

Pendleton

**The Law of
Intellectual and
Industrial Property
in Hong Kong**

**Copyright
Designs
Patents
Trade Marks**

Butterworths

Law of Intellectual and Industrial Property in Hong Kong

– A Guide to trade marks, copyright, patents,
registered designs and other protected
commercial information

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1984

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ISBN 0 406 18117 9

Typeset in Singapore by Colset Pte Ltd and printed by Tien Wah Press (Pte) Ltd

for LING SZE

Foreword

I write this foreword with considerable misgivings, for the following reasons -

- (a) One of my colleagues (whom I have since persuaded to seek early retirement on medical grounds) suggested that it was not appropriate for the foreword to a treatise on intellectual and industrial property to be written by someone who is noted neither for his intellect nor his industry.
- (b) I notice that a judgment of mine has been quoted in it without criticism, which weakens my confidence in the integrity of the book and in the percipience of its author.
- (c) I shall find it difficult to justify to my colleagues my support of a work on a subject for which most of them feel some distaste. This is because applications for the issue of urgent orders for the protection of intellectual property form much of the work of a duty judge and interfere severely with his digestion and his private life. The obligation to leave with his clerk the telephone number of the address at which he proposes to spend the night has sometimes caused acute embarrassment. One judge is recorded as saying: "I refuse to grant any more Anton Pillow orders between midnight and six in the morning".

I am sure that the book will be warmly welcomed, particularly by those, to be found in significant numbers in an inventive and vigorous society which does not like to see a good idea wasted on its originator, who wish to acquire a sufficient knowledge of the intricacies of this branch of the law to know how to avoid it.

It will also be of considerable value to the other groups mentioned by the author, namely, practitioners, students and foreign legal advisers, since this is the first comprehensive work on the subject which concentrates upon the development of this branch of the law in Hong Kong.

The writer is tactful in omitting any claim that the text will be of

assistance to judges. Of course it will, though few of them are likely to admit it, since for a variety of unattractive reasons, they are reluctant to acknowledge their debt to textbook writers, who perform a valuable service by deriving sensible principles from the contradictory, ill-reasoned and hurriedly written judgments which pour from the courts in an endless stream.

Indeed, the traditional judicial attitude to the academic writer is well illustrated by the eccentric rule that a textbook becomes a work of authority only if the writer is dead, when his views are entitled to the same respect as those expressed by judges in a similar condition on the Bench.

The inclusion of an “addendum”, containing a recently decided case, establishes either that the author –

- (a) has surprisingly retained his interest in the subject after having submitted his typescript to the printer; or
- (b) did not know where to place it because he did not understand it.

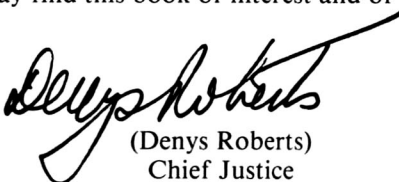
The author prefers the former explanation. Readers will make their own choice, which is likely, as usual, to be the least charitable alternative.

I must express regret, however, at his failure to include reference to the leading judgment of Moulton, J. in *LO Fat v. The Tuen Mun Self Help Association* (better known as the “*Castle Peak Sex Shop Case*”) in which he ruled that there is no copyright in the design of the human frame, or in any component thereof.

Apart from this glaring defect, I warmly commend this book, which sets out in a clear, well-written manner, the principles and practices of an important area of law, which has so far lacked a study based on the Hong Kong experience.

The enactment of legislation protecting trade marks and patents in China has shown that the importance of intellectual property law is well understood in a country eager to encourage foreign investment and trade.

I would like to think that those whose task it is to guide the development of such law in China may find this book of interest and of assistance.



(Denys Roberts)
Chief Justice

18th April, 1984.

Preface

This book is intended more as a guide rather than a definitive work on intellectual property law in Hong Kong.

I have deliberately confined detailed discussion in the text, for the most part, to Hong Kong law. Where, at the time of writing, Hong Kong law virtually coincides with the law in force in Britain or occasionally in another Commonwealth jurisdictions, I have attempted to portray it with a Hong Kong flavour, provided local cases exist for the purpose of illustration. In the absence of such cases, reference is provided to the standard foreign literature. It will become evident that a major Hong Kong departure from British intellectual property law, and that of other Commonwealth countries, is the trend which has developed in the last decade, to place heavy emphasis on criminal sanctions to complement whatever civil remedies may be available. This is particularly noticeable in the areas of copyright, trade marks and trade names.

This book is intended for use by practitioners, students, and foreign legal advisers although it may also be of interest to those concerned with the implications of this branch of the law for Hong Kong's commercial future and international trade development.

I have sought to maintain a close collaboration with practitioners actively involved with intellectual property matters in Hong Kong. I owe a debt of gratitude in this regard which I have attempted to express in the 'Acknowledgements'. For whatever lack of congruence remains between the following account and the relevant law I alone must accept full responsibility.

Michael D Pendleton
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University of Hong Kong

January 1984

Acknowledgements

I wish to extend my thanks to Sir Denys Roberts, KBE, QC, MA, BCL, the Chief Justice of Hong Kong, for kindly providing the Foreword to this book. He has injected a humour which is otherwise sadly lacking. It is rumoured that decisions of Moulton J, an intimate acquaintance of the Chief Justice, can occasionally be obtained by politely approaching Sir Denys.

This book was originally commissioned jointly with my former colleague, Mr PD Sinden. Unfortunately, Mr Sinden was unable to continue the project at a stage before writing commenced. However, I had the benefit of his assistance with some initial research into some of the unreported decisions on intellectual property in Hong Kong. We shared the responsibility for teaching the Intellectual Property courses at the School of Law during the academic years 1981/1982 and 1982/1983, and this gave rise to a mutually advantageous exchange of views on various issues.

Hong Kong is a busy place and I have been most fortunate in having the assistance of a number of busy people who have been very generous with their time.

I am extremely grateful to Mr Robin Bridge and Mr Anthony Rogers, leading practitioners in the area from the respective sides of the profession, for their very valuable help and assistance.

In preparing Chapter 2, *The Registered Trade Mark System*, I had the help and advice of Miss Avril Waters, Acting Registrar of Trade Marks. I am indebted to her for assistance in an area very difficult to research because of the dearth of reported decisions.

Mr John Howard, Principal Industry Officer and Mr Willie Ng, Chief Principal Industry Officer, the Customs and Excise Department devoted many hours to assist me in the preparation of Chapter 3, *The Trade Descriptions Ordinance*. Not only did they give me access to their offices, they also discussed with me various issues of

principle and practice in addition to reading and commenting on the draft chapter.

The preparation of Chapter 4, *Copyright*, was considerably aided by the efforts of Mr Ken Pogson, Regional Director for Asia, the International Confederation of Societies of Authors and Composers (CISAC). He made invaluable criticisms and suggestions at very short notice. I am also indebted to him for writing the section entitled 'Copyright Interest Groups in Hong Kong'.

I had the robust advice and criticism of Mr Peter Morrow in compiling the brief excursion into Civil Procedure in Chapter 7 and for this I extend my sincere thanks.

Valuable assistance with gathering materials was lent by the following practitioners who are listed alphabetically: Mr Raymond D Black, Mr R I Campbell, Ms Ella Cheong, Mr Robert Kotewall, Mr Andrew Liao, Mr R Mills-Owens QC, and Mr Arjan H Sakhrani QC.

With the preparation of Appendices 1 and 2, I must record my thanks to the Demonstrators (research assistants) of the School of Law during the academic years 1982/1983 and 1983/1984, particularly, Mr John Yan and Ms Mabel Ng. For assistance with the preparation of Appendix 3, my thanks to Mr Lam Sek Kong, a current third year Intellectual Property Law student. My thanks also go to the Intellectual Property Law students during the academic years 1981/1982, 1982/1983, and 1983/1984 who helped to impress upon me the truism that, in attempting to teach one really begins to learn. Various chapters of the manuscript were checked by the following kind friends who are alphabetically listed: Mr Stephen John Cheng, Mr Lam Sek Kong, and Ms Twiggy MH Liu. Mr Cheng also helped prepared the Table of Cases and Table of Legislation.

For providing the motivation and encouragement, at times even the bullying, as well as very real help and assistance, my deepest thanks are due to Ms Nancy LS Lau.

I must also record my thanks to my teacher, Professor WR Cornish of the London School of Economics and External Examiner in Intellectual Property Law at the University of Hong Kong. His lectures and publications demonstrate such mastery of the subject, and its practical economic and social relevance to what is surely destined to become an information based society and world, that my interest in the subject was deeply and permanently aroused.

I must also thank the staff of Butterworths Ltd., particularly the editor Ms Sheila Murugasu. Finally, my thanks to Ms Monnie Leung for patiently typing the manuscript. I, of course, remain solely responsible for the text.

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