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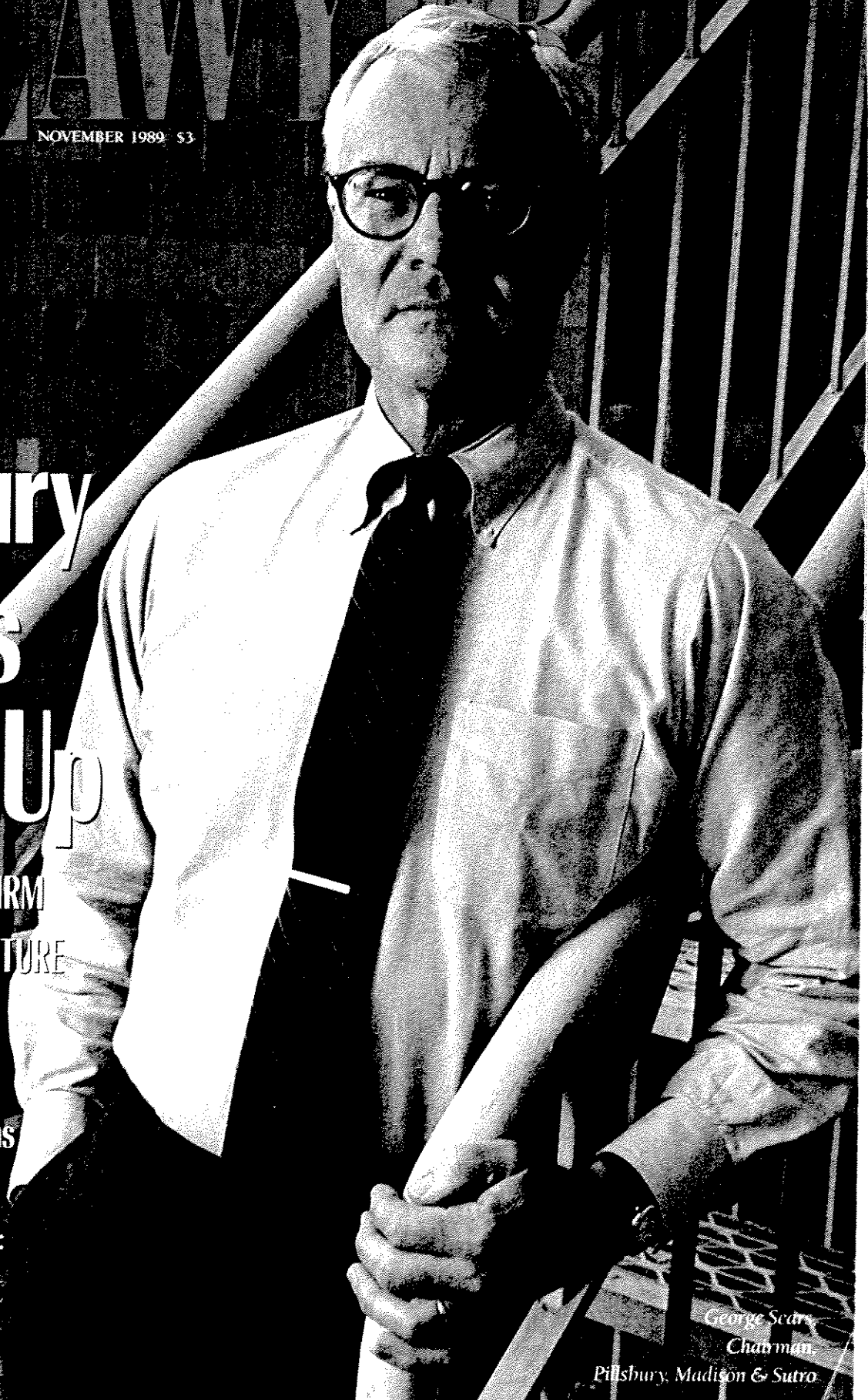
# Pillsbury Plays Catch-Up

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SOFTWARE PIRACY:  
A Global Pursuit

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ASHTON-TATE'S IN-HOUSE COUNSEL LEAD A GLOBAL STRIKE FORCE  
AGAINST COMPUTER SOFTWARE BOOTLEGGERS

# Pursuing the Pirates

**T**he four-lawyer team dedicated to protecting Torrance software publisher Ashton-Tate Inc. from copyright pirates had the earth remarkably well covered earlier this year:

- Stanley P. Witkow, Ashton-Tate vice president and general counsel, was in Pereslavl-Zaleskiy, a town 70 miles northwest of Moscow, at a forum with Soviet software developers. The meeting culminated in the Pereslavl-Zaleskiy Declaration, a document that introduced a radical new concept

to the Soviet Union: the notion that "the owner's permission is required before a [computer] program may be copied and used."

- Richard E. Neff was in the midst of a swing through Asia, with stopovers in Singapore, Hong Kong, Taiwan, the Republic of Korea and Japan, to check on the progress of legal battles against bootleggers of the firm's best-selling database management programs, dBASE III and dBASE IV.

- Peter Davies, based in London, was monitoring a lawsuit filed in Milan in April by Ashton-Tate and Lotus Development Corp. The suit alleges that Montedison, a \$10 billion chemical company, made hundreds of illegal copies of software for in-house use. According to the Business Software Association, piracy in Italy alone costs U.S. manufacturers \$500 million a year in lost revenue.

- Stephen W. Tropp was holding the fort in Torrance, during a breather between pirate-hunting trips across the United States.

The members of Ashton-Tate's anti-piracy team are part of a small but growing corps of lawyers who stalk the globe tracking usurpers of intellectual property, a category that includes copyrights, trademarks and patents. The International Chamber of Commerce in Paris estimates that counterfeited products ranging from Rolex watches to fasteners used in assembling airplanes account for 3 to 5 percent of annual world trade in manufactured goods. That

would put the dollar amount of bogus merchandise in 1988 between \$85 billion and \$140 billion. The International Trade Commission estimates that each year domestic businesses lose \$40 billion in exports, domestic sales and royalties—a hefty chunk of the U.S. trade deficit.

Computer software is particularly vulnerable because of the ease and speed with which products can be copied. Strictly speaking, software is not sold but licensed for personal use, a concept whose implementation has been based on the honor system. One to four copies of bootlegged software are in use for every legal copy sold. The Software Publishers Association estimates that U.S. software companies lost \$2 billion last year to piracy.

John D. Hild, president of Xyquest Inc., reports that a recent review of his company's XyWrite software in an English-language newspaper in Bangkok described the package as "a five-disk program found at your friendly neighborhood pirate's shop." The review quoted local prices of less than one-tenth retail prices in the United States.

Until recently many U.S. companies turned a blind eye to foreign piracy of their products. They might attempt to intercept counterfeit goods at the border or file suit in U.S. courts against distributors and retailers of the merchandise, but they seldom ventured abroad. Some trade associations devoted to combating piracy have been criticized by their mem-

BY MARK THOMPSON

bers for timidity, although "it is very difficult to be aggressive when there are no laws," observes J. Jeffrey Bynum, an analyst on the U.S. Commerce Department's China desk.

But attitudes toward copyright enforcement are changing rapidly. Most major computer software developers now have in-house counsel who conduct global copyright enforcement campaigns. The companies balance enforcement costs against the losses suffered by doing nothing at all. "If we didn't do this, we probably wouldn't sell anything abroad," says Ashton-Tate's Neff.

Ashton-Tate's campaign to stanch the flow of illegal software is particularly impressive in light of the company-wide layoffs and cost cutting announced this year following consecutive \$20 million quarterly operating losses. "I don't see any pressure yet on my budget for anti-piracy," says Neff. "It is well understood that for every dollar spent on copyright enforcement, more than one dollar comes back in sales. Ashton-Tate is one company where lawyers are definitely appreciated."

Private copyright enforcement campaigns abroad come at a time of growing U.S. impatience with its trading partners. Amendments to Section 301 of the 1974



Ashton-Tate's Richard E. Neff and Stanley P. Witkow hunt for pirates across the globe.

Trade Act included in the 1988 Omnibus Trade Act (19 USC §2411) required U.S. Trade Representative Carla Hills to identify countries that maintain pervasive barriers to U.S. exports and to eliminate these practices through either negotiations or trade retaliation. One part of the act created a "Special" 301 action specifically on intellectual property issues.

In May, the Bush administration cited 25 countries for failing to provide adequate protection for intellectual property. Eight of those countries—Brazil, India,

Mexico, the People's Republic of China, the Republic of Korea, Saudi Arabia, Taiwan and Thailand—were given priority status, which means they could be hit with trade sanctions by the end of November if they haven't taken steps to change their policies. The remaining 17 countries are being monitored by the U.S. Trade Representative and will be assessed again next May. Once these countries adopt tougher laws—and many of them have done so in response to U.S. pressure—lawyers for manufacturers will have to make sure they are enforced.

Even in countries where copyright laws are nonexistent, U.S. copyright enforcers have proven that aggressive-ness pays off. Charles Morgan,

a Los Angeles-based copyright enforcement lawyer and a senior vice president for MCA Inc.'s Universal City Studios unit, was one of the first lawyers to search the Third World for copyright pirates. Fluent in Spanish and familiar with Latin American culture, Morgan has investigated video stores and cassette copying shops from Mexico to Panama. He has cajoled police to shut down many offenders; once he persuaded General Manuel Noriega to permit him to take legal action against a pirate cable television system in



## HONG KONG'S WAR AGAINST COPYRIGHT PIRATES

**HONG KONG**—Just a few years ago, Hong Kong openly offered shoppers a cornucopia of counterfeit merchandise. Many of these items are still available, but they're being peddled more furtively now. Touts on the main shopping streets furtively beckon prospective buyers to shops in the back alleys. There the proprietors don't show a customer the actual merchandise—just photographs and price lists. After a sale is made, a runner dashes off and returns with the goods.

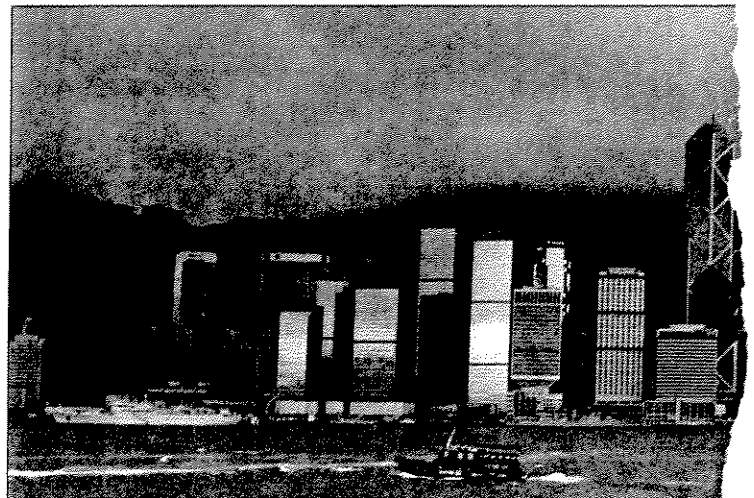
Several times a month local newspapers carry accounts of raids and arrests that serve to remind counterfeiters to be careful. In just the first four months of this year, Hong Kong's copyright enforcement unit made 253 seizures of more than \$3 million worth of goods and sent 24 repeat offenders to jail. Last year 31 people were sentenced to jail terms for copyright and trademark violations.

The successful Hong Kong copyright enforcement campaign is a rarity in Asia. Five Asian nations—Taiwan, the People's Republic of China, the Republic of Korea, Thailand and India—are on the U.S. Trade Representative's priority watch list of eight countries in which intellectual property rights are considered in greatest jeopardy. A number of other Asian nations are on a longer watch list of 25 countries cited under the "Special" 301 provisions of the 1988 Trade Act.

Although copyright enforcement in Hong Kong is considered a model effort, one problem

remains: Even participants in the campaign can't agree why it has succeeded.

Tough laws against piracy and a court system in which English is the official language have certainly helped. "The courts are pro-plaintiff. The laws here are strict, well enforced and in many respects more Draconian than the British," explains Stephen Payne, director of the CTS Group, one of the largest private investigation firms in Asia specializing in intellectual property protection.



Panama City.

Before Universal launched its private copyright enforcement campaign, Morgan says, the company tried to work with the Motion Picture Association of America. Many of the members, however, seemed to have little concern about copyright piracy. "Some studios would literally send a clerk to meetings to take notes and defer all decisions," says Morgan. "The association was taking the side of the slowest-moving wheel on the train. It got to the point where [Universal and Walt Disney Studios] decided if we couldn't get past the bottleneck, we'd start another group."

**L**OS ANGELES sole practitioner Thomas T. Chan is another pioneer in the field of overseas copyright enforcement. Like Morgan, Chan moves easily through the region in which he battles computer software piracy. He was born in Hong Kong and learned about the merchandise trading business from his father. "To me international trade is like going to the supermarket," says Chan.

Like Morgan, Chan is disdainful of U.S. companies that are too frightened to pursue pirates on their home turf. He is also critical of the major computer software trade group, the Association of Data Processing Service Organizations, for its "lack of an international commitment," as Chan diplomatically puts it.

Chan enjoyed his biggest victory over software pirates in the late 1980s while

working as an in-house counsel for Ashton-Tate in Hong Kong. Coordinating a team of private investigators and local lawyers, Chan targeted Hong Kong's infamous Golden Arcade. There, along the arcade's narrow, busy corridors, cubicle after cubicle housed computer shops whose proprietors were blatantly copying the latest \$500 computer programs—manuals and all—and selling them for as little as \$10.

Chan called on K.C. Tong, head of the Hong Kong Customs and Excise Department's Copyright Enforcement Unit. Tong agreed the practices in the arcade were illegal under Hong Kong law and helped gather evidence for the crackdown that followed. (See "Hong Kong's War Against Copyright Pirates," below.)

Nowadays the copyright enforcement unit frequently seizes bootleg merchandise and prosecutes lawbreakers, with jail time the punishment for repeat offenders. In the wake of this successful campaign, five U.S. software publishers joined Ashton-Tate in forming the Business Software Association, which keeps the heat on pirates in Hong Kong and initiated the litigation in Italy against Montedison.

Buoyed by success in Hong Kong, Chan and several other intellectual property lawyers have ventured into the People's Republic of China, one of the countries least hospitable to trademark and copyright enforcers.

China has adequate trademark protection for Western manufacturers, but that hasn't necessarily changed business prac-

tices. According to Sally A. Harpole, a lawyer for Graham & James in Hong Kong who represents Walt Disney Studios in China, "Disney has received a very strong statement of support from the top levels of the trademark bureau in Beijing. But it's difficult for them to control such a big country. Enforcement procedures are very slow because it's still a new area of law and people are new on the job."

**C**OPYRIGHT OWNERS have it much worse. There is no legal protection at all for a concept that runs counter to 40 years of socialist ideology. "Mao's belief that ideas belong to everyone is still deeply embedded" in Chinese thinking, says Clark T. Randt, a Gibson, Dunn & Crutcher partner in Hong Kong and former commercial attache at the U.S. embassy in Beijing. "They had a saying that you still hear today: 'One company imports, one hundred companies benefit.'" Randt adds that some government ministries—notably the ministry charged with publishing textbooks—have units dedicated to pirating materials from the West.

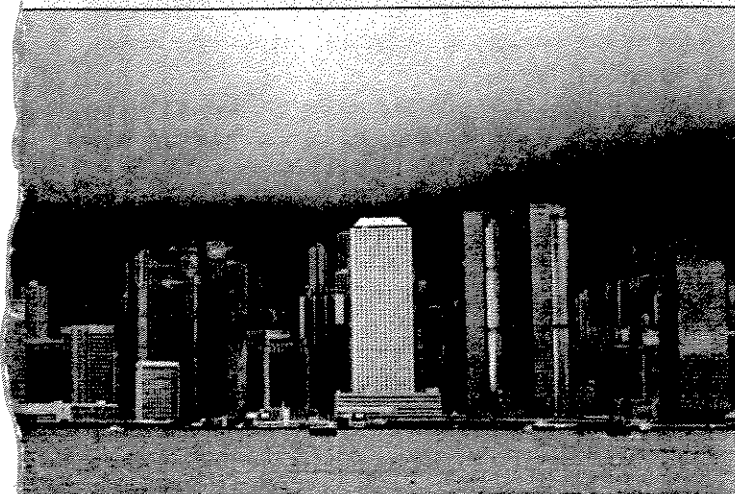
Early this year Chinese officials promised to enact sweeping legal changes, including giving limited copyright protection to computer software, by 1990. Randt says Chinese authorities "were keenly aware they were candidates for inclusion in the Section 301 watch list and were trying to ameliorate the problem."

Just two months before the Commerce Department's May deadline, Chinese au-



Hong Kong's anti-piracy laws were strengthened when the British Copyright Act was extended to the Crown Colony in 1973. Three years later the first Anton Pillar order, a formidable weapon enabling private lawyers to carry out civil search-and-seizure raids on suspected pirates, was issued in Britain and became available to copyright enforcers in Hong Kong as well.

But strict laws and functional courts can only help so much. The United States provides



MARK THOMPSON

state-of-the-art intellectual property protection, yet domestic pirates account for 20 percent of the world market in counterfeit goods. Despite the additional legal protection in Hong Kong, for the most part counterfeiters operated with impunity well into the 1980s.

K.C. Tong, head of the copyright enforcement unit, says copyright piracy has been brought under control because Western businesses finally decided to do more than complain about it. Now, he says, they file complaints with supporting evidence and stick around until the case is closed in court. With that level of cooperation, Tong says his unit can move quickly to crush the pirates.

Organized in 1973 with a staff of six, the Hong Kong Customs and Excise Department's copyright enforcement unit now has 150 full-time investigators and is the only intellectual property police force in Asia. Over the years Tong has accumulated wall plaques and commendations from companies and trade groups that include Louis Vuitton, La Coste, Apple Computer, the Motion Picture Association of America and the American Society for Industrial Security. Recently delegations from Malaysia and South Korea visited Tong's unit to study its procedures.

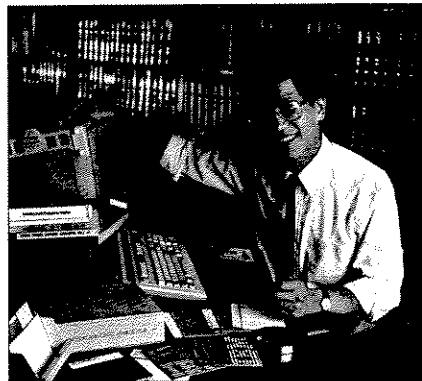
Private investigator Payne acknowledges that Customs "deserves a good deal of the credit. They're better than anyone else in Asia." But many observers suggest the unit has needed more than a slight nudge to take action against the most prosperous counterfeiters.

thorities made their most impressive showing of resolve to combat counterfeiting. While officials looked the other way, private investigators from Hong Kong traveled into China to gather evidence of piracy. In Shenzhen, just across the border from Hong Kong, the investigators bought counterfeit computers and followed trucks delivering the equipment.

After investigators handed evidence to the Chinese police, the Bureau of Industry and Commerce led six raids on factories in which IBM PC replicas were being assembled. The copies were so accurate the IBM logo appeared at 26 places on the machines, just as on genuine IBM PCs. Chinese authorities imposed total fines of \$180,000 on the assembly shops—the largest fine for an intellectual property offense ever imposed in China.

**C**HINESE OFFICIALS held a joint press conference with IBM executives in Beijing following the raids. Although the public relations campaign didn't save China from being listed as one of the eight countries on the priority watch list, the crackdown did win qualified praise from anti-piracy lawyers.

Neil A. Killgren, manager of IBM's intellectual property department in Southeast Asia, says the Chinese "did a very good job," adding that IBM and its investigators were crucial to the success



TOM KELLER

*"Our aim is to change people's morals, not lock people up," says Thomas T. Chan.*

of the operation. "We did a lot of the homework ourselves, gathering a lot of the evidence and presenting it to them."

IBM doesn't intend to drop its own enforcement efforts, which by now have led investigators out of China to the financial backers of the assembly operations. The shops in China were getting material from Taiwan and Hong Kong, says Killgren. "I would assume Hong Kong and Taiwan financial interests were backing the operation. We will have to stay very careful to see that our interests are protected."

Given the business slump that followed the political upheavals across China in May and June, Chinese officials

seem more eager to please than ever. Bynum of the U.S. Commerce Department says, "The reports we are getting are that the [copyright] legislation is still on track." Chan, who has done copyright enforcement work for a number of clients in China in recent years, says he has received repeated assurances from Chinese officials in Los Angeles that business is better than ever. In July, the Chinese government announced it had executed a man for selling counterfeit liquor, Chan reports, adding that he hopes officials didn't intend the news as a gift for U.S. lawyers seeking action against copyright pirates.

Lawyers who conduct enforcement campaigns in countries with scanty copyright laws have to be part teacher as

well as part cop. Chan says he sometimes has trouble conveying the importance of his role as a moral guide to clients interested in cracking heads. "Many companies tell me not to warn the people who are doing the counterfeiting. They want me to surprise them. But that's not fair," says Chan. "Pirating is not wrong in their culture. We have to do some education. They adopted U.S. law at our insistence—all they know is that they passed the law because America wanted it. Our aim is to change people's morals, not lock people up."

Private efforts to change hearts and minds about intellectual property can  
*(Continued on page 136)*

Richard Post, a former CIA agent who now works in the Hong Kong office of Kroll Associates, a private detective agency, says the reason for the crackdown was "pressure, pure and simple." The threat of U.S. sanctions against Hong Kong's exports to the United States, Post says, has been a powerful lever.

California lawyers working for computer software publisher Ashton-Tate Inc. suggest they deserve a good deal of the credit for inspiring raids on the Golden Arcade, where software piracy was rampant just a year ago. Thomas T. Chan, a former deputy counsel for Ashton-Tate who is now in private practice as a copyright enforcement specialist, recalls his early meetings with Tong to discuss a strategy for attacking the blatant counterfeiting. "He thought I was too pushy," Chan recalls. "I recommended a few drastic ways of combating pirates. He accused me of being an aggressive Yankee. But when I left, he adopted my program."

Payne offers yet another reason for the success of anti-piracy measures in Hong Kong. "You can probably tie it in with the economics of the country," he says. "At the turn of the century Americans were copying European products. But once Americans started developing new technology, they needed protection from copiers themselves. Now Taiwan,

Hong Kong and Singapore are coming of age, spending more on research and development and recognizing the need for protecting intellectual property. We now have a number of Taiwanese and Hong Kong clients who are being ripped off in other countries."

Virtually everyone involved in the Hong Kong campaign agrees on one point: No matter how vigorous the copyright enforcement some level of piracy will persist. Even those who would seem the least pessimistic—the investigators and lawyers fighting copyright piracy most vigorously—agree.

Computer shops still line the corridors of the Golden Arcade, but Payne says now they will deliver unauthorized software orders only by mail. The latest trend is to rent legal copies of software and let users make illegal copies for themselves.

"It's like drugs. You can't stamp it out completely," says Paul Yan, general manager for Ashton-Tate in Hong Kong, Taiwan and China. "But it has diminished in degree. If the people selling pirated software have to deal with it like drugs, we've succeeded." The most encouraging sign of success, adds Yan, is that sales of legitimate copies of Ashton-Tate software have increased 400 percent in the last three years.

—MARK THOMPSON

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## Software Piracy

(Continued from page 64)

produce dramatic results. MCA lawyer Morgan says an educational campaign in Japan through the press has served to cut the sale of bootleg video cassettes from 60 percent of total sales four years ago to 10 percent today. MCA is hoping rapidly developing Southeast Asian nations will follow in Japan's footsteps and voluntarily change their ways. "Southeast Asia has a very high literacy rate. People read the papers," Morgan says. "So it doesn't take that long to get them to shift gears."

Ashton-Tate's enforcement campaign in Brazil is a good example of combining moral persuasion with local police powers. Earlier this year the company engineered police raids on four prominent companies in Sao Paulo. Richard Neff was in Sao Paulo at the time but didn't

participate, "not wanting to make it look like the gringos were invading," he says. But he showed up for the press conference afterward and in "fractured Portuguese" outlined the hazards of piracy: the risk of getting defective software, the harm to the country's own high-tech industries, the moral evil of using stolen goods.

Two of the companies quickly settled with Ashton-Tate for a sum of money; the other two, local affiliates of multinational companies, decided to fight and wound up in court. Ashton-Tate followed up with half-page ads in a major Brazilian newsweekly encouraging whistleblowers to report illegal copying by their employers and featuring a toll-free number for the firm's Brazilian lawyer. Neff says phoned-in tips led Ashton-Tate to their original four targets. The company reports that sales in Brazil have more than doubled.

In China, Chan says he appeals to ethnic pride by pointing out how shame-

fully Westerners regard the uncompensated theft of ideas. He also tells officials that China can't hope to develop into a modern nation on an equal footing with Western powers if it doesn't develop computer and other high technology sectors of its own. And he doesn't hesitate to stir up feelings of vulnerability by noting that if a plant manager is in the business of stealing from Western companies, workers may decide they can steal from their own employer.

Chan says he has persuaded three of the four Chinese counterfeiters he has contacted to curtail their activities. And he felt he was making at least slow progress with the fourth—an official in the government ministry assigned the task of pirating foreign textbooks.

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CALIFORNIA LAWYER *senior editor Mark Thompson spent two weeks in Hong Kong gathering information for this story.*

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## Regulatory Negotiations

(Continued from page 70)

\$200,000 per day—if air pollution improvements were made. In June 1987, Exxon agreed to full electrification of its pending Santa Ynez project, a concession to Santa Barbara County that would cost several hundred million dollars.

These deals changed the balance of power in the ongoing regulatory talks. As John Patton, Santa Barbara County's negotiator, points out, "The Exxon deal demonstrated that it was possible to get a permit for a very large project on the kinds of terms we thought the regulation ought to reflect."

More than anything else, the changing climate made it difficult for the negotiators to reach agreement. A position that seemed acceptable one week might appear unnecessary or extreme the next. Meanwhile, self-imposed deadlines passed without effect and the cost of the negotiation ran into the millions.

"People had two babies during that negotiation," Knaster says. "We used to joke about achieving 'peace in our time.'"

The rules of the negotiation stated that if one party called it quits, the reg-neg was finished. But with so much time and money invested, none of the participants wanted to be the first to end the effort. As the presidential election drew near and a

change of administrations loomed, the negotiators agreed to a mid-December 1988 deadline.

On December 14, the dozen or so hardy survivors realized they still didn't have a deal. "There came a time," says Baldwin, "when two caucuses said, 'I don't see how we can get any further.'"

And so after spending thousands of hours trying to reach an agreement, they all slapped shut their notebooks and left. Despite three years of effort and two years of negotiation, California's first reg-neg had failed.

Three days before George Bush's inauguration, the Interior Department initiated offshore air pollution regulation the old-fashioned way—by publishing a proposed rule in the *Federal Register*. Prop 30 CFR §250.47, 54 FR 1846. The rule is tougher than the department's existing rule, but it's not as tough as the local agencies' onshore air pollution regulations. Environmentalists and local governments say it leaves too much discretion to the regional director of the Mineral Management Service; the oil companies also have some quibbles. The department has received some 10 linear feet of comments, and everybody vows to take a shot at the rule in court if it is adopted.

Outside events continued to affect the offshore drilling controversy. A new debate in Congress over the Clean Air Act revived the possibility of transferring offshore jurisdiction to the EPA—which would mean the rule-making process would start all over again. And President Bush's task force on offshore drilling made noises about taking up the air pol-

lution issue as well. Uncertain about what the future would hold, the Interior Department sat on the proposed rule throughout the summer and into the fall. The underlying lawsuit against the Interior Department still sits in U.S. District Court in Los Angeles, but Judge James M. Ideman seems certain to declare it moot if and when a final rule is adopted.

Writing in the *Federal Register*, meteorologist Mitch Baer, the rule's principal author, described the benefits of the failed negotiation—stressing a broader technical understanding of the offshore pollution issue and a better working relationship among some of the agencies involved. Some negotiators agree, but with qualifications. "It's pretty hard to justify that level of effort on the grounds that it educated people," says Santa Barbara County's Patton. Others expressed dissatisfaction with the entire episode, stopping just short of calling it a waste of time. "People were pretty tired by the end, and some people have probably wondered whether it was worth all the time and effort," says Waltner, the environmentalists' lawyer.

Ultimately, regulatory negotiation may evolve into an effective method of administrative alternative dispute resolution. Unfortunately, in this case negotiators at an airport hotel in Los Angeles couldn't overcome presidential campaign politics, fissures in Congress and ramifications of the Iran-Iraq war to agree on air-pollution regulations.

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*William Fulton is a contributing editor of CALIFORNIA LAWYER.*