943 U.N.T.S. 178, revised in Paris on 24 July 1971; the *Convention for the Protection of Producers of Phonograms Against Unauthorised Duplication of Their Phonograms*, 29 October 1971 in Geneva, 25 U.S.T. 309, 866 U.N.T.S. 67; and the *Agreement On Trade-Related Aspects of Intellectual Property Rights*, Annex 1C to *The Final Act and Agreement Establishing the World Trade Organization (WTO). General Agreement on Tariffs and Trade, Uruguay Round (including GATT 1994)*, Marrakesh, 15 April 1994 (TRIPs). These agreements require Hong Kong to protect copyright, trade marks, designs and patents, which is another reason why it was necessary that domestic legislation be in place prior to the handover.

²³ See text accompanying note 10.

ing from the United Kingdom, the *Copyright Act 1956*²⁴ is not applicable in post-handover Hong Kong.²⁵ Further, it would not now be politically expedient for the Hong Kong S.A.R. to afford protection only to United Kingdom patents and designs and to interpret United Kingdom acts in determining the scope of protection and validity of design and patent rights in Hong Kong.²⁶ For these reasons, it was incumbent on Hong Kong to enact comprehensive local legislation in the areas of copyright, patents and designs prior to the handover. The legislation in these areas, and the proposed legislation regarding trade marks will be discussed in the next part.

II. The Intellectual-Property Regime for Hong Kong Post-1997

The legislative vacuum resulting from the change of sovereignty represented the most pressing need for local legislation in the areas of copyright, patents and designs. In addition, Hong Kong had to react to the intellectual-property challenges confronting all countries as the twenty-first century approaches (particularly, information technology and the internationalization of intellectual property).²⁷ Hong Kong's predicament was worse than many in this regard: the core of its pre-handover copyright legislation was written in 1956²⁸ and its design legislation in 1949.²⁹ Its trade-marks legislation is based on a United Kingdom statute written in 1938.³⁰

²⁴ *Supra* note 18.

²⁵ See Wesley-Smith, "The Legal System and Constitutional Issues", *supra* note 10 at 174.

²⁶ Without local patents and design legislation, the courts of the Hong Kong S.A.R. would have been required to interpret the relevant United Kingdom legislation (for example: *Patents Act 1977* (U.K.), 1977, c. 37; *Registered Designs Act, 1949* (U.K.), 12, 13 & 14 Geo. 6, c. 88; *Copyright, Designs and Patents Act 1988* (U.K.), 1988, c. 48) to assess the validity of the patent or design in issue and the rights enjoyed by the owner thereof. See *Canon Kabushiki Kaisha v. Green Cartridge Co. (Hong Kong)* [1995] A.J.P.R. 124 (H.C.) [hereinafter *Canon v. Green Cartridge*] for an example of a Hong Kong court determining the validity of a patent granted by the United Kingdom Patent Office.

²⁷ The Intellectual Property Department of the Hong Kong Government recommended the "putting in place of an independent and modernised copyright regime in Hong Kong which is able to cater for technological advances, reflect prevailing international standards of intellectual property protection, and suit local circumstances" (*Summary: Copyright Bill*; available at http://www.houston.com.hk/hkgipd/cprt_brf.html). Similar objectives were stated in Intellectual Property Department of the Hong Kong Government, *Summary: Registered Designs Bill*; available at http://www.houston.com.hk/hkgipd/dsgn_brf.html.

²⁸ *Copyright Act 1956*, *supra* note 18, amendments were made in 1994, *Copyright (Amendment) Ordinance* (Ord. No. 13 of 1994) (protection afforded to cable broadcasts) and in 1996, *WTO Ordinance*, *supra* note 15 (TRIPs implemented by creating a rental right for computer programs and sound recordings, and affording protection to performances).

²⁹ *Registered Designs Act, 1949*, *supra* note 26.

³⁰ *Trade Marks Act, 1938* (U.K.), 1 & 2 Geo. 6, c. 22. Pendleton, Garland & Margolis, *supra* note 2 at II 1 state: "The trade mark legislation of Britain and Hong Kong is worded in such archaic language as only to be rivalled in obscurity by the Copyright Act 1956." It should be noted that the *Trade Marks Ordinance*, *supra* note 15, had been amended several times, including in 1985 (Part B registration), 1991 (registration of service marks) and 1996 (definition of "trade mark" and provisions regarding geographical indications).

This section will briefly describe the key differences between the *Trade Marks Bill*,³¹ *Copyright Ordinance*,³² *Registered Designs Ordinance*³³ and *Patents Ordinance*³⁴ and the comparable U.K. and European legislation.³⁵ A preliminary issue is the policy decision to base the trade-marks, copyright, designs and patent legislation on United Kingdom statutes, particularly the *Trade Marks Act 1994*,³⁶ *Copyright, Designs and Patents Act 1988*,³⁷ *Registered Designs Act 1949*³⁸ and the *Patents Act 1977*³⁹ respectively. Why would Hong Kong adopt many of the provisions of these United Kingdom statutes in the midst of its decolonization drive?

There are several justifications for Hong Kong's incorporation of the provisions of United Kingdom intellectual-property legislation in its post-1997 ordinances. First, Hong Kong judges and lawyers are familiar with the concepts and ways of thinking inherent in the English common-law system. Second, a developing body of jurisprudence is essential to the survival of the common-law system in Hong Kong, as guaranteed by the Basic Law.⁴⁰ Third, the current United Kingdom legislation is, generally speaking, consistent with the major international intellectual-property agreements.⁴¹ The political ramifications of adopting United Kingdom legislation for the Hong Kong S.A.R. are worth noting. However, it would appear that by agreeing to the application of the common law in the Hong Kong S.A.R., the National People's Congress of the P.R.C. has acknowledged that the law of England will continue to play a prominent role.

Article 82 of the Basic Law⁴² wisely acknowledges the common-law system of precedent, pursuant to which a court decision on the same or similar facts from another common-law jurisdiction is a persuasive guide.⁴³ Acknowledging that reliance

³¹ *Supra* note 4.

³² *Supra* note 3.

³³ *Supra* note 3.

³⁴ *Supra* note 3.

³⁵ A detailed examination of the legislation is beyond the scope of this article.

³⁶ *Trade Marks Act 1994* (U.K.), 1994, c. 26.

³⁷ *Supra* note 26.

³⁸ *Supra* note 26.

³⁹ *Supra* note 26.

⁴⁰ *Supra* note 5.

⁴¹ The Law Reform Commission of Hong Kong, *Report on Reform of the Law Relating to Copyright* (1993) at 8, para. 1.46 [hereinafter *Report on Copyright*] stated: "The provisions of the [United Kingdom Copyright] 1988 Act are not only designed to meet the prevailing international obligations and in addition are compatible with Hong Kong's laws and legal system."

⁴² *Supra* note 5. Art. 82 states that the courts of the Hong Kong S.A.R. "may refer to precedents in other common law jurisdictions."

⁴³ The manner in which conflicts between the common law and the Basic Law are to be resolved is beyond the scope of this article. The crux of this controversial issue is the wording of art. 158 of the Basic Law, which states:

The Standing Committee of the National People's Congress shall authorize the courts of the Hong Kong Special Administrative Region to interpret on their own, in adjudicating cases, the provisions of this Law which are within the limits of the autonomy of the Region.

upon decisions from outside Hong Kong may be necessary, Dobinson and Roebuck state that "Hong Kong [S.A.R.] judges are likely to follow some developments in England, and perhaps, developments elsewhere in the common law world."⁴⁴

By adopting large portions of the comparable United Kingdom legislation, the drafters of Hong Kong's new intellectual-property legislation appear to be encouraging Hong Kong S.A.R. courts to rely upon United Kingdom decisions, as well as decisions from other common-law jurisdictions. With respect to trade marks, the Intellectual Property Department of the Hong Kong Government has stated:

It is important that any changes to the Hong Kong Trade Marks Ordinance are in keeping with the proposed revisions of [the United Kingdom, Australia and New Zealand] since Hong Kong shares with these countries the tradition of deriving its trade mark law from the common law, which is to be maintained after 1997. Any jurisprudence of these countries, interpreting the new provisions of their law, will be of assistance to Hong Kong ...⁴⁵

The reader is directed to the following resources in this regard: J. Hansen, "Judicial Independence in Hong Kong" [January 1997] *New Zealand L.J.* 11; R. Wacks, "Can the Common Law Survive the Basic Law?" (1988) 18 *H.K.L.J.* 435; J. Barrett, "The Relationship Between the Two Legal Systems" (in "Seminar on the Draft Basic Law for Hong Kong") (1988) 18 *H.K.L.J.* 428; H.-C. Kuan, "Chinese Constitutional Practice" in *The Basic Law and Hong Kong's Future*, *supra* note 10 at 55; T.M. Morris, "Some Problems Regarding the Power of Constitutional Interpretation Under Article 158 of the Basic Law of the Hong Kong Special Administrative Region" (1991) 21 *H.K.L.J.* 87.

⁴⁴ I. Dobinson & D. Roebuck, *Introduction to Law in the Hong Kong SAR* (Hong Kong: Sweet & Maxwell, 1996) at 27. See also P. Wesley-Smith, "The Common Law of England in the Special Administrative Region" in R. Wacks, ed., *Hong Kong, China and 1997: Essays in Legal Theory* (Hong Kong: Hong Kong University Press, 1993) 5 [hereinafter *China, Hong Kong and 1997*]. In his article, Wesley-Smith argues that "the Basic Law appears to sanction the continued *binding* effect of Privy Council decisions as well [as those of the House of Lords]" (*ibid.* at 6) (emphasis added). See also P. Wesley-Smith, "The Reception of English Law in Hong Kong" (1988) 18 *H.K.L.J.* 183 [hereinafter "The Reception of English Law"] where the same author states:

Hong Kong courts regard themselves as bound by all decisions of the House of Lords and the Privy Council, except perhaps where a question of some law other than English law is involved. This attitude of deference seems unnecessary, unfortunate and doomed to extinction with the onset of 1997 (*ibid.* at 215).

For a discussion of the role of English law in other former British colonies, see G.W. Bartholomew, "English Law in *Partibus Orientalium*" in A.J. Harding, ed., *The Common Law in Singapore and Malaysia* (Singapore: Butterworths, 1985) 3; G.W. Bartholomew, "Developing Law in Developing Countries" (1979) 1 *Lawasia* 1; A.B.L. Phang, "Convergence and Divergence — A Preliminary Comparative Analysis of the Singapore and Hong Kong Legal Systems" (1993) 23 *H.K.L.J.* 1.

⁴⁵ Intellectual Property Department of the Hong Kong Government, *Consultation Paper: Reform of the Trade Marks Ordinance* (1993) at 2 [hereinafter *Paper on Trade Marks*]. With respect to copyright, see *supra* note 41. Concerning designs, the Law Reform Commission recommended:

a design registry for Hong Kong based closely on the model in the [Designs] 1949 Act. We take the view that a departure from that approach would break with a substantial body of established law. There would be only limited disruption in the relocation of a registry to Hong Kong and by doing that a valuable source of precedent would be maintained (*Report on Copyright, supra* note 41 at 168, para. 17.77).

The expectation that the jurisprudential developments in other common-law jurisdictions will affect the development of intellectual-property laws in the Hong Kong S.A.R. should not come as a surprise. The courts of other former colonies, such as Canada, Australia, New Zealand and South Africa, continue to apply United Kingdom decisions. A brief review of the recent volumes of the *Asian Intellectual Property Reports* reveals that decisions of the courts of the United Kingdom, as well as those of Canada and Australia, for example, were regularly considered and applied in intellectual-property cases decided in Singapore and Malaysia.⁴⁶ Despite the fact that these former colonies obtained independence, whereas sovereignty over Hong Kong has returned to China, it is still likely that United Kingdom court decisions will remain influential in Hong Kong, since

Hong Kong lawyers, Chinese and non-Chinese, using the English language in their day-to-day legal work and operating within the context of institutions derived from England, are uniformly imbued with the common law's characteristic ideas.⁴⁷

There are, however, important differences between the new intellectual-property legislation for the Hong Kong S.A.R. and the comparable United Kingdom statutes, some of which are described below.⁴⁸

It was also recommended that Hong Kong adopt the unregistered design right provisions of the *Copyright, Designs and Patents Act 1988* (*supra* note 26, Part III). However, these recommendations concerning designs were not implemented. Note that the partial adoption of the European Union's designs directive in the new *Registered Designs Ordinance* (*supra* note 3) flies in the face of the policy decision to encourage Hong Kong's intellectual property courts to draw upon decisions of the courts of other common law jurisdictions.

⁴⁶ See e.g. *Biogen Inc v. Scitech Medical Products Pte Ltd & Anor* [1996] A.I.P.R. 1 (H.C. of Singapore); *Renus Innovation Forschungs-Und Abgasanlagen-Productions gessellschaft MBH & Anor v. Hong Boon Siong* [1995] A.I.P.R. 28 (H.C. of Singapore); *Public Prosecutor v. Teo Ai Nee & Anor* [1995] A.I.P.R. 39 (H.C. of Singapore); *A.G. v. Venice-Simplon Orient Express Inc* [1995] A.I.P.R. 17 (C.A. of Singapore); *Expanded Metal Manufacturing Pte Ltd & Anor v. Expanded Metal Co* [1995] A.I.P.R. 1 (C.A. of Singapore); *Sin Heak Hin Tyres Pte Ltd v. Yuasa Battery Singapore Co Pte Ltd & Anor* [1995] A.I.P.R. 420 (H.C. of Singapore); *Reed Exhibitions Pte Ltd v. Khoo Yak Chuan Thomas & Anor* [1995] A.I.P.R. 417 (C.A. of Singapore) *Aztech Systems Pte Ltd v. Creative Technology Ltd* [1995] 564 (H.C. of Singapore); *Real Electronics Industries Singapore (Pte) Ltd v. Nimrod Engineering Pte Ltd* [1995] A.I.P.R. 545 (H.C. of Singapore); *Trade Facilities Pte Ltd & ors v. Public Prosecutor* [1995] A.I.P.R. 215 (H.C. of Singapore); *A Clouet & Co Pte Ltd. & Anor v. Maya Toba Sdn Bhd* [1995] A.I.P.R. 598 (H.C. of Malaysia); *Hummel International Sport & Leisure A/S v. Lim Yew Sing* [1995] A.I.P.R. 276 (H.C. of Malaysia).

⁴⁷ Wesley-Smith, "The Reception of English Law", *supra* note 44 at 216.

⁴⁸ There is a wealth of material available regarding the current intellectual-property legislation of the United Kingdom and its judicial interpretation. See e.g. W.R. Cornish, *Intellectual Property: Patents, Copyright, Trade Marks, and Allied Rights*, 3d ed. (London: Sweet & Maxwell, 1996); E.P. Skone James et al., eds., *Copinger and Skone James on Copyright*, 13th ed. (London: Sweet & Maxwell, 1991); T.A. Blanco White & R. Jacob, eds., *Kerley's Law of Trade Marks and Trade Names*, 12th ed. (London: Sweet & Maxwell, 1986); W. Aldous et al., *Terrell on the Law of Patents*, 13th ed. (London: Sweet & Maxwell, 1982).

A. Patents

The new Hong Kong *Patents Ordinance*,⁴⁹ principally based on the United Kingdom *Patents Act 1977*,⁵⁰ provides for an independent patent system in the Hong Kong S.A.R., whereby the Hong Kong courts will determine the rights enjoyed by owners of *Hong Kong* patents⁵¹ as well as the validity and amendment of such patents, irrespective of action taken with respect to them outside Hong Kong. The key differences between the Hong Kong S.A.R. and United Kingdom patent systems are two-fold. First, it will be possible to submit applications for “short-term patents”.⁵² Second, the Hong Kong Registrar of Patents will issue independent patents based on the registration in Hong Kong of patents issued by “designated patent offices” outside Hong Kong.⁵³ Accordingly, the Registrar of Patents will conduct only a formal examination; the substantive examination (for example, as to novelty and inventiveness) conducted by the designated patent office will be relied upon by the Registrar. The principal justification for not conducting substantive examinations of applications is economic.⁵⁴

The new *Patents Ordinance* itself does not list the “designated patent offices”. The choice of this designation represents one of the more interesting political and practical issues embodied in the *Patents Ordinance*. The Hong Kong Government has indicated that the offices will be the United Kingdom Patent Office, the European Patent Office (with a designation for the United Kingdom) and the Chinese Patent Office.⁵⁵ In other words, only patents issued by those offices may be registered in Hong Kong and may constitute the basis of an independent Hong Kong patent. From one perspective, it might seem appropriate to permit registration of Chinese patents only. On this issue, the Hong Kong Government has stated:

⁴⁹ The *Patents Bill* was published in Legal Supplement No. 3 to the Hong Kong Government Gazette, Gazette No. 23, Vol. CXXXVIII. This bill and the subsequent committee stage amendments are available at: http://www.houston.com.hk/hkgipd/new_law.html. The *Patents Ordinance*, *supra* note 3, was passed on 28 May 1997 and came into operation on 27 June 1997.

⁵⁰ *Supra* note 26.

⁵¹ Under the old law, Hong Kong patents were not issued. Instead, patents issued by the United Kingdom Patent Office (or the European Patent Office, with a designation for the United Kingdom) were simply re-registered in Hong Kong. The rights and privileges of the Hong Kong patentee were the same as those enjoyed by a patentee under the *Patents Act 1977* (*supra* note 26); see *Canon v. Green Cartridge*, *supra* note 26.

⁵² *Patents Ordinance*, *supra* note 3, s. 108.

⁵³ *Ibid.*, s. 8.

⁵⁴ Because the number of patent applications received in Hong Kong has been, and is expected to be, relatively low, and the cost of training examiners and stocking a library of prior art is high, the Patents Steering Committee recommended against substantive examinations being conducted by the Registrar of Patents. See Patents Steering Committee, *Report on Reform of the Hong Kong Patent System* (1993). See also Q. Wang, *The Choice of a Patent System of Hong Kong after 1997* (M. Phil. Paper, Department of Law, City University of Hong Kong, 1996) [unpublished].

⁵⁵ See Hong Kong's New Intellectual Property Law, *Summary: Patents Bill* at para. 8.; available at http://www.houston.com.hk/hkgipd/new_law.html [hereinafter *Summary: Patents Bill*].

In considering the designation of these Patent Offices we have taken note of the reputation of all three Patent Offices, the similarity of the patent systems, the high level of trade and strong links between China and Hong Kong, and the high level of trade between European countries and Hong Kong. We have also noted the need to provide continuity with the existing system and to give choice to the users of the system.⁵⁶

In other words, the choice of the United Kingdom and China as designated patent offices is a compromise. However, it seems that this compromise is intended only as a temporary one, since the Hong Kong Government anticipates that China will indeed become the only designated patent office at some point in the future.⁵⁷

The other main difference between the new *Patents Ordinance* and the *Patents Act 1977* is the introduction of a short-term patent.⁵⁸ The Hong Kong Government has described the purpose of the short-term patent as protecting "inventions which have a short-term commercial life. For such products, businessmen want patent protection quickly but not necessarily for a full 20-year term."⁵⁹ The short-term Hong Kong patent, which is obtained by filing an original application rather than a patent issued by a designated office, has a total possible term of eight years.⁶⁰ There will be only a formal examination of short-term patent applications;⁶¹ however, in infringement proceedings, it will be necessary for the patentee to prove *prima facie* validity.⁶²

⁵⁶ *Ibid.* at para. 14.

⁵⁷ T. Hope, "Agreement on IP Regime for Hong Kong Post 1997" (1996) 9:1 IPAsia 24; J. Smith, P. Cheung & K.Y. Cheung, "New Patent Law Designed to Protect Entrepreneurs Under Chinese Sovereignty" (1996) 11:2 Asia Pacific Legal Developments Bulletin 20.

⁵⁸ Also called "petty patent" or "utility model" in other jurisdictions. This type of patent exists in over 40 countries, including Germany, Italy, Spain, Japan, South Korea, Taiwan and several South and Central American countries. See A.M. Green, *Designs and Utility Models Throughout the World* (Deerfield, Ill.: Clark Boardman Callaghan, 1994); S. Hua, "Patent Protection for Utility Models in Various Countries" (1996) 44:1 China Patents & Trademarks 23. For the short term patent in China, see Patent Law of the People's Republic of China, 4th Sess., 6th N.P.C., 12 March 1984 ¶11-600; Implementing Regulations of the Patent Law of the People's Republic of China, amended 12 December 1992 by the State Council, issued 21 December 1992 by the Patent Office of the People's Republic of China; Chinese Patent Office, Notification No. 27 on December 21, 1989.

⁵⁹ *Summary: Patent Bill*, *supra* note 55 at para. 10.

⁶⁰ That is, the patent is renewable after the first four years for a further four years: *Patents Ordinance*, *supra* note 3, s. 126.

⁶¹ *Ibid.*, s. 117.

⁶² *Ibid.*, s. 129. Numerous amendments to the *Patents Bill*, *supra* note 49, were made at the committee stage including the deletion of s. 73(2), which stated that goods in transit are not considered imports, and clarification that both short-term and standard patents may be based on international applications filed in the P.R.C. (*Patents Ordinance*, *ibid.*, s. 125).

B. Designs

By modelling the draft *Registered Designs Bill*⁶³ primarily on the European Union *Directive on the Legal Protection of Designs*⁶⁴ (“EU *Designs Directive*”), the original drafters rejected the recommendation of the Law Reform Commission that the legislation be based on the United Kingdom’s *Registered Designs Act 1949*.⁶⁵ Adoption of the bill as originally drafted could have resulted in a significant departure from the designs law previously applicable in Hong Kong. For example, unlike the *Registered Designs Act 1949*, neither the EU *Designs Directive* nor the draft *Registered Designs Bill* referred to functionality or “eye appeal” in the definitions of design.⁶⁶ Further, the “interconnections” exclusion⁶⁷ and component-parts provisions⁶⁸ would have been new to Hong Kong designs legislation. These deviations have been avoided with the adoption of the *Registered Designs Ordinance*⁶⁹ which, at least in the key areas of functionality,⁷⁰ novelty,⁷¹ interconnections and component parts,⁷² is more closely

⁶³ Copy on file with author. The *Registered Designs Bill*, which differed substantially from the draft bill, was published in Legal Supplement No. 3 to the Hong Kong Government Gazette, Gazette No. 10, Vol. CXXXIX; available at http://www.houston.com.hk/hkipd/new_law.html. The *Registered Designs Ordinance*, *supra* note 3, was passed on 4 June 1997 and came into operation on 27 June 1997.

⁶⁴ EC, *Proposal for a European Parliament and Council Directive on the legal protection of designs*, OJ Information (1993) No C345/14; *Proposal for a European Parliament and Council Regulation on community Design*, OJ Information (1994) C29/20. Recent proposed amendments are discussed in *Explanatory Memorandum to the Amended Proposal for a European Parliament and Council Directive on the Legal Protection of Designs*, COM96(66). In March 1997, a political agreement on a Common Proposal concerning the proposed directive was announced: E.C. Press Release IP/97/221, reported in “Monti Welcomes Common Proposal on Design Protection”, The Reuter European Community Report, 14 March 1997. The highly contentious issue of automotive spare parts was “settled” by deleting the original proposal from the Common Position. Despite this development, the “debate is certainly not yet closed” since the Common Proposal must be voted upon by the European Parliament (*ibid.*). For a general discussion of the regulation and directive, see T.C. Vinje, “Harmonising Intellectual Property Laws in the European Union: Past, Present and Future” (1995) 8 Eur. Intell. Prop. Rev. 361 and G.B. Dinwoodie, “Federalized Functionalism: The Future of Design Protection in the European Union” (1997) 25 Am. Intell. Prop. Ass’n Q.J. [forthcoming].

⁶⁵ *Supra* note 26. The Hong Kong Government’s explanation for incorporating parts of the EU *Designs Directive* is as follows: “Since the [Law Reform Commission] made its recommendations, the European Union (EU) has proposed a non-examination system as the norm for registration of designs, and we believe that by 1999, the United Kingdom itself will be obliged to change over to the EU norm.” *Summary: Registered Designs Bill*, *supra* note 27 at para. 7.

⁶⁶ In s. 2(1) of the draft *Registered Designs Bill*, *supra* note 63, “design” was defined as “the elements of appearance of the whole or a part of an article resulting from the specific features or elements of the lines, contours, colours, patterns, shape or materials of the article itself or its ornamentation.” However, note that both the EU *Designs Directive* and the draft *Registered Designs Bill* state that “a design is not registrable to the extent that it consists of features of appearance of an article which are dictated solely by a technical function” (draft *Registered Designs Bill*, *ibid.*, s. 6(1)(a) [emphasis added]).

⁶⁷ Draft *Registered Designs Bill*, *ibid.*, s. 6(1)(b).

⁶⁸ *Ibid.*, s. 5(3).

⁶⁹ *Supra* note 3.

⁷⁰ *Ibid.*, s. 2, where “design” is defined with reference to functionality.

⁷¹ *Ibid.*, s. 5.

modeled on the *Registered Designs Act 1949*, and hence United Kingdom common law, than on the *EU Designs Directive*. With respect to procedural matters, the *Registered Designs Ordinance* continues to draw upon the *EU Designs Directive*.

The *Registered Designs Ordinance* is unlike the *Patents Ordinance* in that foreign design registrations will not be re-registered in Hong Kong. Instead, an original application for a design may be filed with the Hong Kong Designs Registry and, if it complies with the formal requirements, an independent Hong Kong design registration will issue. Contrary to the recommendation of the Law Reform Commission, no substantive examination will occur.⁷³ The design will be valid for five years, renewable for four further five-year periods, for a maximum of twenty-five years.⁷⁴

The overlap of design and copyright protection involves complicated issues that have plagued the courts and Parliament of the United Kingdom for decades. In Legislative Council Committee Stage Amendments to the *Copyright Bill*,⁷⁵ the Hong Kong Government attempted to rationalize the copyright and registered-design regimes by limiting the period of copyright protection of artistic works that have been industrially applied and thus have become designs. Contrary to the recommendation of the Law Reform Commission,⁷⁶ these proposed amendments fall short of introducing an unregistered-design right such as that contained in Part III of the *Copyright, Designs and Patents Act 1988*.⁷⁷ Pursuant to the proposed amendments, copyright protection for designs that are registered under the new *Registered Designs Ordinance* will be exhausted after twenty-five years from the date the design is first marketed.⁷⁸ Designs

⁷² The *Registered Designs Ordinance* is silent on the issues of interconnections and component parts. In *Canon v. Green Cartridge*, *supra* note 26, the High Court of Hong Kong considered the spare-parts defense to copyright infringement set out in *British Leyland Motor Corp. v. Armstrong Patents Co.*, [1986] A.C. 577 (H.L.).

⁷³ *Registered Designs Ordinance*, *ibid.* ss. 24 and 27. See *Report on Copyright*, *supra* note 41 at 169, para. 17.80. The Intellectual Property Department of the Hong Kong Government has noted that:

The current regional and international trend is to provide a non-examination system for registered designs. Experience in other countries suggests that even where search and examination is conducted, it is difficult for the Registrar to determine the registrability of a design. We take the view that a registered design system with formality examination only is the best way forward (*Summary: Registered Designs Bill*, *supra* note 27 at paras. 7-8).

⁷⁴ *Registered Designs Ordinance*, *ibid.* ss. 28 and 29.

⁷⁵ The *Copyright Bill* was published in Legal Supplement No. 3 to the Hong Kong Government Gazette No. 8, Vol. CXXXIX. The bill and subsequent committee stage amendments are available at http://www.houston.com.hk/hkqipd/new_law.html. The *Copyright Ordinance*, *supra* note 3, was passed on 24 June 1997 and came into force on 27 June 1997.

⁷⁶ *Report on Copyright*, *supra* note 41 at 170, para. 17.85. One suggested reason for not offering protection for unregistered designs is that the international norm is still developing.

⁷⁷ *Supra* note 26.

⁷⁸ *Copyright Ordinance*, *supra* note 3, s. 87(2).

that are not registered under the *Registered Designs Ordinance* will enjoy copyright protection for fifteen years after first marketing.⁷⁹

C. Copyright

The new *Copyright Ordinance*⁸³ is closely modelled on the *Copyright, Designs and Patents Act 1988*.⁸¹ As in the United Kingdom, copyright in works created by employees in the course of employment is owned by the employer; however, under the new *Copyright Ordinance*, employees are entitled to compensation if the employer uses the work in a manner beyond that which was reasonably contemplated.⁸² Ownership of commissioned works depends upon the terms of any contract between the parties.⁸³ However, the person commissioning the work "has an exclusive licence to exploit the commissioned work for all purposes that could reasonably have been contemplated" by the parties.⁸⁴ The drafters of the draft *Copyright Bill*⁸⁵ must be praised for including provisions relating to the Internet and World Wide Web.⁸⁶ Regrettably, only s. 26(2) found its way into the ordinance as passed. In addition, special provision is made for affidavit evidence relating to subsistence and ownership of copyright⁸⁷ and other enforcement measures previously contained in the old *Copyright Ordinance*.⁸⁸

As a result of intense lobbying by several interest groups, a number of Committee Stage Amendments were made to the *Copyright Bill* at the eleventh hour before the handover. In the original bill, the act of parallel importing had been decriminalized. However, the final legislation states that criminal liability can be incurred only after

⁷⁹ *Ibid.*, s. 87(3). In the United Kingdom, registrable designs that are unregistered enjoy copyright protection for 25 years: *Copyright, Designs and Patents Act 1988*, *supra* note 26, s. 52.

⁸⁰ *Supra* note 3.

⁸¹ *Supra* note 26.

⁸² *Copyright Ordinance*, *supra* note 3, s. 14(2).

⁸³ *Ibid.*, s. 15. In the absence of any agreement, one must conclude that the author (artist) is the first owner pursuant to s. 13.

⁸⁴ *Ibid.*, s. 15(2)(a).

⁸⁵ Copy on file with author. The *Copyright Bill* as published in the Official Gazette, *supra* note 75, differs substantially from the draft *Copyright Bill*.

⁸⁶ For example, s. 35(1) of the draft *Copyright Bill*, *ibid.*, stated:

Copyright in a work which is issued by means of digital transmission is not infringed by the making of a copy which is reasonably required for the viewing or listening of the work by the recipient of the transmission for his own private domestic or private business use.

Under s. 22 of the draft *Copyright Bill*, the issue to the public of copies of the work by means of digital transmission was a restricted act. Under s. 101(3) of the draft *Copyright Bill*, infringement of this right was actionable in Hong Kong "irrespective of the place of issue."

⁸⁷ *Copyright Ordinance*, *supra* note 3, s. 121. For a discussion of *Copyright Ordinance* (Cap. 39), *supra* note 19, s. 9, see Pendleton, Garland & Margolis, *supra* note 2 at IV 207-208.

⁸⁸ *Copyright Ordinance*, *supra* note 3, ss. 122-143.

eighteen months from the date the work is first released anywhere in the world.⁸⁹ Further, it will be a defence if the parallel importer can show that the copyright owner or exclusive licensee has acted unconscionably, for example, by withholding supply or refusing to supply on unreasonable grounds.⁹⁰ Civil remedies for parallel importation remain available for the full term of copyright.

Other contentious issues related to re-transmission of television and sound broadcasts, decompilation of software and landlord liability. In the original *Copyright Bill*,⁹¹ the existing exemption concerning re-transmission of works by satellite master antenna television (SMATV) systems was removed. In response to lobbying by the SMATV operators, s. 82(4) was enacted. Under this provision, the copyright owner is deemed to have granted an implied re-transmission license. The owner may revoke such an implied license by public notice.⁹² The provision permitting decompilation of computer programs has been deleted from the legislation: whether a particular act of decompilation amounts to infringement will be determined in light of amended provisions relating to fair dealing.⁹³ The final legislation, like the original bill, does not make liable landlords who knowingly allow their premises to be used by vendors of pirated goods.⁹⁴

D. Trade Marks

Hong Kong localized its trade-marks legislation in 1873; accordingly, the enactment of new legislation prior to the handover was not as crucial as it was for patents, designs and copyright, which had never been localized. The draft *Trade Marks Bill*,⁹⁵ which was not introduced into the Legislative Council before the handover, is based upon the United Kingdom's *Trade Marks Act 1994*,⁹⁶ which accords with the recommendations of the Intellectual Property Department.⁹⁷ The draft bill, if adopted, will result in a number of changes to Hong Kong's trade-marks legislation in force at the

⁸⁹ *Ibid.* s. 35(4). Representatives of the sound recording and film industries had requested that criminal sanctions be retained for at least two years from first release.

⁹⁰ *Ibid.* s. 36(3). Such a defence is available to all importers, exporters and possessors of, and those who deal in, infringing copies pursuant to ss. 30 and 31 (secondary infringement of copyright).

⁹¹ *Supra* note 75.

⁹² *Copyright Ordinance*, *supra* note 3, s. 82(5). This provision will not be activated until after a review of Hong Kong's broadcasting policy in 1998. See "Speech by STI-Resumption of Second Reading Debate for LegCo Sitting on 24 June 1997", available at http://www.houston.com.hk/hkgipd/sti_spch.html [hereinafter "Speech by STI"].

⁹³ *Copyright Ordinance*, *ibid.*, s. 37(3). This section draws upon the relevant provisions in the United States, "Speech by STI", *ibid.* at para. 24.

⁹⁴ The Business Software Alliance had recommended such a provision with a view to controlling the notorious Hong Kong arcades at which counterfeit computer software is sold.

⁹⁵ *Supra* note 4.

⁹⁶ *Supra* note 36. See *Paper on Trade Marks*, *supra* note 45. See also, T. Hope quoting Averil Walters, Deputy Director, Intellectual Property Department of the Hong Kong Government, to the effect that it is the intention of the Government "to use the UK Trade Marks Act 1994 as a model adapted to suit Hong Kong's requirements" (*supra* note 57 at 25).

⁹⁷ *Paper on Trade Marks*, *ibid.*

time of writing.⁹⁸ In addition to providing protection for well-known trade marks comparable to s. 56 of the *Trade Marks Act 1994*, the draft *Trade Marks Bill* also permits the defensive *registration* of such trade marks.⁹⁹

* * *

With the coming into force of the *Patents Ordinance*, *Registered Designs Ordinance* and *Copyright Ordinance*, Hong Kong will have localized all of its intellectual-property legislation. In this manner, the rights of domestic and foreign owners of IPRs will be safeguarded, so far as that is possible. Basing the *Patents Ordinance*, *Copyright Ordinance* and draft *Trade Marks Bill* on statutes of the United Kingdom should aid in smoothing Hong Kong's transition from a British colony to a region of China governed by common law. To this end, each piece of legislation contains provisions intended to ensure that IPRs enjoying protection prior to the handover will continue to enjoy protection in the Hong Kong S.A.R.¹⁰⁰

III. The Enforcement of IPRs in China Today: How Might Hong Kong Be Influenced?

The "one country, two systems" policy enshrined in the Basic Law¹⁰¹ notwithstanding, over time Beijing's policies with respect to IPRs are likely to influence the parallel environment in the Hong Kong S.A.R. to some degree. Three important factors that affect China's approach to the protection of IPRs are: (1) the attitude in Chinese societies towards intellectual property and copying; (2) the use of intellectual property in the P.R.C. to foster economic growth and foreign technology transfers; and (3) China's own brand of rule of law (particularly, the close relationship between the state and judiciary). It will be argued that despite the absence of a tradition of officially sanctioned protection for IPRs in the P.R.C., much effort has been expended developing legislation that is comparable to that of developed nations. However, it is

⁹⁸ Such changes include abolishing the distinction between Parts A and B of the Register; allowing for assignment of trade mark applications; adopting a simple system to record trade mark licenses; extending the definition of trade mark infringement; and permitting comparative advertising in certain situations. In addition, the requirement that a trade mark be "visually perceptible" in order to be registrable has been removed, thereby permitting, at least theoretically, the registration of smells and sounds. See generally J. O'Connell, "Decolonising Hong Kong's Intellectual Property Laws" [1995] 11 *Eur. Intell. Prop. Rev.* 555; C. Woods, "Trademark Law Reform in Hong Kong" (1996) 9:4 *I.P. Asia* 38; B. Yen, "Developments in Hong Kong's Trade Mark Law" (1995), available at Intellectual Property Department, Hong Kong Government: <http://www.hkqipd/barryyen.html>.

⁹⁹ *Supra* note 4, s. 59. Such registrations are not permitted under the *Trade Marks Act 1994*. See A. Firth, *Trade Marks: The New Law* (Bristol: Jordon, 1995) at 121.

¹⁰⁰ See *Patents Ordinance*, *supra* note 3, s. 158, *Copyright Ordinance*, *supra* note 3, s. 192, and draft *Trade Marks Bill*, *supra* note 4, scli. 4. The transitional provisions regarding registered designs (*Registered Designs Ordinance*, *supra* note 3, s. 91) are particularly generous to owners of designs registered in the United Kingdom, presumably because such owners *automatically* enjoyed design rights in Hong Kong under the old law.

¹⁰¹ *Supra* note 5.

the perceived deficiencies in the *enforcement* of those rights that cause concern in the international business community.

An examination of the tradition in Chinese societies of copying suggests that the application of Anglo-American views of IPRs to the P.R.C. cannot occur without a certain degree of difficulty. It has been argued that “copyright is viewed by many Asians as a Western concept.”¹⁰² A study conducted by Swinyard, Rinne and Kau found that copyright protection “goes firmly against the grain of Asian culture, which supports the concept of sharing, not protecting, individual creative work.”¹⁰³ The authors found that their Singaporean subjects tended to justify copyright infringement on utilitarian grounds; while the subjects acknowledged that their unauthorized copying of computer software was *illegal*, within the Chinese cultural context they did not view it as *immoral*.¹⁰⁴

Historical explanations for the tendency to copy have been suggested.¹⁰⁵ It has been noted that in many Asian cultures, faithful imitation (for example of classic paintings) is a generous compliment.¹⁰⁶ The accurate reproduction of ancient works of the masters by accomplished calligraphic artists may help to account for a general proclivity to copy.¹⁰⁷ In order to become a government official in Imperial China — generally viewed as a most worthy achievement¹⁰⁸ — it was necessary to pass a series of grueling examinations, which entailed a sizable amount of memorization and reproduction of classic Confucian texts.¹⁰⁹ Confucian beliefs, which are still widely held in the P.R.C., stress collectivism, sharing intellectual products with society and a con-

¹⁰² P.G. Altbach, “Economic Progress Brings Copyright to Asia” (1988) 139:9 *Far Eastern Econ. Rev.* 62.

¹⁰³ W.R. Swinyard, H. Rinne & A.K. Kau, “The Morality of Software Piracy: A Cross-Cultural Analysis” (1990) 9 *J.B. Ethics* 655 at 662. Ocko argues that the concept of ownership in Chinese culture requires further research before it can be concluded that there is no tradition of ownership of intellectual property in China (J. Ocko, “Copying, Culture, and Control: Chinese Intellectual Property Law in Historical Context” (1996) 8 *Yale J.L. & Human.* 559). See also W.P. Alford, *To Steal a Book is an Elegant Offense: Intellectual Property Law in Chinese Civilization* (Stanford: Stanford University Press, 1995).

¹⁰⁴ Clearly, this perception is not unique to Asian cultures. According to the Business Software Alliance (BSA), the 1995 piracy rate in the United States (the lowest in the world) was estimated to be a hefty 26%. Incidentally, the 1995 piracy rate in China was estimated to be 96%, and in Hong Kong, 62%. See BSA, “More Than \$13 Billion Lost Worldwide to Software Piracy Joint BSA/SAP Survey Reveals” (18 Dec. 1996), available at http://www.bsa.org/piracy/piracy_study95/SPA_BSA.htm.

¹⁰⁵ J.R. Floum, “Counterfeiting in the People’s Republic of China” (1994) 28 *J. World Trade* 35.

¹⁰⁶ Swinyard, Rinne & Kau, *supra* note 103 at 657.

¹⁰⁷ N. Wingrove, “It’s Not Always Piracy, Say Hong Kong Engineers” (1993) 36 *Research Technology Management* 4; N. Wingrove, “China Traditions Oppose War on IP Piracy” (1995) 38 *Research Technology Management* 6.

¹⁰⁸ K.-S. Yang, “Psychological Transformation of the Chinese People as a Result of Societal Modernization” in M.H. Bond, ed., *The Handbook of Chinese Psychology* (Oxford: Oxford University Press, 1996) 479.

¹⁰⁹ K. Ho, “A Study into the Problem of Software Piracy in Hong Kong and China” (1995), c. 2, s. 2.1; available at <http://www.houston.com.hk/hkgipd/piracy.html>.

cern with the past.¹¹⁰ Since the vast majority of Hong Kong's population is composed of ethnic Chinese, most of whom, or whose parents or grandparents, immigrated from China,¹¹¹ its Confucian cultural heritage is closely tied to that of China.¹¹²

Due in part to this cultural heritage, China did not enact its first comprehensive trade-marks, copyright and patent laws until the early twentieth century, and this occurred largely as a result of pressure from Western nations.¹¹³ The Republican government also promulgated laws protecting IPRs during the period 1928-1932. However, the Imperial and Republican enactments were never effectively implemented due to foreign invasions, civil wars and political instability. The patent and trade-marks laws enacted after the establishment of the P.R.C. were not pursued, largely due to the chaos that resulted from the Great Leap Forward and the Cultural Revolution. However, it would be incorrect to state that Chinese history is devoid of examples in which intellectual property has been protected. Ocko points out, for example, that the concept of authorship did exist in traditional China and that guilds in Imperial China were somewhat effective in restraining the unauthorized use of their trade marks.¹¹⁴

A cultural bias that favours the sharing of ideas is, of course, incompatible with the internationalization of intellectual property, which is fueled by the globalization of economies. China, as a new member of the world trading network, must react to considerable foreign pressure to develop an intellectual-property regime that accords with international standards. Further, as a developing nation wishing to attract foreign investment, the P.R.C. arguably has a vested interest in maintaining vigorous enforcement of IPRs: the success of China's modernization drive depends, to a large extent, upon transfers of technology by foreign corporate investors. It is acknowledged that strong arguments can be made that selective enforcement of IPRs may be an appropriate policy, particularly with respect to developing countries such as China.¹¹⁵ That

¹¹⁰ See Ho, *ibid.*; S.G. Redding, *The Spirit of Chinese Capitalism* (Berlin: de Gruyter, 1990); W.P. Alford, *supra* note 103; Yang, *supra* note 108.

¹¹¹ According to Redding, 99% of Hong Kongers are Chinese (*ibid.* at 23). Official statistics on the ethnic makeup of Hong Kong's population are unavailable. However, statistics regarding usual language spoken are illustrative. In 1991, the most recent census figures available, 97% of Hong Kong's population identified a Chinese dialect as their usual language spoken (see Census and Statistics Department of the Hong Kong Government, "Hong Kong 1991 Population Census — Main Tables" (1992) 70-71). According to Redding at 187, "It may now be asserted more confidently that Overseas Chinese society [including Hong Kong society], as a kind of offshore version of traditional Chinese society, preserves its verticality and its distinct form of order, and preserves also the legacy of weak horizontal cooperativeness."

¹¹² For a discussion of Confucianism in the Hong Kong context, see D.W. Ling, "Confucianism and English Common Law: A Hong Kong Lawyer's Observation" (1995) 1:1 *J. Chinese & Comp. L.* 72 at 80.

¹¹³ See generally, Alford, *supra* note 103 at 30-68.

¹¹⁴ Ocko, *supra* note 103. In Ocko's view, "an intellectual property consciousness, or sensibility, has probably existed in China for a long time" (*ibid.* at 571). See also Alford, *supra* note 103.

¹¹⁵ See F. Machlup & E. Penrose, "The Patent Controversy in the Nineteenth Century" (1950) 10 *J. Economic History* 1; C.A.P. Braga, "Guidance From Economic Theory" in W.E. Siebeck *et al.*, eds., *Strengthening Protection of Intellectual Property in Developing Countries: A Survey of the Literature* (World Bank Discussion Papers) (Washington: The World Bank, 1990) [hereinafter *Strengthening*

being said, the P.R.C.'s frenzied promulgation of "world class" intellectual-property legislation since the 1980s is evidence that it views effective protection of IPRs as necessary to encourage technology transfer.¹¹⁶ Many companies doing business in China agree.¹¹⁷ On the other hand, as a developed region with an economy increasingly based on the provision of services rather than the manufacture of products, Hong Kong's policy objectives with respect to intellectual property differ significantly from those of the P.R.C.

At first glance, the recognition of IPRs in China appears to be contrary to basic Marxist-Leninist (and, incidentally, Confucian) principles, which hold that the products of innovation and creativity belong to the society, not the creator.¹¹⁸ China's eco-

Protection of Intellectual Property]; R.E. Evenson, "Survey of Empirical Studies" in *Strengthening Protection of Intellectual Property*, *ibid.*; U. Anderfelt, *International Patent-Legislation and Developing Countries* (The Hague: Martinus Nijhoff, 1971); A.S. Oddi, "The International Patent System and Third World Development: Reality or Myth?" [1987] *Duke L.J.* 831; D. Brenner-Beck, "Do As I Say, Not As I Did" (1992) 11 *U.C.L.A. Pacific Basin L.J.* 84; R.L. Gana, "Has Creativity Died in the Third World? Some Implications of the Internationalization of Intellectual Property" (1995) 24 *Denv. J. Int'l L. & Pol'y* 109; C.M. Correa, "The TRIPs Agreement and Information Technologies: Implications for Developing Countries" (1996) 5 *Info. & Comm. Tech. Law* 133; R. Acharya, "Intellectual Property Rights and Information Technology: the Impact of the Uruguay Round on Developing Countries" (1996) 5 *Info. & Comm. Tech. Law* 149; K. Peterson, "Recent Intellectual Property Trends in Developing Countries" (1992) 33 *Harv. Int'l L.J.* 277; M.D. Rowat, "An Assessment of Intellectual Property Protection in LDCs From Both a Legal and Economic Perspective — Case Studies of Mexico, Chile and Argentina" (1993) 21 *Denv. J. Int'l L. & Pol'y* 401; P. Gakunu, "Intellectual Property: Perspective of the Developing World" (1989) 19 *Ga. J. Int'l & Comp. L.* 358; S. Lall, "The Patent System and the Transfer of Technology to Less-Developed Countries" (1976) 10 *J. World Trade Law* 1; E. Penrose, "International Patenting and the Less-Developed Countries" (1973) 83 *The Economic Journal* 768; H.E. Grundmann, "Foreign Patent Monopolies in Developing Countries: An Empirical Analysis" (1976) 12 *J. Development Studies* 186.

¹¹⁶ It has been argued that in the absence of laws protecting IPRs, foreign and Chinese inventors and holders of technology would be likely to retain their innovations for fear that infringement would occur and negligible benefit from the transfer would be derived: see S. Dong, D. Zhang & M.R. Larson, *Trade and Investment Opportunities in China: The Current Commercial and Legal Framework* (Westport: Quorum, 1992).

¹¹⁷ P. Tackaberry, "Intellectual Property Risks in China: Their Effect on Foreign Investment and Technology Transfer" (Faculty of Law, City University of Hong Kong, 1997) [unpublished]. This article is a survey of the IPRs-related concerns of Western and Japanese companies doing business in China. There is anecdotal evidence that the perceived failings of China's IPRs regime act as a disincentive for foreign companies to transfer their technology to Chinese joint ventures. See R.L. Thurston, "Country Risk Management: China and Intellectual Property Protection" (1993) 27 *Int'l Law.* 51 and N. Holloway, "Seeds of Worry" (1995) 158:46 *Far Eastern Econ. Rev.* 97. A biotechnology industry expert has said: "Many foreign bio-tech firms were wary of bringing their best crop varieties to China because of concerns over their intellectual property rights" (E. Lococo, "US Pact to Boost Agribusiness" *Hong Kong Standard* (18 June 1996) A3). Chrysler alleges that it recently lost a bid to produce minivans in China because "it did not want to risk exposing its cash cow minivan to Chinese copycat manufacturers." See T. Munroe, "China Uses its Market's Size to Bully World Traders" *The Washington Times* (22 October 1995) A1.

¹¹⁸ Alford, *supra* note 103; Y. Yang, "The 1990 Copyright Law of the People's Republic of China" (1992) 11 *U.C.L.A. Pacific Basin L.J.* 260.

conomic reforms were rationalized on the basis that foreign technology which improves the lot of the people is useful to socialism and is therefore desirable.¹¹⁹ Class struggle is no longer viewed as the key link to socialism; instead economic development through an open door policy is the "central task".¹²⁰ The Hong Kong S.A.R.'s capitalist system lacks the central planning of China's "socialism with Chinese characteristics". Nevertheless, both governments will likely continue to recognize the potentially significant, albeit somewhat different, role to be played by enforceable IPRs in fostering economic growth.

While China's intellectual-property legislation, generally speaking, meets or exceeds the requirements of the major international agreements,¹²¹ it is the application of those laws that causes dissatisfaction in the international business community. It appears the ultimate source of discord may be China's own brand of rule of law,¹²² which entails a close relationship between the state and key players in the enforcement process, including law-enforcement officials, the Bureaus of Administration of Industry and Commerce and the courts. As an example, China's Copyright Law¹²³ clearly prohibits the manufacture and sale of counterfeit computer software, recorded music and films. However, it has been revealed that local officials protect, or at least ignore, the activities of pirate factories within their jurisdiction.¹²⁴ The close connection between

¹¹⁹ Alford, *ibid.*; L. Leong, "Trademark Law in the People's Republic of China: Encouragement of Foreign Investment" (1996) 7 *Australian Intell. Prop. J.* 32.

¹²⁰ J. Wu, *On Deng Xiaoping Thought* (Beijing: Foreign Languages Press, 1996). One must bear in mind that despite the array of reforms, "public ownership constitutes the mainstay" of China's economy (Decision of the CPC Central Committee on Some Issues Concerning the Establishment of a Socialist Market Economic Structure, *Daily Rep. China* (FBIS) (17 November 1993) at 23 quoted in W.H. Simon, "The Legal Structure of the Chinese 'Socialist Market' Enterprise" (1996) 21 *J. Corp. L.* 267).

¹²¹ See S. Kwok, "The PRC Makes Slow But Steady Progress" (1996) 9:10 *I.P. Asia* 18.

¹²² The term "rule of law" is used to describe modern Western legal systems that have comprehensive, systematic, coherent and logically consistent rules that are independent of other institutions (for example, the state) and which are administered by trained legal professionals. In Weber's model, rule of law gives individuals confidence that their disputes with others, including the state, will be adjudicated on the basis of the facts and the law only (see M. Weber, *The Theory of Social and Economic Organization* (New York: Oxford University Press, 1947)). Weber believed rule of law was necessary for capitalism to thrive because "the predictability in the operation of such a rational legal system would provide the psychological security which capitalists and investors need in their business activities": A.H.Y. Chen, *An Introduction to the Legal System of the People's Republic of China* (Hong Kong: Butterworths Asia, 1992) at 3. For a discussion of "rule of law" in the Hong Kong context, see Ling, *supra* note 112 at 83-84.

¹²³ Copyright Law of the People's Republic of China, 15th Sess., 7th N.P.C., 7 Sept. 1990 ¶11-700.

¹²⁴ See F. Chen, "Current Resistance to the Investigation and Punishment of Trademark Infringement in China and the Countermeasures to be Adopted" (1994) 39:4 *China Patents & Trademarks* 69; J. Yu, "Protection of Intellectual Property in the P.R.C.: Progress, Problems and Proposals" (1994) 13 *U.C.L.A. Pacific Basin L.J.* 140; J.T. Simone, "Trade Sanctions Loom Again" (1996) 10:1 *China L. & Prac.* 29; O.D. Nee & E. Bowler, "China" (Forum: Intellectual Property Protection in China, South Korea, Australia and Malaysia) (1995) 8 *Asia Bus. L. Rev.* 28; H.J.H. Weare, "Enforcement Still a Problem for Trademarks" (1996) 9:10 *I.P. Asia* 25.

state and enforcement mechanisms in the P.R.C. can also lead to government involvement in the enforcement of foreign-owned IPRs.¹²⁵

While asserting that judges in China are independent from the influence of the Communist Party, Chen Chunlong, vice-president of the Beijing Higher People's Court, recently acknowledged that Party members are "responsible for the spiritual education in a court".¹²⁶ Su Chi, vice-president of the First Beijing Intermediate People's Court, states that "Chinese or foreigners, whoever is in the right, wins the lawsuit because we only judge by law and evidence."¹²⁷ Presumably, Mr. Su meant whoever is in the right *from a socialist perspective*: it is well known that adjudicative committees composed largely of judges who are members of the Communist Party of China conduct a prior review of significant cases — which may be based only on a short oral presentation by the judge responsible for the case¹²⁸ — and make recommendations as to their proper disposition.¹²⁹ Chen describes the judicial process as "first decide, then try".¹³⁰ In the words of Lewis, laws in China are actually "tools of bureaucrats, agencies and government companies" which "makes for an unpredictable environment".¹³¹ Clearly, the application of law in China is much more closely connected to state policy and whim than in the West.¹³²

¹²⁵ For this reason, foreign companies frequently choose to focus their enforcement activities in Hong Kong, through which many counterfeit products originating in China are exported.

¹²⁶ A. Ngai, "Judicial System 'independent of Communist Party'" *South China Morning Post* (6 March 1997) 10.

¹²⁷ L. Cao, "China Protects Foreign Copyrights: Solemn Promise" (1996) 39:2 *Beijing Rev.* 25 at 25. For an erudite discussion of the relationship between "rule of law" and Deng's "socialism with Chinese characteristics", see D. Guo, "Enlightenment of Law and Rule of Law in China" (1996) 2:2 *J. Chinese & Comp. L.* [forthcoming].

¹²⁸ Chen, *supra* note 122 at 120. See also D. Tan, "Judicial Independence in the People's Republic of China: Myth or Reality?" (1993) 68 *Australian L.J.* 660; Hansen, *supra* note 43.

¹²⁹ M.Y.K. Woo, "Adjudication Supervision and Judicial Independence in the P.R.C." (1991) 39 *Am. J. Comp. L.* 95. See also Dong, Zhang & Larson, *supra* note 116 at 5. See also C. Wang, "Introduction: An Emerging Legal System" in C. Wang & X. Zhang, eds., *Introduction to Chinese Law* (Hong Kong: Sweet & Maxwell, 1997) 1.

¹³⁰ Chen, *supra* note 122 at 120.

¹³¹ D. Lewis, ed., *The Life and Death of a Joint Venture in China*, 2d ed. (Hong Kong: Asia Law & Practice, 1995) at 44.

¹³² According to W.C. Jones, "Policy in China is law. It does not merely influence law": W.C. Jones, "The Constitution of the People's Republic of China" (1985) 63 *Wash. Univ. L.Q.* 707 at 713. See also L. Wang, "China's Patent Law and the Economic Reform Today" (1991) 9 *Pacific Basin L.J.* 254. In the months following the Tiananmen Square "incident", Chinese officials discriminated against foreign joint venture partners. See J. Child, *Management in China During the Age of Reform* (Cambridge: Cambridge University Press, 1994) at 245, 291, 305. Since 1995, subscribers to the Internet have been required to register with the government and the government has made it impossible for subscribers to access numerous politically sensitive websites. See Kwok, *supra* note 121; M. Clough, "Cyberspace: Why Nations Could Fear the Internet" *Los Angeles Times* (4 February 1996) M1; S. Faison, "Chinese Tiptoe Into Internet, Wary of Watchdogs" *The New York Times* (5 February 1996) A3; "China Ban on Internet" *Hong Kong Standard* (9 September 1996) A2. More recently, these restrictions were relaxed to allow access to such websites as CNN and *The Wall Street Journal*. See "Net surfers given access to news sites" *South China Morning Post* (16 January 1997) 10. The

It has been suggested that rule of law may not be necessary for the successful operation of Chinese and other East Asian economies.¹³³ Yet, most foreign investors would evidently prefer to operate within a legal system that produces predictable results with a minimum of government interference.¹³⁴ Herein lies Hong Kong's greatest challenge. If the courts of the Hong Kong S.A.R. are able to resist any attempts by Beijing to intervene in their application of the intellectual-property laws,¹³⁵ Hong Kong will continue to reap the perceived benefits of a jurisdiction in which the IPRs of foreign companies, innovators and artists can be enforced in a reliable and objective manner.¹³⁶

measures are justified on the basis that they control communication that is "harmful to the security of the nation." Those who fail to comply are subject to severe punishment ("Internet users warned on laws" *South China Morning Post* (9 August 1996) 9). The overall effectiveness of these measures remains to be determined; those with financial resources sufficient to permit access to Internet gateways outside China would, it appears, be able to render the regulations impotent as detection would be problematic.

¹³³ According to C.A.G. Jones, "To the extent that the Chinese and East Asian economies are mutually interdependent, they can continue to operate in an environment of legal pluralism, where 'rule of relationships' [familism and *guanxi*] rather than 'rule of law' is central" (C.A.G. Jones, "Capitalism, Globalization and Rule of Law: An Alternative Trajectory of Legal Change in China" (1994) 3 *Social & Legal Studies* 195 at 215). See also Y. Ghai, "The Rule of Law and Capitalism: Reflections on the Basic Law" in *China, Hong Kong and 1997*, *supra* note 44 at 343.

¹³⁴ See Hansen, *supra* note 43. Tackaberry, *supra* note 117.

¹³⁵ Art. 158 of the Basic Law, *supra* note 5, states: "The courts of the Hong Kong Special Administrative Region shall exercise judicial power independently, free from any interference. Members of the judiciary shall be immune from legal action in the performance of their judicial functions." Hansen, *supra* note 43, a former member of the Hong Kong judiciary, states at 12: "Recent events in Hong Kong have also highlighted an apparent failure to fully understand the doctrine of the separation of powers and judicial independence." In particular, he finds it "surprising" that Sir T.L. Yang, while Chief Justice of Hong Kong, would run for the political office of Hong Kong S.A.R. Chief Executive.

While acknowledging that the Basic Law contains some checks and balances, Hansen notes that future Hong Kong judges will ultimately be appointed by Tung Chee-hwa, the Hong Kong S.A.R.'s Beijing appointed Chief Executive. However, Mr. Tung has stated: "For the sake of judicial independence, the Chief Executive will have no role to play [in the selection of judges] but to convene the first meeting [of the commission to select judges] before the chief justice has been chosen" (L. Choy, "Tung vows to stand back from hiring judges" *South China Morning Post* (1 March 1997) 6). In April 1997, Mr. Tung dropped two independents from the body that appoints judges and replaced them with "Pro-China and pro-business" members (A. Li & L. Choy, "Tung drops independents from judges body" *South China Morning Post* (12 April 1997) 1). It has been noted that the Court of Final Appeal, which replaces the Privy Council, will consist of "four Judges appointed by Beijing's satrap and one overseas Judge" (Editorial, "Hong Kong and New Zealand" [January 1997] *New Zealand L.J.* 1). This editorial describes a statement made by Martin Lee, leader of Hong Kong's Democratic Party, to the effect that, "Only overseas Judges could be trusted to keep the parties on a level playing field and not be influenced by the status or identity of the parties" (*ibid.* at 1). The recent appointment of Andrew Li Kwok-nang as Chief Justice of the Court of Final Appeal should allay some of these concerns, at least for the time being: see text below, accompanying note 143.

¹³⁶ According to Christopher Patten, "Patten Speech", *supra* note 1 at para. 4:

Conclusion

Hong Kong and Taiwan — Chinese societies with Confucian traditions — have evolved from sites of rampant infringement of IPRs to more sophisticated societies whose governments acknowledge the global and domestic importance of the protection of intellectual property.¹³⁷ While China's earnest efforts to improve its enforcement of IPRs must be acknowledged,¹³⁸ it is at an earlier stage of this development. Further, as a developing nation with a largely planned economy, China's intellectual-policy objectives differ substantially from those of the Hong Kong S.A.R., a wealthy developed region with one of the freest market economies in the world.

As Hong Kong reverts to Chinese rule, it is at risk of being drawn into the types of intellectual-property disputes that have plagued Sino-United States relations recently.¹³⁹ However, Hong Kong's common-law tradition, which, according to the Basic Law,¹⁴⁰ is to continue at least until the year 2047, will be viewed as a significant asset by many foreign businesses. Assuming the Hong Kong judiciary can resist any involvement of P.R.C. government officials in its enforcement of IPRs, domestic innovation should be encouraged in the Hong Kong S.A.R.,¹⁴¹ and its status as a respected

We, more than anyone, know the value of free trade, and know how much free trade depends upon confidence in the respect that will be shown to legal rights. We have a reputation to defend, a reputation that adds value to the goods and services we offer.

at para. 29:

As a committed member of the free trade club, and a passionate advocate of the benefits of free trade, Hong Kong is necessarily — necessarily — a staunch defender of intellectual property rights. Our credibility as a free trader depends upon being an honest trader. Who will invest in new processes and production of original products here if the fruits of their research and investment, their technology and their designs are not safeguarded? The cost to Hong Kong, and to your business opportunities here, of failing to maintain and enforce our protections for intellectual property is hard to put a figure on, but all too easy to envisage.

¹³⁷ In Taiwan (and other Asia Pacific countries such as South Korea), this did not occur without considerable foreign pressure, particularly from the United States. See Alford, *supra* note 103 and C.C. Li, *The Protection of Intellectual Property Rights as a Strategic Component of the Republic of China's Economic Policy* (Ann Arbor: U.M.I., 1991). In Hong Kong, organized distribution of counterfeit products still continues. It has been alleged that Hong Kong businesses are masterminding some of the pirate factories in China. This suspicion, together with the apparent rapid increase in 1996 and 1997 in the number of Hong Kong arcades selling counterfeit software led the United States to place Hong Kong on the Special 301 Watch List in May 1997; available at <http://www.ustr.gov/releases/1997/04/97-37.pdf>. See "Patten Speech", *supra* note 1; M. Sharp, "Software alliance puts gun to pirates" *Sunday Morning Post* (4 May 1997) 3.

¹³⁸ Only as recently as the late 1970s has modern China been in a position to embark upon the earnest protection of IPRs. See text above, accompanying notes 116-117.

¹³⁹ For a summary of these disputes, see R. Ross-MacDonald, "Developments in Intellectual Property Protection and Enforcement in the People's Republic of China" (1996) 1 *Asian Commercial L. Rev.* 222.

¹⁴⁰ *Supra* note 5.

¹⁴¹ However, as Y.L. Cheung, a Hong Kong games-software developer, states: "Foreigners are reluctant to have alliances with Hong Kong [software] companies because they are afraid of piracy" (S.

member of the international trading network should remain intact. At present, the extent to which the Hong Kong S.A.R.'s autonomy in the area of intellectual-property policy will be maintained can only be a matter of conjecture. However, the recent appointment of Andrew Li Kwok-nang Q.C., a liberal, non-aligned, British-educated lawyer, as Chief Justice of the Court of Final Appeal should provide some comfort to those who wish to see a continuation of Western-style rule of law in Hong Kong. Mr. Li's appointment was met with almost unanimous approval from British, pro-democracy and pro-Beijing factions,¹² an unusual occurrence in pre-handover Hong Kong.

The convergence of the intellectual-property laws of Hong Kong and China seems inevitable, at least in the long term. However, in view of the "one country, two systems" approach adopted in the Basic Law, an official policy of harmonization is not now in effect, and, it is submitted, should not become an objective in the immediate future. By modelling most of its new intellectual-property legislation on the statutes of the United Kingdom, the Hong Kong Government has evidenced its intention to maintain a course distinct from that of China. It is hoped that this legislative foundation will be accompanied by a clear separation of the judiciary and the state. In this manner, the Hong Kong S.A.R. will maintain its generally favourable reputation in this era of the globalization of economies and internationalization of intellectual property.

Doulaverakis, "HK has talent to lead global games industry" *South China Morning Post* (13 May 1997) T-2). The recent proliferation of counterfeit software in Hong Kong has caused a Business Software Alliance (BSA) representative to allege that software companies "have been slow to come [to Hong Kong] because they are afraid of having their products pirated" (Sharp, *supra* note 137). The BSA also alleges that Hong Kong's high piracy levels make Singapore and Taiwan more attractive for technology companies and wonders "how Hong Kong could be a successful hi-tech centre without stamping out blatant copyright abuse" (Sharp, *ibid.*; M. Sharp, "Pirates sell Windows 97" *South China Morning Post* (4 May 1997) M-1).

Artists, entrepreneurs and inventors in the P.R.C. have for some time complained that piracy and difficult-to-enforce intellectual-property laws are thwarting their efforts to enter the Chinese market. See Nee & Bowler, *supra* note 124; A. Higgins, "The New China: Cartoon Capers Land Pirates in Courts" *The Guardian* (5 June 1996) 12; M. Forney, "Now We Get It" (1996) 159:7 *Far Eastern Econ. Rev.* 40. Ling Yan, a Chinese computer-software developer says, "Knock-off products merely singe the hair on foreigners' arms, but they burn us out by the roots" (*ibid.* at 40). Well known Chinese authors, software developers and musicians such as Ling Yan, Wang Shuo and Cui Jian say they are losing a substantial portion of their revenues to infringers (see Forney, *ibid.* at 40-41). To make matters worse, some Chinese creators are suffering because foreign entertainment companies are unwilling to promote their work in music and films without adequate protection of IPRs (see "Record Firms to Scout Talent" *Eastern Express* (19 June 1996) 6).

¹² See C. Yeung, "Andrew Li named as top judge" *South China Morning Post* (21 May 1997) 1; C.K. Lau, "A man to keep faith in the law" *South China Morning Post* (22 May 1997) 19.