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Legal Update

Hong Kong Removed from U.S. Trade Representative's Special 301 Watch List[†]

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1. In an announcement made on February 20, 1999, the United States Trade Representative removed the Hong Kong Special Administrative Region from the Special 301 Watch List of countries that do not sufficiently protect intellectual property rights.¹ In announcing the decision, the Trade Representative urged Hong Kong to increase its efforts to reduce the occurrence of intellectual property violations within the region.² Removal from the Watch List means that the Trade Representative will no longer continuously monitor Hong Kong, and Hong Kong will not be subject to trade sanctions.³

2. Congress created the Watch List, commonly referred to as Special 301, in 1988 because of its dissatisfaction with the international intellectual property protection offered by efforts like the Paris and Berne Conventions.⁴ Special 301 is part of the Omnibus Trade Act of 1974 ("the Act"),⁵ which authorizes the Trade Representative "to identify foreign countries that deny adequate and effective

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¹ See Simon Beck, *Hong Kong Off Piracy 'Watch List,'* S. CHINA MORNING POST, Feb. 21, 1999, at 1, available in 1999 WL 2521394.

² See *id.*

³ See *id.*

⁴ See Robert J. Pechman, Note, *Seeking Multilateral Protection for Intellectual Property: The United States "TRIPs" over Special 301*, 7 MINN. J. GLOBAL TRADE 179, 179, 195-96 (1998) (examining the relationships between the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) and unilateral measures, such as Special 301, used by the United States to protect intellectual property rights internationally).

⁵ See *id.* 195-96.

protection of intellectual property rights, or deny fair and equitable market access to United States persons that rely upon intellectual property protection.”⁶

3. The Trade Representative identifies suspect countries and places them on the Watch List, which is the least serious category, or the Priority Watch List; the Trade Representative also identifies countries as Priority Foreign Countries, which is the most serious category.⁷ Priority Foreign Countries are “those foreign countries that have the most onerous or egregious acts, policies, or practices that deny adequate and effective intellectual property rights.”⁸ Special 301 requires the Trade Representative “to negotiate agreements [with Priority Foreign Countries] to end piracy within [six] to [nine] months.”⁹ If an offending nation does not respond to those negotiations, it will face additional consequences, and the United States will enforce its other trade laws to retaliate economically against the recalcitrant nation’s exports.¹⁰ The Act allows a maximum of eighteen months between the initiation of negotiations and the imposition of economic sanctions, even if negotiations are still underway at the end of the eighteen month period.¹¹

4. Hong Kong’s placement on the Watch List, however, did not implicate the serious consequences faced by Priority Foreign Countries. In contrast to the harsh treatment shown Priority Foreign Countries, the United States continuously monitors Watch List countries and may impose discretionary trade sanctions.¹² The Trade Representative first placed Hong Kong on the Section 301 Watch List in April 1996.¹³ The Trade Representative identified Hong Kong as a Watch List nation because of the volume of “unchecked infringements” occurring within the region and an increase in piracy, despite the Trade Representative’s request for increased protective measures.¹⁴ The Trade Representative added Hong Kong to the Watch

⁶ 19 U.S.C. § 2242(a)(1)(A)-(B) (1994).

⁷ See Eric M. Griffin, Note, *Stop Relying on Uncle Sam! – A Proactive Approach to Copyright Protection in the People’s Republic of China*, 6 TEX. INTELL. PROP. L.J. 169, 175, 183-87 (1998) (discussing the need for a more proactive approach to protecting the United States’s intellectual property interests in the People’s Republic of China, due to both a lack of resources in that nation and an internal desire to ignore intellectual property rights violations).

⁸ 19 U.S.C. § 2242(b)(1)(A).

⁹ Griffin, *supra* note 7, at 175.

¹⁰ See *id.*

¹¹ See Pechman, *supra* note 4, at 195-96 (discussing the adoption and development of Special 301).

¹² See Beck, *supra* note 1, at 1.

¹³ See *Hong Kong Now Off USTR ‘Watch List,’* ASIAN WALL ST. J., Feb. 22, 1999, available in 1999 WL-WSJA 5428277.

¹⁴ Anna M. Han, *Hong Kong’s Economy Under Chinese Rule: Prosperity and Stability?*, 22 S. ILL. U. L.J. 325, 326, 330 & n.27, 333 (1998) (discussing China’s self-interest in preserving Hong Kong’s

List despite Hong Kong's enforcement efforts, which included raiding 1282 shops and hawker stalls, arresting 1268 people, and seizing compact discs, video compact discs, and CD-ROMs worth approximately four million dollars.¹⁵ In 1995, Hong Kong also "increased piracy penalties and bolstered antipiracy enforcement in its customs bureau."¹⁶

5. After being placed on the Watch List in 1996, Hong Kong instituted additional measures to address the problems of intellectual property infringement.¹⁷ In lobbying for Hong Kong's removal from the Watch List, Hong Kong officials pointed to the measures they had adopted "towards eliminating copyright piracy."¹⁸ These measures were apparently successful.¹⁹ In a statement announcing Hong Kong's removal from the Special 301 Watch List, Trade Representative Charlene Barshefsky stated that Hong Kong had taken substantial measures to reduce piracy.²⁰ These measures included "improving its legal regime through the passage of the Prevention of Copyright Piracy Ordinance, significantly increasing raids and seizures against retailers and distributors, seizing approximately 70 pirate CD production lines, closing several notorious retail arcades and imposing stiffer penalties on pirates."²¹ While applauding these efforts, Ms. Barshefsky noted that in light of the high piracy rates within the region, Hong Kong should take

economic system and identifying key factors of Hong Kong's economic system that China should strive to maintain, such as an efficient civil service and limited government regulation).

¹⁵ *See id.* at 330.

¹⁶ *Intellectual Property News from Around the World*, West's Legal News, Nov. 15, 1995, available in 1995 WL 911292.

¹⁷ *See Beck, supra* note 1, at 1.

¹⁸ *Hong Kong Claims Improvements in Intellectual Property Protection*, 10 J. PROPRIETARY RTS. 20 (1998) (Hong Kong "claims to have taken a variety of important steps [toward eliminating copyright piracy], including increasing staffing for the Intellectual Property Investigation Bureau, increasing custodial sentences and penalties, empowering police to seize suspect pirated goods, mandating a license to import or export disc manufacturing equipment, strengthening ties with other enforcement agencies and international and local rights owners, offering rewards for uncovering pirating activity, implementing a public education program for students, and seizing millions of pirated optical discs in the past year.").

¹⁹ *See Beck, supra* note 1, at 1.

²⁰ *See id.*

²¹ *Id.* (quoting from a statement made by Trade Representative Charlene Barshefsky announcing the removal of Hong Kong from the Watch List).

“significant new steps in the near future” to address the ongoing problem.²² Hong Kong’s removal from the Watch List leaves thirty-one countries on the list.²³

6. According to a spokesman for the Hong Kong Trade and Industry Bureau, the Hong Kong government is committed to eliminating copyright piracy.²⁴ The government pledged additional funds to continue educational programs, “focusing on schools in particular.”²⁵ While these educational efforts appear to be a prudent measure, there are serious obstacles that threaten their effectiveness. For example, Hong Kong residents’ high demand for counterfeit goods could undermine any curative effects.²⁶

7. While the Trade Representative removed Hong Kong from the Watch List, it could easily return Hong Kong from to the list if the Trade Representative is not satisfied with Hong Kong’s progress in the future.²⁷ Therefore, while Hong Kong has shown marked improvement in protecting intellectual property rights, Hong Kong will need to maintain the effectiveness of its efforts to continue to meet the challenges of intellectual property law.

²² *Id.*

²³ *See U.S. Trade Representative Announces Special 301 List*, 10 J. PROPRIETARY RTS. 19 (1998) (discussing in general the announcement of the United States Trade Representative in June 1998). The latest announcement placed no countries in the Priority Foreign Country category. *See id.* The Trade Representative did place fourteen countries on the Priority Watch List: Argentina, Bulgaria, the Dominican Republic, Ecuador, Egypt, Greece, India, Indonesia, Israel, Italy, Kuwait, Macao, Russia, and Turkey. *See id.* At this time, the Trade Representative also placed thirty-two countries on its lowest level Watch List (before recently removing Hong Kong from the Watch List): Australia, Bahrain, Canada, Chile, Colombia, Costa Rica, the Czech Republic, Denmark, Guatemala, Honduras, Hong Kong, Ireland, Jamaica, Japan, Jordan, Kazakhstan, Oman, Pakistan, Peru, the Philippines, Poland, Qatar, Saudi Arabia, Singapore, South Africa, South Korea, Sweden, Thailand, the Ukraine, the United Arab Emirates, Venezuela, and Vietnam. *See id.*

²⁴ *See id.*

²⁵ *Id.* (“The Intellectual Property Department is continuing with their school-visit programme, which has already covered some 150 schools and 48,000 students,” according to a spokesman for the Hong Kong Trade and Industry Bureau.).

²⁶ *See id.* According to a survey of people between the ages of 15 and 29, nearly 80% stated that they had purchased and were still interested in purchasing counterfeit goods. *See id.*

²⁷ *See Jo Pegg, Halt to Piracy Watch Decried – U.S. Move Shocks Industry Beset by Thriving Illicit CD Market*, S. CHINA MORNING POST, Feb. 23, 1999, available in 1999 WL 2521673.