

Counterfeiting under colonialism: the evolution of legal regimes protecting intellectual property in Hong Kong, c.1948-1962¹

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Abstract

This article analyses from a development-economy perspective intellectual property rights (IPR), the making and breaking of formal rules governing imitation. It explores how the evolution of colonial and imperial legal regimes created information asymmetries that were exploited by counterfeiters.

Introduction

The international exchange of knowledge was an important source of economic growth. Historically much of this knowledge transfer was unintended, the outcome of movements of products, capital and people. However, during the modern period, as the knowledge gap widened between the West and the Rest, intellectual property rights (IPR) regimes emerged to regulate the exchange of knowledge. Two positions are adopted with respect to these institutions, Optimists think that these regimes encouraged growth by strengthening the incentives for foreign direct investment (an increasingly important vehicle for technology transfer), and by allowing non-foreign firms in the developing world to collect rents from their own innovations.² Optimists assume that, in the absence of corrupt politics, these incentive-effects exceeded the resources expended on enforcement. Pessimists, by contrast, think these regimes slowed the diffusion of knowledge, created disincentives to innovate by protecting the rental values of assets owned by proprietors, and erected costly, and capricious, enforcement regimes; they believe that, by protecting the monopoly power of westerners, IPR regimes constrained economic development in the non-western world. Evidence derived from observations of contemporary economies indicates that the optimistic view holds.³

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² For an introduction: Edith Penrose, *The Economics of the International Patent System* (Baltimore, 1951).

³ For the contemporary era see Keith E. Maskus, *Intellectual Property Rights in the Global Economy* (Washington, 2000) and Carsten Fink and Keith E. Maskus, *Intellectual Property and Development: Lessons from Recent Economic Research* (Washington, 2005).

Historical evidence indicates that what really mattered long term was the adaptability of institutions -- not institutional choice *per se* – for this aided development.⁴ From a development-economy perspective therefore the core question is: did institutions flex in the past? Given that so many developing countries were part of Empires, and were affected by processes of institutional transfer from metropolitan economies, an important supplement question is: to what extent did imperial political economies fix institutions?⁵ Section one considers the evolution of international IPR regimes.⁶ Section two chronicles the evolution of laws protecting IP in Hong Kong. Section three explores counterfeiting. Section four explains how segmented industrial structures made Hong Kong prone to piracy. Section five concludes.

1. Institutional and organisational change

Economic historians argue that particular political-economy structures protected individual ownership of tangible assets, such as land and capital, and that these rights laid the institutional framework for long term growth.⁷ The best institutions, informal and formal rules governing behaviour,⁸ aligned private and public benefits, to ensure, for example, that the private right to own land did not degrade the natural environment, and that the private right to sell labour maximised investment in training and education. IPR regimes, the formal institutions creating rules, sought to align private benefits (rents for creators) with public benefits (the mass diffusion of the best ideas). They did so by giving proprietors exclusive rights to use an idea.

Organisations, as well as states, have secured exclusivity. For centuries artisans have guarded their trade secrets, often by keeping them in the family, common practices in China before and during industrialisation.⁹ Business groups, such as guilds, have also long defined and monitored products and processes to ensure that they met quality benchmarks. A multiplicity of such organisations existed in Hong Kong, a multi-ethnic city, inhabited by merchants from across the globe, and from various sub-regions of China.¹⁰ Such a rich ‘cultural context’ may, as Douglass North argues, have created processes of ‘multiple

⁴ See Ha-Joon Chang, *Kicking Away the Ladder: Development Strategy in Historical Perspective* (London, 2003), notably, for IPR, pp. 57-58, and 83-85.

⁵ Acemoglu, Daron, Simon Johnson, James A. Robinson, 2001, The Colonial Origins of Comparative Development: An Empirical Investigation, *The American Economic Review*, vol. 91, No. 5, pp. 1369-1401.

⁶ Work on national histories is extensive: for seminal contributions see C. Macleod, *Inventing the Industrial Revolution* (Cambridge, 1988); and Ron Harris, *Industrializing English law: entrepreneurship and business organisation, 1720-1844* (Cambridge, 2000). Work on international histories much more limited: see Catherine Seville, *The Internationalisation of Copyright Law: Books, Buccaneers and the Black Flag in the Nineteenth Century* (Cambridge, 2006).

⁷ See Douglass C. North, *Institutions, Institutional Change and Economic Performance* (Cambridge, 1990).

⁸ See Douglass C. North, *Understanding the Process of Economic Change*, (Princeton and Oxford, 2005) which places greater stress on culture.

⁹ For overviews and cases see Ampalavanar Brown, R., ed., *Chinese Business Enterprise*, (London, 1996), Four Volumes.

¹⁰ See David W. Clayton, ‘Industrialization and institutional change in Hong Kong, 1842-1960’, in A. J. H. Latham and Heita Kawakatsu, eds., *Asia Pacific Dynamism 1550-2000* (London and New York, 2000), pp. 149-169.

experimentation and creative competition’, a variety of ways of making know-how better known.¹¹ In such a setting, social devices to secure exclusivity may well have been weak. Knowledge would have leaked.

In the modern period IP proprietors have responded to such environments by using the firm to secure exclusivity. Firms reduced the leakage of knowledge by rewarding skill and longevity of service using material incentives. In so doing, they made it more difficult for competitors to re-engineer product and process technologies; over the long term, this strategy was evident in Hong Kong where Western and Japanese corporations set up subsidiaries and franchises in Hong Kong.¹² A precondition for this strategy, however, was state protection for IP.

States have, for centuries, sanctioned strategies of exclusion by private interests such as firms and guilds. In the early modern period, courts often upheld the customary claims of ‘owners’ and rulers sponsored creators. From the mid 19th century, due to industrialisation and business lobbying, substantive laws defined intellectual property as patents, designs, copyrights and trade and merchandise marks, and governments strengthened material incentives for inventors and secured for them greater social status.¹³ The construction of scarcity in knowledge has been contested, notably via the creation of black markets for pirate goods. IPR regimes have, therefore, been progressively strengthened by the deployment of the bureaucratic and jurisdictional power of nation states.¹⁴

One of the most controversial aspects of modern legal regimes relates to trade marks, names and symbols placed on, and text distributed with, a particular produce. These institutions had two potential effects. At a micro level, they allowed consumers to trace the origins of a product back to the owner, and facilitated product differentiation by manufacturers; they may also have had intangible effects, if, that is, these symbols, by communicating abstract ideas, altered attitudes towards consumption.¹⁵ At a macro level they may have been the pre-requisite for higher levels of investment in new product and process technologies, which had the potential to raise productivity, and generate growth;. These effects may well have been strong because, unlike other forms of IP, states gave proprietors the right to renew their ownership rights indefinitely; they were not time-limited, and thus subject ultimately to free, licit, competition in the market. They may also have been strong due to changing demand structures. As incomes rose the value of these intangible assets also rose. Mass markets for branded consumer products grew. Firms making products, such as processed foodstuffs, clothing, footwear and toys, commonly

¹¹ See North, *Understanding*, p. 36.

¹² See Stephen W. K. Chiu and Tak-Lok Lui, ‘Hong Kong: unorganised industrialism’, in Gordon L. Clark and Won Bau Kim, eds., *Asian NIEs and the Global Economy: Industrial Restructuring and Corporate Strategy in the 1990s* (Baltimore, 1995).

¹³ See Ian Inkster, ‘Potentially Global: “Useful and Reliable Knowledge” and material progress in Europe, 1474 to 1914’, *International History Review*, XXVIII, 2, June 2006, pp. 237-472W; and M. Landes and R. A. Posner, *The Economic Structure of Intellectual Property Law* (Cambridge, MA, 2003).

¹⁴ See Christopher May, *A Global Political Economy of Intellectual Property Rights: the new enclosures?* (London, 2000).

¹⁵ See G. Akerlof, ‘Market for “Lemons”: Quality Uncertainty and the Market Mechanism’, *Quarterly Journal of Economics*, 1970, 84, pp. 488-500.

packaged together bundles of patented and unpatented knowledge into a product which was marketed aggressively to forge brand identities with the aim of shifting its price elasticity of demand.¹⁶

During the late modern period, from circa 1870, IPR regimes developed international dimensions. Beginning in the late 19th century, an era of rapid globalisation, nation-states entered into multilateral treaties to extend IPR internationally. These bound member governments to adopt national IP regimes that did not discriminate against foreigners.¹⁷ These international regimes were ‘plagued by deficiencies’, ‘lacked effective enforcement structures and systems for the settlement of disputes’.¹⁸ They did not set standard rules, and did not set up a permanent international apparatus to settle disputes. Membership by developing countries was patchy.¹⁹ These weak systems of global governance may, from one perspective, have created a ‘strong disincentive for innovation, investment and trade’.²⁰ However the laxity of these regimes may have facilitated development. Without strong global institutions less-developed countries could ‘craft laws that reflected their levels of economic development and comparative advantages in either innovation or imitation’.²¹ (This malleability of institutions was only recently eroded when, from the mid-1990s, the Trade Related Aspects of Intellectual Property Rights (TRIPS) created substantive rules enforced by the threat of exclusion from the World Trade Organisation.²²)

IPR regimes governing the behaviour of imitators in Hong Kong, a highly successful late-industrialising LCD, were laxly enforced. This laxity facilitated innovation. Some of this laxity was structural, due to how IPR regimes were configured within the British Empire.

2. Laws protecting intellectual property in Hong Kong, 1842-1962

IP law emerged in the 19th century to protect the interests of western merchants who based themselves in Hong Kong to trade with China. In 1844, English Common Law came into force in the new colony of Hong Kong, and thereafter protected owners of intellectual

¹⁶ See M. Wilkins, ‘The Neglected Intangible Asset: the influence of the Trade Mark on the rise of the modern corporation’, *Business History*, 1992, 34.

¹⁷ Foreigners were given the right to re-register to obtain ownership rights in each signatory country. The key treaties were: The Paris Convention for the Protection of Industrial Property (1883), which covered trade marks as well as patents; The Madrid Agreement [on trade marks]; The Berne Convention for the Protection of Literary and Artistic Works (1886), and the Universal Copyright Convention (1952). Bilateral agreements pre-ceded them, notably with respect to copyrights.

¹⁸ Peter van Den Bossche, *The Law and Policy of the World Trade Organisation: texts, cases, and materials* (Cambridge, 2008), p. 743.

¹⁹ The Madrid Agreement set up a central register of trade marks but only six developing countries from a total of 24 joined; fifty developing countries (from a total membership of 87) signed up for the Paris Convention. see UN Conference on Trade and Development: *The Role of Trade Marks in Developing Countries* (New York, 1979).

²⁰ Van Den Bossche, *Law and Policy*, p. 743.

²¹ Susan K. Sell, *Private Power, Public Law: the Globalisation of Intellectual Property Rights* (Cambridge, 2003), p. 12.

²² For a summary see Joseph E. Stiglitz, *Making Globalization Work* (London, 2006).

property resident in Britain and the colony under the tort of ‘passing off’. The major institutional break came, however, after 1870 when the core principle of modern IP law extended to Hong Kong. From then on, registration became the *prima facie* evidence to support a claim for exclusivity. The level of protection available to IP owners increased in the early to mid twentieth century, as reformist governments in independent Asian countries extended western-style legal codes and signed international commercial treaties that guaranteed non-discrimination against foreign IP holders. This allowed foreign proprietors and their agents to re-register marks in China. At this stage, however, the level of effective protection in China would probably have been low, and so the existence of stronger IPR regimes in colonial Hong Kong merely displaced some pirate production along the China coast.

In the post-war years the regional political-economies of IPR regimes shifted dramatically. By the early 1950s, China had a communist government that favoured autarchic planned development and which was subject to discriminatory commercial policies by world powers. China was not a good place to be an export-orientated pirate. Japan’s trade with the West was also strictly managed by export and imports quotas and tariffs, making piracy problematic from a Japanese location. Hong Kong, by contrast, had relatively free access to global markets. It was part of the British Empire, and thus could gain preferential access to British, colonial and some Commonwealth markets. It was also the ‘Berlin of the East’, an important symbol of the war against Communism, and as such gained relatively free entry into the large American market. Hong Kong became, by default, one of the best places to be an entrepreneur-cum-pirate on the China coast.²³ Piracy occurred across the range of intellectual properties, but, given how the law was configured, and given prevailing demand and supply-side constraints, some forms of piracy were more effective than others.

To gain protections under British patent law within Hong Kong, inventors had to register their innovation in the UK (a ‘slow and tedious business’) and then, within five years, re-register it in Hong Kong.²⁴ For many foreign patent holders the costs of gaining protection (such as hiring legal representatives) in a distant and small market would have been high. As Hong Kong industrialised, and the risk of piracy grew, the benefits of re-registration grew. Torch manufacturers were, for example, ‘very astute’ at copying ‘new ideas’. On receipt of a sample, they would manufacture and ship ‘large quantities’ ‘long before’ a proprietor or his local agent could take ‘effective action’.²⁵ However foreign proprietors concentrated their efforts on improving the law and enforcement regimes for other forms of IP (as revealed in section 3). Three inferences can be drawn. First that copying advanced knowledge from chemical, electrical or mechanical engineering was costly, requiring access to skilled labour. Consequently patent holders could extract rent in other forms,

²³ For the creation of this trading regime see David Clayton, *Imperialism Revisited: political and economic relations between Britain and China, 1950-54* (Basingstoke, 1997).

²⁴ Information Pamphlet prepared by the Hong Kong General Chamber of Commerce, ‘Notes on Merchandise Marks, Patents, Designs and Copyright Protection in Hong Kong [undated, c.1955], p.4.

²⁵ BT209/10/0, P. W. Marjot, Hong Kong Office, Oxygen and Acetyene Co, to Vereber and Co, London (copied to BT), 28 March 1961 [regarding ‘Magniray’].

through, for example, payments to install and maintain equipment.²⁶ Second that, because most Hong Kong firms relied on labour-intensive modes that used common knowledge of production processes, demand for novel techniques was low. These demand and supply constraints did not hold for other forms of IP. Third, colonial legal regimes for these other forms of IP were, by the early post-war period, better developed, allowing local, as well as metropolitan, registration.

In Hong Kong's main post-war markets (North America, and Europe) consumer demand rose sharply as incomes rose, and as novelties were marketed.²⁷ In Britain, for example, there was the shift from the years of austerity, when people wore 'utility' clothing, to the years of affluence when people displayed the 'New Look'.²⁸ From the early 1950s, most Hong Kong products sold to design-conscious consumers whose tastes were being influenced by mass marketing. Even industries that had been present in Hong Kong for generations, and which had traditionally catered to the tastes of Asian consumers, reoriented towards high-income markets in the West; the rattan ware furniture industry, the 'prototype', labour-intensive, Far Eastern industry, 'Americanised', adopting new styles for new consumers.²⁹ Some of this re-marketing was successful because western styles were becoming more oriental. Much, however, was due to copying of western designs: the core Hong Kong product-marketing strategy became 'applying Chinese workmanship' to a range of imported materials and meeting "modern" Anglo-American 'tastes'.³⁰ In the 1950s very few Hong Kong firms employed independent designers with the responsibility to innovate – to create new styles for western markets. This made mass imitation of western goods inevitable. As a Department of Trade and Industry official in Hong Kong admitted these demand and supply-side structures made 'a substantial section of Hong Kong industry dependent on the piracy of design'.³¹ The obvious response by foreign proprietors was to re-register their designs in Hong Kong and commit resources to police infringements. The configuration of colonial Law, however, made this strategy ineffective.

Although British law on Designs extended to the colony, protecting designs in Hong Kong was difficult.³² Prospective owners had to register designs in the UK and then, if they were to improve their chances of successful legal action, to re-register them in Hong Kong. This required them to advertise their designs in the local press, costs that were unlikely to be recouped via higher sales (incomes were low in Hong Kong). Even so, the chances of a successful prosecution for an infringement to a registered (or re-registered) design were low given that proprietors had to be able to prove that the counterfeit was almost an exact

²⁶ On the scale of maintenance costs see David Egerton, *The Shock of the Old: Technology and Global History Since 1900* (London, 2006), pp. 75-103.

²⁷ Avner Offer, *The Challenge of Affluence: Self Control and Well-Being in the United States and Britain since 1950* (Oxford, 2006).

²⁸ See Harry Hopkins, *The New Look: a Social History of the Forties and Fifties in Britain* (London, 1963).

²⁹ See Matthew Turner, 'Hong Kong design and the roots of Sino-American trade disputes', *Annals*, Sept. 1986, p.40; for structures and longevity also note Clayton, 'Labour-intensive'.

³⁰ I have extended Turner's conceptualisation: see 'Hong Kong design', p.42, and p.45.

³¹ HKRS41/1/9602, note [no author specified] on 'alleged infringement of design of Pasold Ltd. by Hong Kong manufacturers of knitted children's garments', [no date, but spring 1958].

³² The British law on Designs, which differentiated by shape and by ornamentation (as for textiles), was revised in 1949 and 1956.

copy of the registered design. Slight mutations, conscious or subconscious redesigning, reduced the chance of gaining redress. British ministers acknowledged that the protection provided by this law in Hong Kong was ‘inadequate’ for many branches of manufacturing.³³ Often proprietors did not re-register designs in Hong Kong. Pasold Ltd, makers of branded children’s garments that sold in many world markets including Hong Kong, registered a design for printed cloth in Hong Kong but, for some reason, failed to register the use of the same design on a T-shirt. As shall be described in section 5 this left Pasold prone to piracy. However the main problem (from the perspective of foreign proprietors) related to lags in the time it took to re-register in Hong Kong. The Board of Trade admitted that, in the case of piracy of Pasold’s ‘Ladybird’ range of clothing, the ‘securing’ of ownership rights took ‘so long’ that Hong Kong manufacturers had a large number of imitation Pasold designs on the market before the proprietor could act.³⁴ Time delays also affected enforcement. By the time a batch of pirated goods was traced to the place of manufacture (and this often took months given that Hong Kong sold goods globally), many footloose entrepreneurs had moved premises or were making new product ranges.³⁵ Enforcement regimes for protected designs were, inevitably, lax.

Trade mark law provided a device to deal with these problems. It allowed proprietors to bundle together a variety of features, some IP protected and some not, into a product and to label its origins. In so doing proprietors could seek redress for ‘passing off’ or for trade mark infringement. Modern trade mark law extended early to Hong Kong (in 1863) and the colony pioneered the registration of trade marks.³⁶ By the 1950s, after nearly a century of experimentation, registration was a ‘simple’ procedure, and a dynamic, and specialist, legal profession had emerged to meet local and foreign demand for it.³⁷ The law, based on British and Commonwealth comparators, was also kept up to date; although there was a long lag between the 1909 and the 1954 ordinance, and the pre-war register was destroyed during the War which must have temporarily impaired the local enforcement regime.

Under the 1954 ordinance, which was based on the 1938 British Trademarks Law, the rights of proprietors were greatly strengthened. Prospective owners applied for registration for goods that were already ‘distinctive’. A US menswear company Cluett, Peabody and Co., for example, registered “Arrow” and the “Dart” which allowed prosecution against exact copies or copies with a ‘close phonetic resemblance’, such as “Narrow”; “Hallow”; “Harlow”; “Barrow”; “D’Arrow”; and “D’Art”.³⁸ Establishing distinctiveness meant incurring legal and marketing costs but the Hong Kong law allowed registered goods which would acquire (within two years) distinctiveness ‘through use in trade’. This device enabled proprietors to spread expenditure, and to respond to early evidence of piracy by

³³ See BT209/10/0, especially letter from Keith Joseph, Minister of State, to Eric Pasold, 8 Dec, 1962.

³⁴ BT209/10/0 minute by N. S. Belam, 12 Jan. 1962.

³⁵ BT209/10/0 minute by N. S. Belam, 12 Jan 1962.

³⁶ Pendelton, *Intellectual and Industrial Property*, p. 56.

³⁷ See National Archives, Washington, US, Record Group 59/846G (Box 4924), Julian Harrington, American Consul General, Hong Kong, to the Department of State, Washington, Despatch 994, Dec. 21. 1954, ‘The New Hong Kong Trademark Ordinance’; ‘Trade Mark and Patent Registration in Hong Kong’ [an article prepared by the Registrar of Trade Marks], *The Trade Bulletin* [published by the Hong Kong Department of Commerce and Industry], March 1955.

³⁸ Note ‘Trade Mark’, *Trade Bulletin*, p. 22.

augmenting or initiating investment in marketing. The 1954 ordinance also extended the ‘defensive’ clause of the 1938 British Act, an additional safeguard that banned firms from using a mark associated with a particular product range (for example children’s clothing) and use it on another (for example toys).³⁹ Even this augmented trade mark law, however, could not prevent piracy of well-known western branded, and IP-protected, goods.

3. Piracy in Hong Kong

By the late 1950s, Hong Kong manufacturers were in ‘constant difficulties over trade marks, designs, copyrights, and related issues’;⁴⁰ and ‘infringement’ of trade marks had become a particularly ‘chronic problem’.⁴¹ This propensity to imitate would have been innate in Hong Kong people because copying is a universal behavioural trait that aides education. But these genetic-effects would have been reinforced by centuries of nurture because, for centuries, Chinese codes had permitted imitation.⁴² This propensity to copy would have been further strengthened from the 1870s as China integrated into global markets. The penetration of foreign goods -- and at a time when modern IP law was weakly enforced -- transformed Chinese cultures of consumption.⁴³ Piracy of Western goods was already common in the 1920s when firms were already using ‘clever imitations of a favourite trade-mark’ to entice Chinese consumers ‘away from the line of goods [foreign brands] which has gained his confidence’.⁴⁴ These cultural and genetic effects were strongly felt in Hong Kong, a place of inward migration from China.

The ingenuity of imitators in Hong Kong, however, suggests that piracy was an *intended* strategy, and not the unintended consequences of genes plus Chinese cultures. Surely imitators must have known they were illegally ripping off famous brands when they made exact copies of labels such as ‘Arrow’, ‘Manhattan’, ‘Coopers’ and ‘Ladybird’. Surely, by modifying trade marks, imitators must have been trying to evade enforcers, and, where possible, dupe consumers into believing that they were buying “originals”. The combined effects of poor English language skills and ignorance of the Law might explain why ‘Hanes’ T-shirts became ‘Hines’ T-shirts; “Blue Bell” jeans became “Gold Bell” jeans; ‘Arrow’ shirts became ‘Lucky Arrow’ shirts; Brycreem became ‘Roycream’ and ‘Bailyteen’. But, surely, these imitators had agency, the motivation and the means to cheat.

³⁹ See ‘Notes on Merchandise marks’, p. 3.

⁴⁰ HKRS163/1/2151, ‘Some Problems Affecting Hong Kong Industry’ [no author stated but drafted in the Department of Commerce and Industry] [not dated, but bundled together with documents dated the late 1950s]; and HKRS2709/1/16, note for the Director of the Department of Commerce and Industry, 7 Nov. 1962, regarding Memorandum for the Trade and Industry Advisory Board, ‘Merchandise Marks (Amendment Bill) 1962 [TIAB M80/62].

⁴¹ US, NA, RG59 [1955-59] 846G (Box 4539), Edward R. Fried, American Consul, to Department of State, no. 896, 2, May 1958.

⁴² For orientation see William P. Alford, *To Steal a Book is an Elegant Offence: Intellectual Property Law in Chinese Civilisation* (Stanford, 1995).

⁴³ A new literature revises this story somewhat: see Julia Strauss, *Strong Institutions in weak politics: state building in Republican China, 1927-1940* (Oxford, 1998); and Philip C. C. Huang, *Code, custom, and legal practice in China: the Qing and the republic compared* (Stanford, 2001).

⁴⁴ See Julean Arnold, *China: A Commercial and Industrial Handbook* (Washington, 1926) [reprinted Taipei, 1973], p.343.

Surely those mutating signs and symbols of western products were cunning – rather than careless -- copy-cats?⁴⁵ The Hoover Manufacturing Company, and the Parker Pipe Co Ltd, infringed patents, trade marks and designs for the Parker range of lighters made by Ronson Products.⁴⁶ Their basic strategy, and it was a common one amongst imitators,⁴⁷ was to reassemble a range of IP-protected features of a particular product in new ways.

The evidence is, once again, piecemeal and anecdotal but it suggests that imitators were entrepreneurial, deliberately making inferior copies priced below the superior originals.⁴⁸ Shirts with a ‘false’ ‘Arrow’ label attached to them sold wholesale at one-seventh of the price of ‘genuine’ ‘Arrow’ shirts.⁴⁹ ‘Photo-set reproductions’ of technical and medical text books published by foreign publishers and re-exported through Hong Kong to Taiwan, Japan and the US sold at under a third of the originals.⁵⁰ Charles Burnham, the sales director of an unnamed firm of shirt manufacturers in Wakefield, West Yorkshire, alleged that the Hong Kong-made shirts he discovered on sale in Southern Rhodesia were ‘identical’ to those produced by his firm in every respect except ‘quality’.⁵¹ Eric Pasold noted that a rising number of Hong Kong-made goods were ‘exact’ copies of Ladybird merchandise, ‘in appearance, but not quality’.⁵² A ‘Mr Fiz’ toy copied by ‘Asiatic gentlemen’ in Hong Kong used the same label and motto -- “A million faces in one” – but was, according to the British Press, ‘inferior’ because the doll’s face, which children could manipulate into ugly grimaces, was ‘pock-marked’.⁵³ Many cases of piracy of trade marks and protected designs were only uncovered when goods were seized under colonial regulations governing health and safety of products and places of production. The production of these inferior goods could have been the unintended consequence of poor local knowledge of process technologies – for example how to mould, and re-mould plastic – exacerbated by poor monitoring of production processes. The production of “Shoddy” (inferior) goods could equally, however, have been a conscious strategy to gain entry into low-income markets using product and price differentiation strategies.

⁴⁵ See the US records of the Consult General document numerous cases: see US, NA, RG59 [1951-55] 846G (especially Box 4924), and HKRS270/1/16, Commercial Crimes. For example note: the ‘Washington Tobacco Company of Hong Kong’ used a “Gold Dollar” sign on cigarette packages, ‘deceptively designed to appear as the product’ of Philip Morris Company and giving the ‘connotation’ of being the property of the Federal government of the USA; the Hong Kong Flour Mills Co marked a range of products using a ‘Horse Head’ brand similar to the “Horse Head” brand of the ‘Phillsbury Mills, Inc, of Portland, Oregon’; local pharmaceutical manufacturers used “Golden Gate” which bore a ‘phonetic similarity’ to ‘Colgate’.

⁴⁶ BT209/10/0; G. B. W. Harrison, UK Trade Commissioner, to W. P. Smith, 18 April 1956.

⁴⁷ See US, NA, RG59 [1955-59] 846G (Box 4539, Everett F. Drumright, Consul General, to the Department of State, No.1767, April 1955; and BT209/10/0, R. William, Board of Trade, to J. K. B. Davenport, Trade Commissioner, 27 Jan. 1961.

⁴⁸ Proving conclusively that they were inferior would require direct physical comparisons of these ephemeral product supported by written evidence derived from business archives.

⁴⁹ \$30 per dozen as opposed to \$210 per dozen: see ‘Label Infringement: ‘Seizes of Large Number of Shirts with “Arrow” Mark’, *South China Morning Post*, 20 Jan. 1955, in BT209/10/0.

⁵⁰ See US, NA, RG59 [1955-59] 846G (Box 4539), Everett F. Drumright, Consul General, to Department of State, no. 463, 20. Sept. 1955; these particular books may well have been manufactured in China.

⁵¹ John Beverley, ‘Colony Stamps Out “Pirate” Traders’, *News Chronicle*, 15 Nov. 1954, in BT209/10/0.

⁵² BT209/10/0, note from Pasold Ltd, undated [early 1960s].

⁵³ ‘Stand by for Mr Fiz from Hong Kong’, *Daily Sketch*, 20 March 1954, in BT209/10/0.

Although some piracy would have been due to ignorance of the law these effects would have been short lived. One example is illustrative. In the late 1950s a New York-based company, 'Rico Ltd.', registered over one hundred designs for plastic flowers mostly made in Hong Kong. Under the law, local Chinese manufacturers, who had been using the designs for years, were liable to pay a fee to this company. This rent could be easily collected given that US customs had the authority to seize any consignments where there was evidence that payments had not been made. This case, which got local Chinese manufacturers 'thoroughly aroused', was given 'front page treatment' in the Hong Kong press.⁵⁴ This case suggests that ignorance of the law would not have lasted long. Information, about commercial laws, and business ethics, disseminated quickly in a small, densely populated city-state, where oral modes of communication were good, and where print cultures were strong (literacy rates were high and newspapers and pamphlets numerous and frequently published). With Chinese firms dependent on getting their goods into high-income markets where IPR enforcement regimes were now strong, they had a strong incentive to learn the rules by which the imitation-game was played.

In sum, piracy was chronic in early post-war Hong Kong, and imitators were entrepreneurial; they were taking advantage of information asymmetries created by IPR regimes and responding to effective demand overseas for cheap branded products. The evidence is based on a self-selecting and highly skewed sample (derived from proprietors and their agents), and intent to cheat cannot be conclusively proved: genetic traits, traditional Chinese cultures, plus an initial ignorance of Hong Kong law, might have caused unintended piracy. There is, however, indirect evidence that most piracy was intended entrepreneurship. This conclusion tallies comparatively. Economic historians have shown that piracy (of British product and process technologies) was common in 19th century Europe.⁵⁵ What distinguished Hong Kong pirates from their European and Chinese predecessors was their dependence on global sub-contracting networks, a feature that takes some 'agency' away from those doing the actual imitating – the makers and finishers of products – and gives it to distributors, western as well as Chinese.

4. Industrialisation and the decline of trust

Global sub-contracting, linking retailers and merchants in high income markets with manufacturers and merchants based in developing countries, was prevalent in post-war Hong Kong. Hong Kong manufacturers made goods to be finished overseas and finished products ready for immediate consumption. Export merchants, of western and Asian origins, became key components in these global supply-chains.⁵⁶ They took orders from,

⁵⁴ US, NA, RG59 [1955-59] 846G [Box 2534], from Hong Kong to the Secretary of State, March 2, 1961, no. 1444: Rico was established on 30 September 1959 as a subsidiary of 'Intercontinental Inspection Service Ltd.

⁵⁵ Chang, *Ladder*, pp. 57-58.

⁵⁶ See David Meyer, *Hong Kong Metropolis* (Cambridge, 2000); and, for cases, G. C. Allen and Audrey G. Donnithorne, *Western Enterprise in Far Eastern Economic Development: China and Japan*, (New York, Macmillan, 1954); and Solomon Bard, *Traders of Hong Kong: Some Foreign Merchant Houses, 1841-1889* (Hong Kong, Urban Council, 1993).

and placed orders with, wholesale merchants (or large-scale retailers) based overseas.⁵⁷ Most had good access to information about what products and processes were IPR-protected, and in which particular markets. Many evolved from importing Western consumer and capital goods for Asian markets to exporting Asian goods for Western markets. In the 1950s, although many continued to import western capital goods for transshipment across Asia the rise of autarkic regimes (notably in China) and the introduction of discriminatory commercial policies (notably embargoes on trade in ‘strategic’ and ‘semi-strategic’ goods) reoriented them towards marketing Asian-made goods globally.⁵⁸

Given developments in ICT (notably telegraph) information on price could be acquired at low cost, but merchants were still essential because inter-personal communication was required to place, and monitor the processing of, orders. Merchants had local and global knowledge. They earned a living by setting a price for it, their commission. (Many also had good access to credit to extend to manufacturers.) The cost of acquiring and verifying local knowledge rose considerably in the early post-war years due to rapid demographic and economic change. Manufacturers entered and exited the market quickly and most would not have been known, at least initially, to merchants. The number of manufacturing concerns more than doubled in the early post-war decades; membership of the Chinese Manufacturers Association, the main business group representing industrial enterprises, rose from 70 in 1934 to 750 in 1953 and to 1,500 in 1965.⁵⁹ It would have taken time for information about those in good or ill repute to become common knowledge. New merchants were also entering the market, and they would have made mistakes, failing to check IPR registers or placing orders with those of ill-repute. These new entrants may also have been more inclined to free-ride on the global reputation of Hong Kong as a place of legitimate trade.

Given the quality of the evidence, firming up these speculations is not easy. Although, for example, it was alleged that Indian and Japanese merchants placed orders with local Chinese manufacturers for goods for cashmere knitwear and marketed them illegally as ‘Scottish Cashmere’, who took the decision to make and attach this illegal label: was it these merchants (as a Press report implied) or wholesales in overseas markets?⁶⁰ Who, likewise, took the common decision to label or re-label goods made in, or transhipped through, Hong Kong as “Empire made” in order to counter the prejudice of British and Commonwealth consumers against goods labelled ‘foreign-made’?⁶¹ Even when caught in

⁵⁷ See J. L. Epsy, ‘The Strategy of Chinese Industrial Enterprise in Hong Kong (unpublished DBA dissertation, Harvard, 1974).

⁵⁸ For context on British agency houses see Stanley Chapman, *Merchant Enterprise*; for the political effects of the 1940s and early 1950s see Clayton, *Imperialism Revisited*.

⁵⁹ Clayton, ‘Institutional change’, p.154. Data on factory registration is a less useful measure because it does not count labour-intensive workshops.

⁶⁰ BT209/10/0, J. K. B. Davenport, Trade Commissioner Hong Kong, to J. R. M. Whitehorn, Deputy Director of Commerce, Federation of British Industries, 8 March 1962; and *Daily Express*, 7 March 1962.

⁶¹ See CO852/22418, E. A. Cohen, Board of Trade, to T. W. Davies, Colonial Office, 18 July 1939; BT641/1735, F. I. Lamb, Board of Trade, to D. G. Price, Export Group of the National Wool Textile Exporters, Bradford, 7 July 1954; CO1026/117, letter from Peter Thorneycroft, President of the Board of Trade to Alex. Lennox-Boyd, Secretary of State for the Colonies, 30 Sept. 1954.

the act (and it was not often), export merchants suggested that import merchants initiated these cheats. The Wah Hing Trading Co, which exported garments, claimed that a UK wholesaler had requested that it attach a label that bore a strong resemblance to that used by E.S.A. Robinson of Bristol.⁶² But it is impossible to know for sure whether Wah Hing was being candid or evasive? Establishing which distributor had responsibility – for monitoring product standards, which included checking IP regulations – was a significant co-ordination problem that had to be resolved given that industrial structures were segmented in Hong Kong.

Many manufacturers sub-contracted production functions to workshops and to outworkers, either as part of permanent division of labour or to meet orders when at full capacity. And pirates tended to congregate in these small, labour-intensive enterprises. Most of these businesses were part of the untaxed unregulated economy, and they entered and exited the market frequently; many were located in domestic premises. Sidney S. Wong, the manager of Seymour and Company, the local agents of Weco Products Company, which had failed to stop local firms copying their wares (especially “Dr West” toothbrushes), noted that ‘it is almost impossible to find the offenders because the imitations are made in comparatively small quantities by family groups and individuals in flats, cubicles and cocklofts’.⁶³ In the late 1950s, Hip Shing, a new enterprise making garments, defended itself when accused of counterfeiting by Pasold, by noting that it did not employ its own in-house designer. Instead it had submitted the task of finishing the children’s garments to a very small ‘jobbing’ screen printing firm.⁶⁴ It also claimed that the original order had been placed by ‘John Hutchison and Sons’, a large and reputable mercantile firm. Like many other enterprises caught in the act it had passed the buck. This strategy was either an attempt to evade the law, or, as seems more likely, reflected Hip Shing’s belief that mercantile firms had the responsibility for checking IP regulations. Even reputable manufacturers worked on the assumption that local export merchants bore the responsibility for verifying that a product batch had not transgressed IPR regimes in target markets. One case is particularly illustrative.

Mee King was a local garment factory accused, like Hip Shing, of infringing designs owned by Pasold. Unlike Hip Shing, and unlike most Hong Kong small-scale manufacturers, Mee King did not sub-contract finishing to other firms. This firm submitted samples to large-scale, reputable merchants, including ‘Dodwells, John D. Hutchinson, and Li and Fung’. If these merchants secured orders from overseas clients, Mee King would batch-produce. Mee King relied on its reputation for making the requisite goods on time to meet overseas demand shaped by seasonal and fashion shifts. Designing a sample product that would secure orders was critical and Mee King employed an in-house designer; ‘only very occasionally’ did it make products to specifications set independently by merchants.⁶⁵ (This was unusual in Hong Kong where most firms sub-contracted design-tasks.) This in-house designer probably gained inspiration from reading catalogues and sampling

⁶² BT209/10/0, G. B. W. Harrison, UK Trade Commissioner, to W. P. Smith, BT, 9 June 1956.

⁶³ US, NA, RG59 [1951-55] 846G [Box 4539], American Consulate General, Hong Kong, to the Department of State, no. 896, 2 May 1958.

⁶⁴ HKRS41/1/9602, draft telegram to the London, 65/(TD44/965/53), 28, Feb., 1958.

⁶⁵ HKRS41/1/9602, draft telegram to the London, [Hong Kong Government Office], 65/(TD44/965/53), 28, Feb., 1958.

products; s/he also, no doubt, observed western-made goods circulating in Hong Kong; and emulated fellow local designers. S/he would have had good knowledge of “Ladybird” branded produce; Pasolds advertised in Hong Kong magazines and had secured ‘considerable sales’ in the “better class of Hong Kong shops”.⁶⁶ To what extent, however, was s/he a pirate?

There are a variety of equally-plausible answers to this question. It is possible that his or her copying was a sub-conscious creative process; that this imitation was unintended. It is possible that the imitation was intended but that the designer believed that the original designs were common property: s/he may have thought that a design featuring gun-totting, sombrero-wearing, cartoon cowboys ranching long-horn cattle was, due to the global reach of Hollywood, a universal image. It is possible that s/he knew that there was a good chance that these “American Wild West” images were patent-protected but that s/he would not be culpable if the cheat was uncovered because responsibility for checking IP registers lay with the merchant. Finally, Mee King or the merchant may even have realised that this design was owned by Pasold, but that this British company had failed to register it locally and thus the risk of being sued or prosecuted for design infringement was low (so long, that is, that the imitation Pasold design was not stamped with the IP-protected ‘Ladybird’ trade mark). Imperial and colonial IP regimes had, in short, created a myriad of information asymmetries.

Conclusion

In the post-war period in high-income Western markets, incomes increased, and tastes shifted due to the mass production and marketing of novel products. Demand for branded, designer goods consequently rose. A high proportion of this demand was met by firms based in these high-income markets. These firms registered their novel products using national and international IPR regimes. Supply-side shifts in Hong Kong, however, encouraged the infringement of these property rights. Gaps in knowledge between proprietors (and their agents) and imitators -- which are common to all IP regimes -- were exacerbated in this case by the distance between the IP registration processes in Britain and re-registration and enforcement processes in Hong Kong. Imperial political economies created relatively standardised legal rules but colonialism created flexible local legal regimes.

⁶⁶ HKRS41/1/9602, note [no author specified] on ‘alleged infringement of Design of Pasold Ltd by Hong Kong manufacturers of knitted childrens’ garments’, [no date, but spring 1958].