

Lawsuits against pirates urged to test ruling

Cases will strengthen the system after disappointing judicial interpretation of copyright law, US trade official says

PIRACY

Pete Nowak in Guangzhou

United States trade officials have called on intellectual property rights holders to test the new judicial interpretation of China's copyright enforcement law by pressing forward with prosecutions against violators.

"Getting cases through the pipeline can help strengthen this system," Mark Cohen, intellectual property rights attaché to the US embassy in Beijing, said at a conference in Guangzhou last week. "Let's see how the system works."

According to Mr Cohen, last month's ruling gives guidelines for criminal prosecution and conviction but "not much else". In his view, the interpretation fails to address numerous problems and eliminates desirable provisions.

One key point of the interpretation, issued by China's Supreme People's Court on December 22, establishes the price to be used in determining damages to rights holders, and thus the threshold above which a violator can be criminally prosecuted.

The price at which a violator sells a counterfeit product - rather than the product's real market value - is to be used in calculating damages. In the case of a DVD with a market value of 100 yuan but sold by a counterfeiter for five yuan, it is the lower selling price that counts.

The interpretation does, however, lower the threshold level for criminal prosecutions. Individuals will be subject to criminal prosecution if the value of their infringing

goods exceeds 50,000 yuan. For companies, the threshold is set at 150,000 yuan. The individual and commercial thresholds had previously been set at 150,000 yuan and 300,000 yuan respectively.

If the value of goods fails to meet these thresholds, the violator will be subject to less severe administrative or civil actions.

Also disappointing, Mr Cohen said, is the interpretation's failure

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Counsel, Rouse & Co International

to address key issues, such as arrest procedures and how to prevent destruction of evidence.

The new interpretation also removes the previous "three strikes and you're out" provision, which stated that anyone caught violating intellectual property rights for a third time automatically qualified for criminal prosecution.

According to Mr Cohen, about 67 per cent of counterfeit goods seized in the US last year were made in China, and resulted in lost trade valued at US\$2.8 billion.

About 400 such criminal cases were prosecuted in China last year, a small increase over 2003.

"This isn't a country that lacks



Legal adviser Tim Browning (left) and Mark Cohen (right) of the US embassy in Beijing, say laws protecting intellectual property do not go far enough. Photo: Peter Nowak

resources for copyright enforcement," Mr Cohen said, estimating that more than 600,000 mainland officials are tasked with enforcement of intellectual property rights.

Tim Browning, legal adviser for enforcement with the US Patent and Trademark Office, also urged further action by China. He sug-

gested administrators adopt the US enforcement manual and train more judges in the US.

However, other observers argue that last month's ruling is a step in the right direction.

"Now at least we have some transparency in how far we can go," says Alan Adcock, counsel for

Rouse & Co International. "In the past we'd have to stick our neck out and say 'let's go ahead with a criminal action even though we don't really know what the pricing evaluation bureau is going to base its report on'.

"It helps us manage our clients' expectations better. It doesn't nec-

essarily help the client, but at least it helps them make decisions."

Maarten Roos, client service manager at Wang Jing & Co, also played down the importance of the nullified "three strikes" rule. "If you can resolve problems regarding valuation, then the 'three strikes' rule is less important," he said.

"The killing of that is more of a detail than a far-reaching point."

Mr Adcock added: "In New York, putting someone behind bars for trademark infringement would be very, very harsh. Very few judges in the west would do that. But now we're expecting Chinese judges to do that for Chinese infringers?"