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# Intellectual Property Protection in Hong Kong and the People's Republic Of China

## **Abstract**

This note considers the legal approaches adopted by the authorities in Hong Kong ('HK') and the People's Republic of China ('PRC') to protect intellectual property rights. It is not intended to detail legislation exhaustively since readers can always refer to the statutes themselves. Rather, the note examines the rationales of the two approaches and the possible directions the law might take in the future. Accordingly, the discussion will be confined conveniently to the three traditional areas of intellectual property law: copyright, trademark and patent.

## **Keywords**

intellectual property, Hong Kong, People's Republic of China, copyright, trademark, patent

## **Cover Page Footnote**

This note is based on a paper submitted in July 1993 for assessment in the subject 'Legal Aspect of Doing Business Abroad'. The author wishes to thank Associate Professor Ross Buckley for his encouragement and helpful comments.

COMMENTS AND  
NOTES

INTELLECTUAL PROPERTY PROTECTION IN HONG KONG AND  
THE PEOPLE'S REPUBLIC OF CHINA



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### Introduction

This note considers the legal approaches adopted by the authorities in Hong Kong ('HK') and the People's Republic of China ('PRC')<sup>1</sup> to protect intellectual property rights. It is not intended to detail legislation exhaustively since readers can always refer to the statutes themselves. Rather, the note examines the rationales of the two approaches and the possible directions the law might take in the future. Accordingly, the discussion will be confined conveniently to the three traditional areas of intellectual property law: copyright, trademark and patent.

### Definition of Intellectual Property

It has been argued<sup>2</sup> that the essence of intellectual property law is to protect 'exclusive rights in valuable information'. As the world enters the post-industrial society,<sup>3</sup> access to information, contended Pendelton,<sup>4</sup> becomes the most valuable economic resource. Legislators attempt to strike a balance between competing interests in maintaining and restricting access to valuable information. Hong Kong, for example, has, it has been suggested,<sup>5</sup> consistently restricted local access to valuable information in order to protect vested colonial interests. The PRC, on the other hand, is still grappling with

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1 For the purpose of this note PRC is used interchangeably with China.

2 Pendelton, *Intellectual Property Law in the People's Republic of China* (1st edn, 1986) Butterworths, Singapore, 1.

3 *Ibid* at 2. According to Pendelton this is the stage of development whereby science and technology is so advanced that the ability to keep abreast of its development determines the economic well-being of a country.

4 *Ibid*.

5 See Pendelton, 'Hong Kong: Colonial Intellectual Property Law Discourages Local Innovation and Design' (1989) 3 *IP Asia* 2 at 2. He maintained that HK had one of the most restrictive intellectual property laws in the world. The main reason being the colonial government's desire to protect the interests of foreign intellectual property owners at the expense of local interests.

the value of monopolised information in a socialist society where everybody theoretically has the right to all information.<sup>6</sup>

### Intellectual Property Protection in HK

HK has enjoyed a comprehensive system for the protection of intellectual property since the 1970's. All of its intellectual property laws are based on relevant UK legislation as applied locally.

#### *Copyright Law*

The copyright law<sup>7</sup> is derived from the UK's *Copyright Act 1956* ('the Act'), extended to HK in 1973. There is also a local Copyright Ordinance ('the Ordinance') providing penalties against infringements. The Act protects the author or owner of works in many categories. The work must be original and requires certain skill, labour and effort. Copyright will arise automatically if the author lives in HK or if the work is first published there. Likewise, foreign authors are protected if they are resident in member countries of the Berne Convention<sup>8</sup> or Universal Copyright Convention.<sup>9</sup> Copyright generally lasts for the author's lifetime plus 50 years. Remedies against any infringement include injunction, damages and account of profits.

#### *Problems*

It has been suggested<sup>10</sup> that both the Act and the Ordinance fail to achieve their objectives as a result of the inadequacies of the Act itself and the perceived bias favouring foreign intellectual property owners under the Ordinance.

The Act has been criticised as unintelligible to laymen<sup>11</sup> and uncertain in its operation.<sup>12</sup> Any proposed changes to the Act, however, would have to be in line with the European Community's policy on copyright

<sup>6</sup> See Goldstein, 'Copyright Relations Between the United States and the People's Republic of China: an Interim Report' (1984) 10 *Brooklyn J Int'l L* 403 at 411. See also Brahm, *Intellectual Property Law in the People's Republic of China* (1st edn, 1988) Longman (Far East), Hong Kong, vii, where the author cited as an example the Chinese Constitution which guarantees such basic economic rights as employment, housing while totally silent on protecting private property rights.

<sup>7</sup> For a discussion of HK's copyright law, see Wheare, 'Hong Kong: A Brief Review of Intellectual Property' (1990) 6 *IP Asia* 2 at 3-4.

<sup>8</sup> The Berne Convention for the Protection of Literary and Artistic Works, July 24, 1971.

<sup>9</sup> Ratified on September 6, 1952; revised on July 24, 1971.

<sup>10</sup> See Pendelton, *The Law of Intellectual and Industrial Property in Hong Kong* (1st edn, 1984) Butterworths, Singapore, 228.

<sup>11</sup> *Ibid.* He cited Professor Cornish's submission to the Whitford Committee that the *Copyright Act 1956*, unlike its German counterpart, was very hard to understand. Since this Act applies directly to HK by virtue of the Copyright Hong Kong Order 1972, the HK statute would have the same problems as its UK counterpart.

<sup>12</sup> *Ibid.* He suggested that since the *Copyright Act* had lumped diverse subject matters together, the court was required to stretch the central theme of the Act to comprehend vastly different factual situations.

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as the UK is a signatory to the Maastricht Treaty. Such changes would hardly reflect HK's interests, especially in view of the impending transfer of sovereignty to China.<sup>13</sup>

Sections 5 and 9 of the Ordinance have also been seen as too protective of foreign interests at the expense of local concerns.<sup>14</sup> Section 5, for example, imposes criminal penalties<sup>15</sup> on any person who possesses, for trading and business purposes, an infringing copy of a work unless he can prove to the court's satisfaction that he has no knowledge of any such infringement.<sup>16</sup> Section 9 provides that any person claiming to be the copyright owner can file an affidavit affirming ownership of copyright. The affidavit would be admitted without further proof in any legal proceeding under the Act or Ordinance. The Hong Kong Court of Appeal in *Phonographic Performance Ltd v California Entertainment Ltd*<sup>17</sup> held that once the plaintiff filed the affidavit under section 9, the onus rested with the defendant to prove it otherwise. This is very difficult as the plaintiff is usually the only party that possesses all the relevant information about the case. Since the majority of plaintiffs are foreigners, this decision reinforces the perception that the law operates against local interests.

#### *Trademark Law*

At present the Trade Marks Ordinance<sup>18</sup> provides for registration of goods and services.<sup>19</sup> A registered trademark may consist of a word, name or phrase or a combination of these. Registration lasts for 7 years from the date of application<sup>20</sup> and is renewable for periods of 14 years.

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<sup>13</sup> See above n 5 at 2. According to Pendleton highly developed countries like most EC members would see their interests similar to that of a net technology exporter, who prefers limited access to valuable commercial information. Conversely, developing countries like China and to a lesser extent HK would see themselves as end users of such information and would not want strong restrictions on access to it.

<sup>14</sup> See Parsons, 'Copyright Ordinance May be Inconsistent with the Bill of Rights' (1992) 2 IP Asia 6 at 6-7.

<sup>15</sup> A fine of HK\$ 1,000 (US\$ 128) for each infringing copy and one year imprisonment.

<sup>16</sup> This view, it is submitted, is incorrect. In *R v Edwards* [1975] QB 27 Lawton LJ, delivering the Court of Appeal's judgment, held at 39-40 that the fundamental rule of English criminal law was that the prosecution had to prove every element of the offence charged. The only exception is:

...limited to offences arising under enactments which prohibit the doing of an act save in specified circumstances or by persons of specified classes or with specified qualifications or with the licence or permission of specified authorities.

Then the defendant had the persuasive burden to prove his innocence. Section 5, however, was drafted as all-embracing in its operation: it does not exempt certain accused from being charged with possessing infringing copies. On the basis of Lawton LJ's reasoning, the onus of proof should never have been reversed under section 5. This view was cited with approval in the House of Lords decision in *R v Hunt* [1987] AC 352 by Lord Griffiths at 376 and Lord Ackner at 386.

<sup>17</sup> [1988] 2 HKLR 237 at 244.

<sup>18</sup> For a discussion of HK's trademark law, refer to Sharpe (ed), *Protecting Intellectual Property Law in Asia-Pacific* (2nd edn, 1989) Longman Cheshire, Melbourne, 40-5.

<sup>19</sup> New Trade Mark Rules ('the Rules') were introduced on 2 March 1992 to allow application for service marks registration.

<sup>20</sup> Under the Rules the date of application is up to 2 March 1992.

### Problems

It has been suggested<sup>21</sup> that sections 23 and 53 of the Ordinance discriminate against local trademark applicants to protect the interests of foreign trademark owners. Hunter J's interpretation of section 23 in *Hong Kong Caterers v Maxim's Ltd*<sup>22</sup> is illustrative. The case evolved around the application by a local company, Hong Kong Caterers Ltd, to register the mark 'Maxim's' in respect of the bakery products sold at the cafes that it operated in HK. The French restaurant Maxim's opposed the application in pursuance of section 23. The section<sup>23</sup> provides that the Registrar may refuse any local application to register a mark if it is identical or resembles a trademark in respect of goods 'in a country or place from which such goods originate'. Hunter J, sitting as a Deputy Judge of the High Court, rejected the defendant's submission that the word 'originate' meant 'manufactured, grown or first saw light of day in the country of registration'<sup>24</sup> and accepted the House of Lords' definition of the word in the case of *Aristoc Ltd v Rystra Ltd*.<sup>25</sup> His Lordship noted:

[T]he essential feature of a trade mark was its indication of the origin of the goods in the broadest sense of having been adopted or stamped with the approval of the holder of the mark in the course of his business before being offered for sale . . . Scotch whisky or Welsh lamb no doubt from time to time passes through Maxim's kitchen in Paris. Its 'preparation' there stamps it with Maxim's mark so that in the trade mark sense it originates in France.<sup>26</sup>

In other words, the latter phrase simply meant goods marked with a foreign trademark. It followed that the French restaurant was entitled to oppose the registration in HK of the mark 'Maxim's' not only in respect of bakery products, but literally of everything else. His Lordship therefore was not prepared to register the copied mark in HK. On the basis of this interpretation a foreign trademark owner *in any country* (emphasis added) has the right to oppose registration of a local trademark similar to his. A HK applicant has to conduct a world-wide search for any conflicting trademark that has previously been in use. This is extremely costly and sometimes impossible when countries, like the PRC, do not provide such search facilities.<sup>27</sup>

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21 Above n 5 at 3.

22 [1983] HKLR 287.

23 This section is peculiar to the HK Ordinance and in the words of Hunter J, *ibid* at 295, manifested 'legislative disapproval of the piracy of foreign marks' and encouraged 'the protection of foreign goodwill'. Pendleton, above n 10 at 121, fn 62, cited Wilkinson's claim, made in *A History of and Treatise on The Law in Hong Kong Relating to Trade Marks* (2nd edn, 1991) Kelly and Walsh, Hong Kong and Shanghai, that section 21, the predecessor to the current section, existed primarily to 'protect the trading concerns of foreign investors'.

24 The *Maxim's* case, above n 22 at 299.

25 [1945] RPC 65.

26 Above n 22 at 299.

27 Above n 5 at 3.

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It is submitted his Lordship's rejection of the geographical connotations of the word 'originate', with respect, is incorrect. Trademark law seeks to protect a mark in use within a particular jurisdiction.<sup>28</sup> A British trademark, for instance, is not recognised in the US unless it is registered there. Similarly, international trademark conventions like the Paris Convention<sup>29</sup> will grant priority to trademark applicants only within member states and on a reciprocal basis. His Lordship's interpretation of section 23 effectively conferred on a foreign trademark owner an *unlimited* right to protect his interests in HK while no country in the world gives local trademark owners a similar reciprocal right.

Section 53 is equally discriminatory. It provides that a foreign trademark owner can apply to remove a HK registered mark from the register on the ground that the mark is confusingly similar to his.

The HK government has urged<sup>30</sup> local trademark applicants to play a more active role in promoting their rights in future. To this end, the authorities, it is submitted, should follow other Commonwealth countries' example in preparing to register a local mark unless such registration can be objected to on valid grounds.<sup>31</sup> Equally, the present legislation needs to be amended to provide better protection to local trademark applicants and owners.

#### *Patent Law*

HK has no independent patent registration system. Any inventor must obtain a UK-registered patent and have it re-registered locally. Under the Registration of Patents Ordinance, the patent holder enjoys the same rights as his UK counterpart, which include, among other things, a maximum patent term of 20 years and free transferability of patent rights.<sup>32</sup>

#### *Problems*

While it is generally accepted that the UK Patent Office grants good patents,<sup>33</sup> the lack of a local patent system reinforces the view that the colonial government treats local manufacturers' interests with contempt. For instance, when a HK manufacturer wants to know whether his customer owns the design given him to manufacture, he must hire, at great costs, a patent agent

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<sup>28</sup> Ibid.

<sup>29</sup> The Paris Convention for the Protection of Industrial Property applies in HK since November 1977 by virtue of the Patents Etc (Hong Kong) Convention Order.

<sup>30</sup> See the Averil Waters' Interview (1992) 10 IP Asia 12 at 16 where the Acting Registrar of Trade Marks outlined the government's views on protection of trademarks in HK.

<sup>31</sup> Ibid. Such grounds may include fraud, imposture etc.

<sup>32</sup> Refer to Wheare, above n 7 at 4-5.

<sup>33</sup> The Averil Waters' interview, above n 30 at 12. The UK Patent Office, for example, has an extensive array of search methods not presently available in HK.

in the UK to conduct a search for him.<sup>34</sup> The government ascribes the failure to establish such a system to a lack of local expertise.<sup>35</sup> This is plainly untenable given the technical excellence of local lawyers.<sup>36</sup> It is conceivable that HK, after 1997, may establish its own patent system which can access an international search and examination procedure<sup>37</sup> or even consider joining other developing countries in formulating a regional patent policy.<sup>38</sup>

### Future Directions

Given HK's colonial origins it is not surprising that the government has taken local interests for granted. What is extraordinary, though, are the lengths the court will go to to protect vested foreign interests. It is submitted that only a colonial judge like Hunter J, with respect, will interpret section 23 of the Trade Marks Ordinance the way his Lordship did in the *Maxim's* case. Other judges would have exercised policy discretion and decided the case differently.<sup>39</sup> However, it is equally arguable that the present laws are necessary to ensure the integrity of foreign products in HK, which in turn will guarantee consistent foreign investments and economic prosperity for the territory.<sup>40</sup> This view is increasingly suspect, though, considering the huge economic strides made by local manufacturers in the 1980's<sup>41</sup> and the government's avowed policy of discouraging discrimination on all fronts.<sup>42</sup>

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34 This is necessary because HK's patent register consists of only British patents and European patents in respect of the UK.

35 Above n 30.

36 Above n 5 at 4, for example, reported that at least two HK law firms had already developed computerised registers of patents and trademarks which allowed them to conduct far more accurate searches than that offered by the Registrar General's Department.

37 Above n 10 at 241.

38 Evanson, 'Intellectual Property Rights and the Third World' (1983) 12 EIPR 330; quoted by Pendelton, *ibid*, fn 11. Evanson was of the view that the establishment of a regional policy will make it easier for citizens of these countries to sell technology to developed countries.

39 Assistant Registrar Thomson, for example, in *North Pole TM* (9 January 1959 at page 12; quoted in Pendelton, above n 10 at 123) was prepared to hold for the local applicant in a similar case where the goods in question, in the normal course of business, originated from more than one place. To do otherwise, argued the Assistant Registrar, would have meant open slather for foreign manufacturers to gain priority over local applicants for the registration of goods originating in HK: a result a local court would not countenance. This view might suggest the court is departing from its traditional role of interpreting the language of the statute and not to legislate. However, for reasons that will be developed later, it is submitted that courts in HK need to exercise policy discretion in interpreting colonial legislation.

40 Above n 5 at 7.

41 The manufacturing sector now accounts for 16% of HK's output and is instrumental in making the annual growth rate of 7% in GDP possible throughout the 1980's. See *The Far East and Australasia 1994* (25th edn, 1994) Europa Publications, London, 258-259.

42 Eliminating discrimination is an important part of the free market economic policy coined by the former Financial Secretary Sir Phillip Haddon-Cave as 'positive non-interventionism'. See the *South China Morning Post*, March 5, 1977 at page 2.



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It remains to be seen whether the present laws will survive 1997. While HK would generally maintain its legal system after the hand-over,<sup>43</sup> it is likely that the resumption of Chinese sovereignty would result in more protection for local interests in its intellectual property laws.

### Intellectual Property Protection in the PRC

Compared to HK, China has a relatively short history of formal protection of intellectual property. It was not until 1983 and 1985 that the Laws on Trademark and Patent became operational respectively. The new Copyright Law came into force only in June 1991.

Yang has suggested<sup>44</sup> that the communist ideology is mainly responsible for the slow development of intellectual property protection in China. The present Constitution, for example, confirms that all artistic and scientific endeavours existed primarily to advance the proletarian revolution and in that regard private property must be renounced in order to eliminate class inequalities.<sup>45</sup>

#### *Copyright Law*

China's long-standing antipathy towards authors and intellectual communities may explain why it has not enacted a copyright law for over forty years.<sup>46</sup> However, present economic realities<sup>47</sup> dictate otherwise and hence the new Copyright Law.<sup>48</sup> For the most part, the new law covers the same major areas of protection as HK's. Important features include:

- (i) a work need not be in a material form in order to be protected. Accordingly, oral works like lectures and public speeches are specifically protected.<sup>49</sup>
- (ii) the law also provides extensive protection of author's moral rights.<sup>50</sup> These rights are personal to the author and not transferable.

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<sup>43</sup> See, for example, Article 159 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China.

<sup>44</sup> See Yang, 'The 1990 Copyright Law of the People's Republic of China' (1993) 11 No. 2 UCLA Pacific Basin L J 260 at 269.

<sup>45</sup> See Pendleton and Zheng, 'The Chinese Copyright Law - Opportunities for Foreign Investors and for China' (1991) June, Blake Dawson Waldron Reporter - Current Developments in Intellectual Property and Trade Practices 1 at 2. See also Goldstein, above n 6 at 412.

<sup>46</sup> Above n 44 at 271-273. These groups, the main beneficiaries of protection of copyright, are often seen as products of decadent bourgeois capitalism and sternest critics of the communist government. See also Sidel, 'Copyright, Trademark and Patent Law in the People's Republic of China' (1986) 2 Texas Int'l L J 259 at 260.

<sup>47</sup> It is unlikely that advanced technology would be introduced into China unless the legal system provides protection for ownership rights in the technology being transferred. Without such technology the government's economic reforms would be stalled.

<sup>48</sup> For a more detailed review of the copyright law, see Wang and Davidson, 'The New Law on Copyright in the People's Republic of China' (1991) 9 No. 1 Copyright Reporter 2-11.

<sup>49</sup> *Ibid* at 3.

<sup>50</sup> Article 6, for example, grants to the author the rights of publication, claiming authorship, revision and integrity of work.

- (iii) foreigners may enjoy copyright in works which are first published in Chinese territory, which would theoretically include HK, Macau and Taiwan. But if the work is not first published in China, the author's rights would still be protected by the bilateral agreements between China and his country or any international agreements to which China is a signatory.<sup>51</sup>

### *Imperfections*

However, certain vital issues are yet to be addressed. The most important one is to determine whether a literary work, in order to qualify for copyright protection, must manifest originality both in the ideas it expresses and the form it takes.<sup>52</sup> HK, by contrast, requires only that the work be independently created.<sup>53</sup> Also, the State Council needs to come up with guidelines on protection of copyright in published editions of works, folk-artistic works and the rights of copyright owners over infringements.<sup>54</sup>

### *Trademark Law*

Despite the lack of a copyright law, China has not been greatly hampered in the development of other forms of intellectual property protection.<sup>55</sup> In fact, it has a relatively sophisticated system of trademark regulations.<sup>56</sup> However, the focus of the system is not so much protection of private commercial advantage as promotion of foreign trade and maintenance of quality products.<sup>57</sup>

To this end, the Trademark Law<sup>58</sup> has adopted the principle of first to file in its registration of marks. Trademarks must be distinctive and may only be registered in respect of China's own list of classifications of goods.

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51 Above n 48 at 6-7.

52 Ibid at 3.

53 Above n 10 at 186. He cited Lord Reid's judgment in *Ladbroke's (Football) Ltd v William Hill (Football) Ltd* [1964] 1 WLR 273 at 277 that under the *Copyright Act 1956* original meant the work originated in the author independently.

54 Above n 48 at 11.

55 Above n 46 at 269. Shortly after the founding of the PRC in 1949, Provisional Regulations on Trademark Registration were promulgated. Brahm, above n 6 at viii, also indicated that the emphasis placed on technology transfer by the communist regime has resulted in more advanced development of protection for trademark and patent rights.

56 Ibid.

57 See Dawid, 'Trademark Protection in the People's Republic of China' (1980) 9 Den J Int'l and Pol'y 217 at 218-9. The author was of the opinion that the system served to promote foreign trade which was necessary for the economic survival of the newly established communist regime. This view is also consistent with the traditional communist antagonism against private property - trademark protection has been afforded mainly to enterprises owned by workers' collectives ever since the Provisional Regulations were promulgated.

58 For a general discussion of the Trademark Law, see Sharpe, above n 18 at 136-9.

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Foreigners are subject to the same requirements under the law, to the extent that international agreements have not altered such requirements. Where the exclusive right to use a registered trademark has been infringed, the offender has to pay compensation for losses to the rights holders and a fine not exceeding 20% of the proceeds of the illegal sales. Recent amendments,<sup>59</sup> for example, to register service marks, allow applications in multiple classes, and impose heavy penalties on serious infringements, have further brought the Trademark Law into line with international practice.

#### *Issues to Watch*

The amendments, however, failed to mention associated marks, collective marks, certification marks or defensive marks.<sup>60</sup> Neither is the protection of well-known marks included in the amendments. It has therefore been proposed<sup>61</sup> that an invalidation procedure be introduced to declare any trademark void if they are registered fraudulently or illegally.

#### *Patent Law*

Under the present Patent Law<sup>62</sup> three kinds of patents are registrable: inventions, utility models and outward designs. Inventions and utility models must possess 'novelty' and 'creativity' but designs only need 'novelty'. Novelty means no similar model has been received or published inside or outside China while creativity requires obvious progress when compared to technology already in existence.<sup>63</sup> China has adopted the first to file system of patent registration and specifically excluded any inventions, utility model and outward designs that are contrary to Chinese laws and social ethics from patentability.

Foreigners can file patent applications; but they must be processed through a designated patent agent. The patent rights are transferable and may last from 5 years for utility model or design to 15 years for inventions. Any offender found guilty of infringement is required to pay compensation for losses and serious offenders may be jailed for three years.

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<sup>59</sup> The amendments became effective on July 1 this year. For a review of the amendments, refer to Tan and Lim, 'PRC Trademark Law Amended' (1993) 2 IP Asia 23 at 23-4.

<sup>60</sup> See Tan, 'China Amends Trademark Law' (1993) 15 East Asian Executive Reports 14 at 15.

<sup>61</sup> See Wen, 'China's Experience in Industrial Property Protection' (1991) No. 33 Intellectual Property in Asia and the Pacific 28 at 33.

<sup>62</sup> For a review of the Patent Law, see Sidel, above n 46 at 282-7.

<sup>63</sup> Above n 18 at 132.

### Problems

The Patent Law has nevertheless been criticised in the following terms:<sup>64</sup> it discourages domestic research and development and the introduction of state-of-the-art technology into China. It encourages the production of unsafe, ineffective products by imitators. It affords scant protection to trade secrets and the development of China's chemical and pharmaceutical industries. However, there are as yet no significant amendments to the law to deal with the problems.<sup>65</sup>

### Conclusion

Both HK<sup>66</sup> and the PRC<sup>67</sup> want to use their intellectual property laws as a means of attracting foreign investments. HK, as Pendelton suggested, has been overly protective of foreign interests in its search for investment dollars. While HK may have achieved its objective beyond expectation, it is submitted that its intellectual property laws have failed in terms of protecting local interests.

The main purpose of importing English laws to colonies like HK is to equip them with a set of laws which can be modified by judges when 'necessity arises'.<sup>68</sup> To this end, the English laws have to be 'adapted to the conditions and wants of the [colony's] inhabitants' and cannot 'operate unjustly and oppressively' on them.<sup>69</sup> On this basis, it is safe to assume that local interests would not be unduly prejudiced in any legal dispute. However, it would appear that the HK judiciary, staffed mainly with expatriates, with respect, is more than willing to put foreign interests ahead of local concerns.<sup>70</sup> Such an attitude has resulted, for example, in HK's manufacturers being

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<sup>64</sup> See Neunuebel, 'The Case for Amending China's Patent Law' (1990) 2 No. 10 ALP 42 at 43 where he quoted the survey conducted by China Patent Agent (HK) of 291 companies regarding the impact of China's Patent Law. These criticisms can be understood in the light of the narrow focus of the Patent Law which benefits primarily those state-owned enterprises seeking to modernise. See also Yang, above n 44 at 270.

<sup>65</sup> Ibid.

<sup>66</sup> Above n 5 at 7.

<sup>67</sup> Above n 44 at 288-9.

<sup>68</sup> See Wesley-Smith, 'The Reception of English Law in Hong Kong' (1988) 18 HKLJ 183 at 217. This is seen as necessary as HK has a totally different social and legal culture from England.

<sup>69</sup> Ibid at 211 where Wesley-Smith quoted Maxwell CJ's judgment in *Choa Choon Neoh v Spottiswoode* (1869) 1 KY 216 at 221. The Chief Justice said:

In this Colony, so much of the law of England as was in existence when it was imported here, and as is of general (and not merely local) policy, and adapted to the conditions and wants of the inhabitants, is the law of the land; and further, that the law is subject ... to such modifications as are necessary to prevent it from operating unjustly and oppressively on them.

This view was approved by the Full Hong Kong Court of Appeal (Hogan CJ and Gould J) in *Wong Yu-shi v Wong Ying-kuen (No 1)* [1957] HKLR 420 at 442-443. On the basis of Maxwell CJ's statement the courts in HK have generally exercised policy discretion when local circumstances demand it. See, for example, Blair-Kerr J's dicta in *Brentwood Wig Manufactory Ltd v Poncher (No 2)* [1966] HKLR 643 at 651-652.

<sup>70</sup> See, for example, above n 22, Hunter J's judgment in the *Maxim's* case.

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placed at significant cost disadvantage as they have to incur huge expenses searching registration records overseas. Therefore, it is further submitted that HK must rid itself of such a colonial mentality before it can have more balanced intellectual property laws.

Likewise, if China wants to use its intellectual property laws in its present drive<sup>71</sup> to increase technology transfer and promote foreign investments, it must overcome its inherent mistrust of writers and intellectuals and recognise the value of monopolised information. The government needs to adopt an approach that is comprehensive in nature and consistent with international practice. To this end, China may use HK's intellectual property legislation, with its international orientation, as a model to reform its own laws. This is particularly relevant when HK reverts to Chinese rule after 1997.

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<sup>71</sup> Above n 45 at 2-3, cautioned that enthusiasm shown by foreign investors towards the intellectual property legislation had to be tempered with the fact that the National People's Congress, not the Supreme People's Court, is the ultimate body to interpret the law in China; that the Chinese courts are generally seen as an extension to the administration. It is therefore possible that the present legislation would be discredited as another instrument of capitalist oppression after it has served its political purposes.