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目 录

【专论】

香港的知识产权的范围广于英国和美国——

这正是危险所在 迈克尔·彭德尔顿 (1)

关于修改现行著作权法的思考 沈仁干 (34)

“悬而未决的矛盾”:互联网、国家和被管理者

的认可 大卫·波斯特 (54)

域名与知识产权 薛 虹 (107)

域名登记与商标保护 唐广良 (162)

数据库法律保护在中国

——兼评中国法院审理的两起涉及数据库

的案件 董炳和 (188)

论新技术革命与知识产权行政保护制度改革

..... 莫于川 (219)

数字技术对版权制度的影响与我国《著作

权法》的修订 应 明 (240)

信息时代的工业产权新问题 李朝应 (252)

论商标权利用尽及商品平行进口 黄 晖 (266)

试论反不正当竞争法的客体和法律

属性 李顺德 (279)

美国专利法中的等同理论

- 希尔顿化学公司案述评 李明德 (317)
- 大学在知识产权制度中的作用 陈美章 (354)

【案例分析】

网上数字作品著作权保护的几个问题

- 评陈卫华与成都电脑商情报社侵犯
著作权纠纷案 马 赫 (373)
- 公开他人委托调查结果构成侵犯商业秘密
..... 董建中 (383)

【司法与执法】

- “王力平与国家知识产权局专利局专利复审
委员会专利复审行政诉讼”行政判决书 (389)
- 一九九九年上半年人民法院审理知识产权
案件情况 (401)

【法律·法规·规章】

- 专利管理机关查处冒充专利行为规定 (403)
- 中国专利奖评奖办法 (410)
- 专利代理机构年检办法 (414)
- 关于在非相同非类似商品上擅自将他人知名商品
特有的名称、包装、装潢作相同或者近似使用的
定性处理问题的答复 (417)
- 关于解决商标与企业名称中若干问题的意见 (419)
- 关于保护服务商标若干问题的意见 (422)
- 关于颁发《出版文字作品报酬规定》的通知 (425)

附：出版文字作品报酬规定	(427)
中国互联网络域名注册实施细则	(432)

【书摘】

法律冲突：离职一年以后的成果问题	张玉瑞 (438)
------------------------	-----------

【其他】

首届“新技术与知识产权”征文颁奖	(449)
更正	(450)
中国社会科学院知识产权中心简介	(451)

CONTENTS

[ARTICLES]

- Hong Kong's Intellectual Property is of far Wider
Scope than Britain or the United States——
Therein Lies A Danger *Michael Pendleton* (3)
- Some Reflections on the Revision of the Current
Copyright Law *Shen Rengan* (49)
- The "Unsettled Paradox": The Internet, the State,
and the Consent of the Governed
..... *David G. Post* (76)
- Domain Names and Intellectual Property Rights
..... *Xue Hong* (159)
- Domain Name Registration and Trademark
Protection *Tang Guangliang* (162)
- Legal Protection for Database in China
——Comments on two cases about database
protection in China's courts *Dong Binghe* (213)
- Technology Revolution and Protection for
Intellectual Property Through Adminis-
trative Mechanism *Mo Yuchuan* (237)

The Impact of Digital Technology on Copyright and the Revision of China's Copyright Law	<i>Ying Ming</i> (248)
New Issues of Industrial Property Rights in the Information Age	<i>Li Chaoying</i> (264)
Exhaustion of Trademark Rights and Parallel Import	<i>Huang Hui</i> (277)
The Legal Attributes and Objects of Anti—Unfair Competition Law	<i>Li Shunde</i> (311)
The Doctrine of Equivalents in US Patent Law— Comments on Hilton Davis Chemical Co. V. Warner—Jenkinson Co.	<i>Li Mingde</i> (347)
The Role of University in the IP System	<i>Chen Meizhang</i> (362)

[CASES AND COMMENTS]

Several Issues relating to Copyright Protection of Digital works on Internet	<i>Ma He</i> (373)
Revenling the Commissioned Investigation Data Constitute An Infringement of Trade Secret	<i>Dong Jianzhong</i> (383)

[JUDICATURE AND ENFORCEMENT]

An Administrative Decision on “Wang Liping v. Patent Reexamine Committee of the Patent Office of the National Intellectual Property Administration”	(389)
--	-------

Statistics on Intellectual Property Cases Handled by People's Courts (before July 1999)	(401)
--	-------

[LAWS, REGULATIONS AND RULES]

Regulations on Investigation and Punishment of Pseudo-Potents by Patenta Administration Organs	(403)
Rules on Evaluation of China Patent Awards	(410)
Rules on Annual Inspection of Patent Agencies	(414)
The Answer of Determining the Nature and Dealing with the Problems of Using Other Famous Goods' Special Name, Package and Decoration in Non- alike and Unsimilar Goods in a Same or Similar Manner	(417)
Opinions on Resolving Some Problems in Trademarks and Enterprises Names	(419)
Opinions on Some Problems in Protection of Service Marks	(422)
Circular on the Distribution of Rules on Remuneration for Publication of Literary Works	(425)
Annex: Rules on Remuneration for Publication of Literary Works	(427)
Implementing Regulations for Registration of China Internet Domain Names	(432)

[BOOK DIGEST]

Legal Conflict: Problems Concerning Work Results
--

Within One Year after Employment

..... *Zhang Yurui* (438)**[MISCELLANEOUS]**

Money Reward for the Winner of the Solicit Articles

on “New Technology and Intellectual Property”

(First Section) (449)

Corrections (450)

A Brief Introduction of the Intellectual Property

Centre of Chinese Academy of Social Sciences

..... (455)

【专论】

香港的知识产权的范围广于 英国和美国——这正是危险所在

迈克尔·彭德尔顿*

Hong Kong's Intellectual Property is of
far Wider Scope than Britain or the United
States——Therein Lies A Danger[†]

Michael Pendleton

香港特别行政区的知识产权法律与英国和美国力度要强,范围要广,从而不利于香港。香港没有控制垄断地位的滥用和不正当竞争行为的法律。知识产权被用来进行在西方国家闻所未闻的不正当竞争。从媒体最

* 澳大利亚麦道大学亚太知识产权法研究所副主任、法学教授,香港城市大学法学院访问教授。

† For English version, see page 3.

近对盗版的报道里,人们感觉到香港和亚洲的其他地方一样,对于知识产权的保护并不充分。本文试图解释为什么香港的反假冒的法律比英、美力度强、范围广,却仍旧遇到假冒的问题。

通过香港的知识产权(版权除外)与英美国家法律的简单比较可以看出,在《与贸易有关的知识产权协议》(TRIPs)之前,香港的知识产权法几乎完全模仿美国,但保护的范围和强度却大于英、美的法律。但是,本世纪六十年代以来,香港大大提高了知识产权的保护。结果是香港成为全球对信息创新者的保护最强的地方之一。在 TRIPs 之后香港仍然是这样,可是与以前相比,香港对创新者的保护却减弱了。下面以版权法为例对香港、英国、美国作一比较,以证明香港法律比美国提供更高的保护。

香港的版权条例(Copyright Ordinance Cap 528 LHK)对于取得香港的版权保护没有任何条件要求,而世界上其他任何国家都要求有居住地、出版地或者承认国际条约。版权条例保护大量的客体,这包括绝大多数日用物品的图样,并且间接地保护了立体物品本身。实际上,所有物品或者部件,只要是根据图样制造的,在具有创新性的条件下,就可以在香港取得版权保护。英国已于 1988 年废除了这一规定,而美国从来就没有提供这样的保护。在香港,平行进口受版权保护的货物既是侵权,又是犯罪。最近美国最高法院判定不能以版权来禁止一定种类的平行进口。在香港,为商业目的占有侵权复制品是犯罪行为,在香港领域之外制作侵权复制品也是犯罪行为。香港的版权条例还规定,当原告主张版权和所有权时,被告有责任举证原告没有版权和所有权。英国和美国均没有这样的规定。防止盗版条例规定,除非向海关登记,在香港生产任何 CD、VCD 或光盘的行为都是犯罪。

香港存在知识产权侵权并不是因为法律有任何不足,而是因为小工厂可以快速地转移。现在许多发达国家的律师批评说知识产权的范围过宽,知识产权的条约正在侵蚀单独国家的主权。他们认为过宽的知识产权保护压抑了竞争。

问题的解决办法在于从根本上再造知识产权,使得信息本身能够受到保护,所保护的程度仅限于它与以前的信息有重要的不同。信息应被保护不被简单模仿、窃用和不正当竞争。当产生了新的信息,并且没有发生侵权时,新信息的权利就应该被赋予那些创造新信息的人。

Hong Kong's Intellectual Property is of far Wider Scope than Britain or the United States——Therein Lies A Danger

*Michael Pendleton*¹

The Hong Kong Special Administrative Region of China (Hong Kong) has stronger intellectual property laws, and of far wider scope, than those of Britain and the United States. For example, unlike Britain or the United States, Hong Kong copyright law extends to the three dimensional embodiment of most articles or components manufactured from drawings. Possession of infringing goods for commercial purposes or parallel importing copyright goods may constitute a crime as well as a tort. It will be argued these laws are far too wide and strong for the well being of Hong Kong, indeed anywhere. They serve as a timely warning of the danger of over protection of information at the expense of competition and access.² Recently, a Hong Kong Trade & Industry con-

1 Michael D Pendleton, Professor of Law & Deputy Director, Asia Pacific Intellectual Property Law Institute, Murdoch University. Visiting Professor, Law School, City University of Hong Kong.

sultation paper recommended the criminalisation of possession of infringing goods intended for personal use. Such a recommendation bodes ill for Hong Kong as the following article attempts to illustrate.

When making comparisons between Asian jurisdictions and Hong Kong it is important to remember that the judiciary of Hong Kong and its lawyers still comprise large numbers of personnel who trained, worked and indeed remain citizens of major common law jurisdictions such as England, Australia, Canada and New Zealand. For good or ill, a 'have gavel will travel' judiciary brings with it the mind set of these jurisdictions and conclusions as to the role, importance and functioning of law have to be adjusted in regard to Hong Kong which in this respect is fundamentally different to other Asian Jurisdictions.

Corruption, seen as endemic in much of Asia and one reason for the recent economic collapse is not regarded as a major problem in Hong Kong. However, reunification with mainland China and more importantly the vast array of Chinese operations controlled for some time now from Hong Kong have exacerbated this problem.

A final caveat is that Hong Kong has no legal safeguards in regard to abuse of monopoly and anti competitive behaviour. There is no anti trust, restrictive trade practices or competition law in Hong Kong. Intellectual Property is legally used to commit anti competitive practices unheard of in Western jurisdictions though this pales in comparison to the flagrant yet legal abuse of dominant positions in the banking, real estate and other sectors.

A clear perception from recent media coverage of so – called counterfeiting is that Hong Kong is as deficient in the protection

2 A summary of the conclusions in this article was published in South China Morning Post, 28 January 1999 Analysis – Caught Out By Copyright, p8.

of intellectual property as anywhere else in Asia. Nothing could be further from the truth. The following explains why Hong Kong continues to experience problems with counterfeiting yet at the same time its anti-counterfeiting laws are demonstrably stronger and more extensive than those of its developed trading partners. Indeed it is far from difficult to prove that Hong Kong's anti-counterfeiting laws are stronger and more extensive than those of the United States or Britain.

These facts are far from controversial though most practitioners (who are virtually the only sector of Hong Kong society conversant with these laws) must consider the interests of their retained clients who include industry lobby groups and are unable or unwilling to speak frankly.³ For at least the past four decades Hong Kong's successive governments have long been at pains to reassure foreign investors that their intellectual property will be well protected in Hong Kong. Hong Kong intellectual property laws are a proper example for the developing world.⁴ This degree of protection puts Hong Kong at odds with the rest of Asia. Only relatively recently did Japan become serious about the protection of intellectual property under United States threat of trade sanctions and the realisation that its own innovations needed more protection. Ironically, the United States itself only joined the world's major copyright convention, the Berne Convention in 1988, one hundred years after its instigation thereby according full copyright protection to non residents.⁵

3 Until recently the few large Hong Kong solicitor's firms with specialised intellectual property practices would almost always only act for plaintiff's for fear of causing displeasure to existing clients who themselves were plaintiffs.

4 See Pendleton, *Intellectual Property & the National Interest: What Developing Countries Can Learn from the Hong Kong Experience*. (1998) Sept EIPR.

5 In that year it finally did away with the notorious 'manufacturing clause' in its copyright law which effectively denied full copyright protection to foreign publishers. S Stewart *International Copyright* (1982) Butterworths.

In recent months Hong Kong has shown how it is possible to protect too much as this article will illustrate.

Brief Comparison of Hong Kong Intellectual Property (other than copyright) with British & United States Law

The following is a brief litany of Hong Kong's enhanced intellectual property protection over that of Britain and the United States. The Trade Marks Ordinance Cap LHK⁶ and the Trade Descriptions Ordinance Cap LHK together protect foreign registered trade marks which are unregistered in Hong Kong irrespective of the mark being famous (there are special provisions for famous marks) or marks having no reputation in Hong Kong. As in most Anglo - Commonwealth jurisdictions the common law action of passing off - similar to United States Lanham Act 1946 protection, is available where sufficient reputation and goodwill exists. The ex parte or unilateral Anton Piller Order Procedure has since the eighties ruled out by legislation the option of a defendant pleading the privilege against self incrimination. This order, derived from English practice, remains widely used in Hong Kong, admittedly more fairly to the defendant than in the past. In the area of trade secrets the Hong Kong Court of Appeal has even been prepared to countenance the characterisation of information as property, a step specifically rejected over the centuries and in recent times by vitally all common law jurisdictions for fear of its monopoly implications.⁷

The inescapable fact of any competent comparative legal analysis is that Hong Kong intellectual property law prior to the World Trade Organisation (WTO) Trade Related Intellectual

6 Shortly to be replaced by a new Trade Mark Ordinance. The Trade Mark Rules which will accompany the ordinance are in the final stages of the consultation phase and it is understood a bill will shortly be gazetted.

7 Koo V Lam (1991 - 2) 23 IPR 607, at 633.