

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2005 SPECIAL 301

SPECIAL MENTION

HONG KONG

While IIPA members remain pleased with the level of cooperation by Hong Kong Customs & Excise on a number of enforcement fronts, we are nonetheless concerned over some legislative and regulatory matters. IIPA members urge the U.S. government to monitor legislative developments in Hong Kong closely throughout the coming year and engage with the Hong Kong government to ensure that the Copyright Ordinance remains an effective tool in fighting all types of piracy, including digital theft. Though not recommending that Hong Kong be included on any of the Special 301 lists at this time, IIPA believes that the U.S. government should conduct an out-of-cycle review at an appropriate point to determine whether industry's concerns with current deficiencies in copyright legislation were adequately addressed in Hong Kong's consultative and legislative processes on copyright laws.

The Hong Kong government recently issued a consultation paper on the review of certain provisions of the Copyright Ordinance. The consultation paper's stated purpose is to facilitate review of crucial provisions involving the scope of end-user liability, fair use principles, parallel import protection, evidentiary burdens in computer software cases, liability for circumvention of technological protection measures, and rental rights for films.

Notably absent from the consultation paper are important provisions relating to the protection and enforcement of intellectual property rights over the Internet. This is indicative of the somewhat piecemeal approach to legislative reform that the Hong Kong government has undertaken in recent years. The copyright industries have asked the government to conduct a comprehensive review and amendment of the Copyright Ordinance to meet the challenges in the digital age. Unfortunately, there has been no indication that this will be undertaken soon. Once again, IIPA urges the Hong Kong government to avoid attempting to deal separately with difficult subjects that are in fact interconnected in law and in practice. IIPA members are actively engaged in the consultation process and ask the U.S. government to monitor closely developments with respect to these vitally important topics.

The book publishing industry remains concerned with the Copyright (Suspension of Amendments) Ordinance 2001, which was recently extended to 31 July 2006, and which suspends criminal liability for those knowingly possessing an infringing copy of certain copyright-protected works in the course of a trade or business, with a view to committing an infringing act. This provision, which unnecessarily and unjustifiably differentiates between copyright-protected works according to medium or genre, reduces the level of protection afforded affected works, including many of those produced by the U.S. publishing industry. Such discrimination is wholly out of step with international norms, and with Hong Kong's obligations to employ effective and deterrent measures against copyright piracy. IIPA members remain actively engaged on this issue and strongly urge that this discriminatory provision be eliminated when next up for review.

In addition, entertainment software companies still face burdensome evidentiary requirements for prosecuting copyright offenses, causing an expenditure of excessive resources in order to bring a copyright infringement case. Under Hong Kong procedure, the copyright holder must provide Section 121 affirmations for every copyright infringement prosecution, which includes providing evidence of copyright ownership as well as attaching true copies of the video game titles that are the subject of the case. The situation remains unresolved due to the government's delay in using its powers under existing legislation to designate foreign copyright registries (including the U.S. Copyright Register) under Section 121. Recognizing U.S. copyright registration certificates and allowing their substitution for copies of the genuine article would greatly reduce the burden on copyright owners and expedite compliance with the affirmation requirements. It is hoped that the Hong Kong government will soon adopt the measures necessary to effect the recognition of foreign copyright registries.

The entertainment and business software industries appreciate the Hong Kong government's increased efforts against criminal syndicates involved in the distribution of pirated copyrighted products. The industries, however, remain concerned with Hong Kong's role as a transshipment point for counterfeit goods, including cartridge-based video games. Industry notes that according to statistics from U.S. Customs, in 2003 Hong Kong was the number two source of counterfeit goods reaching U.S. markets (behind only China). In 2004, there was an increase in seizures of counterfeit cartridge-based video game products from Hong Kong by the U.S. Bureau of Customs and Border Protection. Over 165,000 pirated Nintendo video game products were seized in the U.S. and several European countries in 2004. Despite the efforts of Nintendo of America (NOA) to provide exporter information on overseas seizures to Hong Kong Customs authorities, NOA has not received any information regarding legal action or investigations resulting from this information. It is hoped that the efforts that have been directed toward addressing criminal syndicate involvement in optical disc piracy by the Hong Kong authorities will also be extended towards the problem of transshipment of pirated cartridge-based games through the territory.

The Hong Kong government has maintained good progress in eradicating optical disc piracy at the retail level and fighting illegal photocopying, and has recently begun to look at ways to address the growing problem of Internet piracy in the peer-to-peer environment. However, despite civil enforcement and IP education and awareness efforts by industry, business end user piracy remains a significant barrier to the development of the computer software industry in Hong Kong. End user piracy accounted for most of the US\$102 million in losses felt by the software industry in 2003, when Hong Kong experienced a software piracy rate of 52%. During the same time period, other markets in the region reduced their software piracy rates, putting Hong Kong well behind other advanced economies in the Asia Pacific region, including South Korea, Singapore, Japan, Taiwan, Australia and New Zealand.

The Hong Kong government has over time expressed its commitment to taking action against business end user piracy, consistent with its obligations under Article 61 of the TRIPS Agreement and its vision to build a knowledge-based economy. The government has also recently renewed its pledge to promote the development of cultural and creative industries, including the computer software industry. The government took steps to implement this policy in April 2001, when the Copyright Ordinance was amended to clarify that the knowing possession of infringing computer software for the purpose of or in connection with any trade or business is a criminal offense. Since the enactment of the law, the Customs & Excise Department have carried out a number of end user raids against those suspected of using software illegally. However, since that time only a few of these cases have made it to court and every contested case has ended in acquittal. Industry is concerned that the government has not invested

sufficient resources to successfully investigate and prosecute business end user piracy cases and that, unless modified, the law remains inadequate to address the problem. The business software industry looks to the Hong Kong government to address the continuing challenge of end user piracy by achieving a meaningful reduction of this persistent form of piracy, through successful criminal enforcement and prosecution, and deterrent penalties.

Moreover, even though the current criminal law has proven to be ineffective in addressing the problem, the government recently consulted the public for views on proposed legislation that might significantly narrow the scope of protection for computer software. While the business software industry appreciates the government's stated commitment to tackle the business end user piracy problem, it urges the government to take concrete steps to make this commitment meaningful, including to: (1) take into account the apparent ineffectiveness of the current law when examining the need for refinements to facilitate the successful prosecution of business end user piracy cases in the short term; (2) refine the law to clarify the circumstances under which the failure to prove ownership of licenses can result in criminal sanctions; (3) refrain from rolling back copyright protection in software through amendments to existing legislation; (4) refrain from introducing a general fair use defense in copyright laws without first strengthening liability provisions; and (5) pursue sustained and effective criminal enforcement, prosecution, and IP education efforts.

IIPA members wish to emphasize that, though we have not asked for a specific ranking for Hong Kong at this juncture, we are deeply concerned about the approach Hong Kong is taking in its legislative reform process. The government's actions on the above-named matters have the potential for global significance. Hong Kong remains a vitally important market for the U.S. copyright industries, and we therefore ask the U.S. government to pay close attention to upcoming developments in the territory