

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE®



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Douglas M. Bell  
Chair, Trade Policy Staff Committee  
Office of the United States Trade Representative  
1724 F Street, NW  
Washington, DC 20508

Re: **China's WTO Compliance** - Notification of Intent to Testify and Testimony Re:  
"Request for Comments and Notice of Public Hearing Concerning China's  
Compliance With WTO Commitments" (78 Fed. Reg. 49787, August 15, 2013)

To the Trade Policy Staff Committee:

This written notification responds to the TPSC's Request for Comments and Notice of Public Hearing Concerning China's Compliance With WTO Commitments. The request requires persons wishing to testify orally at a hearing that will be held in Washington, DC on Friday, October 4, 2013, to provide written notification of their intention, as well as a copy of their testimony, which is attached hereto.

### **Notice of Request to Testify**

We hereby notify the TPSC that the following person wishes to testify orally at the above-referenced hearing on behalf of the International Intellectual Property Alliance (IIPA):

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### **Summary of Testimony**

IIPA will use its five minutes of oral testimony to indicate why we believe China's enforcement infrastructure for copyright requires further improvements to fully meet the standards of the WTO TRIPS Agreement and how the products of U.S. creative industries continue to face some significant market access restrictions. While there continue to be some signs of positive change in the IP infrastructure in China, piracy remains a serious problem.

# CHINA (PRC)

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2013 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that USTR maintain China on the Priority Watch List and that China be monitored under Section 306 of the Trade Act.<sup>1</sup>

**Executive Summary:** The situation in China for copyright owners remains an enormous challenge, despite some positive developments that deserve recognition. High copyright piracy levels persist in China, from widespread online piracy of music, films, television programming, books and journals, and other copyright materials, to pervasive use of unlicensed software by enterprises (including state-owned enterprises) and pre-installation of unlicensed software and other copyright materials (hard disk loading piracy) at the distribution level, and physical piracy including the export of relatively high-quality counterfeits and “media boxes,”<sup>2</sup> as well as the export of counterfeit/pirated books. While periodic enforcement campaigns (including one in June 2012 to address online infringements), some continued administrative actions, and transfers of some cases for criminal prosecution have had some effect, piracy will not abate until the Chinese government takes a much more active approach to criminal enforcement. In addition, China still maintains too many significant barriers to creative content (like the console ban) harming U.S. companies as well as Chinese businesses, and preventing the development of a healthy marketplace for copyright materials.<sup>3</sup> China must fully implement the market reforms required by the WTO market access decision, and needs to rationalize its regulatory structure to facilitate rather than hinder the creation of a legitimate online market. Failure to legalize the use of software and other copyright materials by government agencies and state-owned enterprises (SOEs), as promised in previous years and again in the 2012 U.S.-China Strategic & Economic Dialogue (S&ED) and the 2012 U.S.-China Joint Commission on Commerce and Trade (JCCT), results in significant lost opportunities for creative companies’ commercial growth in China. Notwithstanding the recent U.S.-China Film Agreement, the Chinese government should move towards promoting and granting necessary approvals on a non-discriminatory and transparent basis to other companies to engage in national distribution of foreign motion pictures for theatrical release, should support further movement to normalize the relationship between producers and distributors of foreign films, should develop transparency in the censorship approval process, and should avoid periods of “special protection” for domestic films that interfere with the normal commercial practices for the release and scheduling of imported films.

However, some positive developments in China in the past year deserve recognition. These include the historic U.S.-China Film Agreement in February 2012, the issuance of long-awaited Supreme People’s Court (SPC) *Judicial Rules on Several Issues Concerning the Application of Law in Hearing Civil Dispute Cases Involving Infringement of the Right to Network Dissemination of Information* (2012 Network Rules) in December 2012, cooperative activity between stakeholders and Chinese online services aimed at curbing infringements of U.S. right holders’ copyright materials,<sup>4</sup> and the welcome news that China’s *Gougou* pirate search engine shut down over piracy concerns (*Gougou* was run by notorious site *Xunlei*, which had cancelled a planned IPO in 2012, also over

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<sup>1</sup>For more details on China’s Special 301 history, see Additional Appendix available at <http://www.iipa.com/pdf/2013SPEC301HISTORICALSUMMARY.pdf>. Please also see previous years’ reports at <http://www.iipa.com/countryreports.html>. Section 306 monitoring is with respect to, among other obligations, those set out in Ministry of Foreign Trade and Economic Cooperation Minister Wu Yi, *People’s Republic of China Intellectual Property Rights Memorandum of Understanding—1995 Action Plan*, February 26, 1995.

<sup>2</sup>“Media box” piracy consists of hardware sold that facilitates remote access to music videos, karaoke, audiovisual, and other creative materials. These boxes are being manufactured in China and exported to overseas markets throughout Asia. This next generation piracy threatens not only the Chinese market for content but is exported from China, harming other markets.

<sup>3</sup>The Guangdong Chamber of Audio and Video Distributors ceased its operations in February 2011 because of rampant piracy problem and the lack of Chinese government support. While we do not have quantitative information of exact revenue losses due to piracy, we know that due to rampant piracy, over 90% of a Chinese film’s return on investment comes from theatrical box office revenues, while in the United States theatrical revenue averages 25-30% of total revenue. Thus, it appears that piracy has a dramatic effect on revenues in China from non-box office sources.

<sup>4</sup>Industry reports that the PSBs, prosecutors, and judges in some cities (e.g., Shanghai, Shenzhen, and the Beijing Haidian District) ramped up their efforts in addressing online piracy and counterfeit software in 2012.



piracy concerns). In addition, the Chinese government moved forward with a process to make much needed amendments to the Copyright Law, and started to research and draft a new amendment to the IPR criminal liability provisions in the Criminal Code, which will continue in 2013.

China amended its Catalog of Foreign Investment Guidelines in December 2011 in part to align Chinese measures with the 2009 WTO case involving market access of movies, music, and publications, partially opening some of those industries' sectors to foreign investment for the first time. However, China's restrictions remain both vague and onerous, undermining business clarity and predictability. China must fully comply with the decision of the Appellate Body in the 2009 WTO market access case, and should eliminate its discriminatory censorship processes. In addition, Chinese and foreign firms engaged in more partnerships in 2012, including U.S.-Chinese film co-productions and numerous licensing deals with online portals providing opportunities for the development of programming and establishment of authorized online distributors. Significantly, during the 2012 S&ED, China recognized the importance of increasing sales of legitimate IP-intensive products and services in line with China's status as a globally significant consumer of these goods. This was an important recognition by the Chinese government that real progress on IP protection and enforcement must be measured based on whether there have been significant increases in sales of copyright and other IP-intensive products. Sadly, for IIPA members, this has yet to be realized. We urge that increased sales of IP-intensive products and services continue to be used as the benchmark of progress in bilateral negotiations with China on IP issues.

As a new leadership group comes to power in China, we urge them to build on the signs of progress we saw in 2012 and devote greater resources and attention to addressing market barriers that keep the Chinese market closed and ultimately stunt commercial growth for the U.S. copyright industries, as well as providing deterrent levels of enforcement against piracy in all its forms.

## **PRIORITY ACTIONS REQUESTED IN 2013**

### **Market Access**

- Meaningful implementation of the WTO cases, to provide creators with meaningful access to the Chinese market for their goods and services, as well as faithful and comprehensive implementation of the February 2012 U.S.-China Film Agreement, including: actively promoting and approving Chinese companies to engage in national distribution of theatrical films; providing for transparency in the censorship process; eliminating special periods of protection for domestic films, so as to permit foreign films to be released and scheduled (permitting both the Chinese distributor and the producer to achieve maximum commercial benefits); and ceasing other actions taken by the government and SOEs (formal or otherwise) which have a discriminatory impact on foreign producers.
- Cease discriminatory and suspect censorship for online distribution of music in China and remove the exclusive licensee requirement for online music distribution.
- Remove prohibitions against foreign enterprises and foreign-invested enterprises (FIEs) participating in publishing activities.
- Ensure that no measure in China conditions market access on local ownership or development of a service or product's intellectual property, or compels transfers of foreign intellectual property and R&D to China, including sales of information security software and cloud computing products.
- Refrain from introducing mandates or preferences favoring the acquisition of Chinese (over foreign) software.
- Ease the ban on the sale and importation of videogame consoles.

### **Enforcement**

- Ensure full implementation of the 2012 Network Rules to ensure that those who intentionally facilitate infringement, including through services which build on or otherwise encourage infringement of creative materials, are held liable for their activities.
- Bring effective administrative and criminal investigations and enforcement against online piracy services that facilitate piracy (such as *Sohu/Sogou*, *Xiami*, and *PaiPai*), mobile piracy (including on mobile networks, such as unauthorized wireless access protocol (WAP) sites and mobile "apps" which enable users to carry out

unauthorized downloading and streaming of infringing music to smart phones), commercial end-user and hard-disk loading piracy of software, and physical piracy such as at *Buynow PC Malls*.

- Allow more specialized IPR judges to hear criminal cases and allow right holders as victims to file collateral civil claims for compensation during the trial of criminal IPR cases.
- Follow through with JCCT commitments that government agencies and SOEs, the latter which account for a substantial share of the country's economy, will use only legal software, and implement transparent and verifiable programs to ensure government agencies and SOEs comply with this requirement.
- Follow through with respect to China's promise to implement mechanisms, including transparent performance indicators, to hold local government officials responsible for effectively enforcing IP violations, including Internet and mobile piracy, and enterprise end-user piracy of software.
- Ensure that the State Administration of Radio, Film, and Television (SARFT) is implementing watermarking in theatrical prints and ensure that the Chinese government and those involved in the value chain for theatrical distribution step up efforts to deter illegal camcording.
- Follow through with JCCT commitments to resolve the longstanding complaint regarding entities engaged in unauthorized copying and distribution of academic, scientific, technical and medical journals.<sup>5</sup>
- Establish a central authority responsible for compiling statistics of ongoing and completed civil, administrative, or criminal enforcement actions and cases involving copyright infringement; and provide those statistics to the U.S. government and affected stakeholders.
- Increase actions by SARFT, the General Administration on Press and Publication (GAPP), the Ministry of Culture (MOC), and the Ministry of Industry and Information Technology (MIIT) to revoke business licenses and halt online services by enterprises that deal in/provide access to infringing materials, and shut down websites that engage in such activities.<sup>6</sup>
- Enhance "pre-release" administrative enforcement for motion pictures, sound recordings, and other works, e.g., by establishing voluntary government-backed online copyright bulletin boards.
- Expand resources at National Copyright Administration of China (NCAC), local Copyright Administrations, and Law and Cultural Enforcement Administrations (LCEAs), commensurate with the scale of the piracy problem.
- Allow foreign right holder associations to increase staff and conduct anti-piracy investigations.
- Confirm shorter, more reasonable time limits for civil IP infringement trials, if necessary, through amendments to the Copyright Law or the promulgation of a new judicial interpretation.

### Legislation and Related Matters

- Amend the Copyright Law, Criminal Code, and subordinate legislation/regulations to ensure full compliance with the Berne Convention, the TRIPS Agreement, the WIPO Copyright Treaty (WCT), and the WIPO Performances and Phonograms Treaty (WPPT).
- Ensure the criminalization (if necessary through amending the thresholds) of: 1) unauthorized use of software by enterprises (enterprise end-user software piracy); 2) hard disk loading of software or other copyright materials; 3) Internet piracy including the communication to the public or the making available of any work/related right; and 4) circumvention of technological protection measures, trafficking in circumvention technologies and providing circumvention services.
- Specify and lower the proof requirements for evidence preservation orders and injunctions in civil copyright infringement actions.
- Make it a violation of law to use, or attempt to use, an audiovisual recording device to make or transmit a copy of a cinematographic work or other audiovisual work, or any part thereof, from a performance of such work in an exhibition facility.

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<sup>5</sup>In particular, the Ministry of Education should adopt regulations to ensure that all books and journals acquired by and used at universities (whether by professors, professional staff or students) and by the government are legitimate copies.

<sup>6</sup>At an annual meeting of the Internet Society of China and the Mediation Center Internet Legal Professionals held in Beijing in mid-January 2013, MIIT announced it would be establishing a digital dispute-resolution center to deal with disagreements over intellectual property and online copyright issues. Ellyne Phneah, *China to Establish Center to Resolve IP Disputes*, ZDNet, January 23, 2013, at <http://www.zdnet.com/cn/china-to-establish-center-to-resolve-ip-disputes-7000010164/>.

- Lower the threshold for criminal enforcement actions to be taken against infringers, including Internet infringers, and including infringements undertaken for purposes other than commercial gain.

## **PIRACY AND ENFORCEMENT CHALLENGES IN CHINA**

Previous IIPA submissions<sup>7</sup> have described in great detail the many forms of copyright piracy faced by IIPA members in China. Such piracy activities greatly disadvantage companies that respect copyright, whether they are Chinese or foreign entities. For example, the BSA | The Software Alliance's annual Global Software Piracy Study indicates that the commercial value of unlicensed software piracy in China rose to \$8.9 billion in 2011 – an amount that has more than doubled since 2005 and that is almost half the value of all unlicensed software in the Asia-Pacific region. The piracy rate remained an extremely high 77%, well above the global average of 42% and the Asia-Pacific average of 60%.<sup>8</sup> As another example, a new business model involving media boxes facilitating remote access to music videos, karaoke, audiovisual, and other creative materials, are being manufactured in China and exported to overseas markets throughout Asia. The negative effects of Chinese piracy were already well apparent. A May 2011 ITC report found that copyright infringement was the largest category of reported IP infringement in China in 2009 and that overall IP infringement in China costs the U.S. economy as much as \$107 billion and upwards of 2.1 million jobs.<sup>9</sup> Meanwhile, the enforcement situation in China remains difficult. For example, the recording industry reports that less than 17% of the complaints filed against unlicensed online music services led to termination of the service in question. The following highlights some key piracy challenges faced by the copyright industries in China.

**Internet and Mobile Piracy Updates:** Internet and mobile piracy in China remain severe problems. China boasted 538 million Internet users as of the end of June 2012, or 39.9% of the entire Chinese population (up from 38.3% at the end of 2011) (according to the China Internet Network Information Center (CNNIC)).<sup>10</sup> According to the MIIT, the total number of mobile phone subscribers in China amounted to more than 1.095 billion by the end of October 2012,<sup>11</sup> approximately 212 million of whom (nearly 19%) are connected to high speed 3G networks. 388 million Chinese access the Internet through their mobile devices, making mobile devices the top manner in which people in China access the Internet. Among these users, those who access mobile videos also increased dramatically to top 100 million users, or 27.7% of all mobile users. In addition to the mobile Internet users, almost all of whom enjoy high-speed wireless networks, the number of broadband users continues to grow exponentially in China, although still lagging behind many developed economies. According to MIIT, by April 2012, the number of broadband users in China reached 159 million, or 11.7% in terms of the penetration rate (whereas most developed markets are around 25% penetration rate). According to CNNIC, most Internet users, whether through wire or wireless, fixed or mobile, use the Internet to access content.<sup>12</sup> Sadly, most of this content accessed is illegal.

<sup>7</sup>See, e.g., International Intellectual Property Alliance, *China's WTO Compliance - Notification of Intent to Testify and Testimony Re: "Request for Comments and Notice of Public Hearing Concerning China's Compliance With WTO Commitments"* (77 Fed. Reg. 50206, August 20, 2012), September 19, 2012, at [http://www.iipa.com/pdf/2012\\_Sep19\\_China\\_WTO\\_Compliance\\_Request\\_to\\_Testify\\_and\\_Testimony.pdf](http://www.iipa.com/pdf/2012_Sep19_China_WTO_Compliance_Request_to_Testify_and_Testimony.pdf); International Intellectual Property Alliance, *IIPA Written Submission Re: IIPA Written Submission Re: 2012 Special 301 Out-of-Cycle Review of Notorious Markets: Request for Public Comments*, 77 Fed. Reg. 48583 (August 14, 2012), Docket No. USTR-2011-0011, September 14, 2012, at [http://www.iipa.com/pdf/2012\\_Sep14\\_Notorious\\_Markets.pdf](http://www.iipa.com/pdf/2012_Sep14_Notorious_Markets.pdf).

<sup>8</sup>BSA | The Software Alliance's 2012 Global Software Piracy Study, conducted with two leading independent research firms, IDC and Ipsos Public Affairs, measured the rate and commercial value of unlicensed PC software installed in 2011 in more than 100 markets. In 2011, the software piracy rate in China was 77%, representing a commercial value of unlicensed software of US\$8.9 billion. These statistics follow the methodology compiled in the Ninth Annual BSA and IDC Global Software Piracy Study (May 2012), <http://portal.bsa.org/globalpiracy2011/index.html>. The BSA study covers piracy of all software run on PCs, including desktops, laptops, and ultra-portables, including netbooks. It includes operating systems, systems software such as databases and security packages, business applications, and consumer applications such as games, personal finance, and reference software. It also takes into account free software, open source software, and software as a service if it is paid for. It does not cover software that runs on servers or mainframes and routine device drivers, free downloadable utilities such as screen savers, and software loaded onto tablets or smartphones. The methodology used to calculate this and other piracy numbers are described in IIPA's 2013 Special 301 submission at <http://www.iipa.com/pdf/2013spec301methodology.pdf>.

<sup>9</sup>United States International Trade Commission, *China: Effects of Intellectual Property Infringement and Indigenous Innovation Policies on the U.S. Economy*, Investigation No. 332-519, USITC Publication 4226, May 2011, available at [www.usitc.gov/publications/332/pub4226.pdf](http://www.usitc.gov/publications/332/pub4226.pdf).

<sup>10</sup>China Internet Network Information Center (CNNIC), *The 30th Survey Report*, September 28, 2012, at [http://www1.cnnic.cn/IDR/ReportDownloads/201209/t20120928\\_36586.htm](http://www1.cnnic.cn/IDR/ReportDownloads/201209/t20120928_36586.htm).

<sup>11</sup>Ministry of Industry and Information Technology (MIIT), *October 2012 Report on Changes in Mobile Connectivity*, November 29, 2012, at <http://www.miit.gov.cn/n11293472/n11293832/n11294132/n12858447/15036659.html>.

<sup>12</sup>According to CNNIC, in 2011, of all Internet users, 75.2% used the Internet for "Web music," 63% used the Internet for "Web game," 63% used the Internet for "Web video," and 40% used the Internet for "Network literature." CNNIC reported that by the end of 2011, "online music, online games and entertainment applications such as online literature slightly increased in the number of users, but usage has declined. In contrast, the number of network video users increased (...continued)

The harm caused by Internet piracy can perhaps be best understood in numbers by comparing the values of China's legitimate market for certain types of creative products with that of other countries. For example, the value of total legitimate digital sales for music in 2010 in China was a mere US\$48.8 million, and total revenue (both physical and digital) was a mere US\$64.3 million. This compares to almost \$4.4 billion in the U.S., US\$178.4 million in South Korea and US\$68.9 million in Thailand — a country with less than 5% of China's population and with a roughly equivalent per capita GDP. If Chinese sales were equivalent to Thailand's on a per capita basis, present music sales would be almost US\$1.4 billion, and even that would represent under-performance and reflect significant losses to piracy. It is fair to say that China's lack of enforcement against music piracy — particularly on the Internet, amounts to well more than US\$1 billion in subsidies to Chinese Internet companies who can provide their users with access to music without negotiating licenses therefor.

**Online Music Piracy Update:** Online music piracy is still rampant despite the nationwide campaign, and despite the welcome news that in early January 2013, *Gougou* closed down its pirate search engine operations. Run by *Xunlei*, *Gougou* closed just after being listed by the U.S. Trade Representative on its Notorious Markets list. The parent site *Xunlei* was slated to launch an IPO in 2012, but postponed that, apparently due to piracy concerns.<sup>13</sup> Aside from this notable development, the music industry notes that there has been a significant proliferation of unlicensed video websites and user-generated content (UGC) sites where music can be found. In general, unlicensed music can be easily found through one-click hosting sites (referred to as cyberlockers), forums, deep-linking services (like *Sohu/Sogou*),<sup>14</sup> through peer-to-peer (P2P) services (like *Xiami*), and through unlicensed music portal sites (although we see a decreasing number of such sites). By the end of June 2012, with continuous growth of mobile phone subscribers, unlicensed music WAP sites resumed operation and more WAP sites have been identified as providing unauthorized music content through mobile networks.<sup>15</sup> Rapid growth of smartphones further facilitates music piracy via mobile applications. The rapid expansion of Internet connectivity is also leading to the development of cloud services which will pose new challenges to copyright protection.<sup>16</sup> A wide range of newly released and/or pre-release content is posted at forums/blogs which then direct users to download or stream unauthorized music files saved in one-click hosting sites (cyberlockers). Functionality facilitating one-click sharing to a long list of "social networks" is also not uncommon in China. Micro-blogging sites like *Weibo* (China's version of Twitter but having nearly 170 million users as of mid-2012, according to CNNIC) are being used for easy and simultaneous sharing of copyright content without authorization.

Enforcement challenges for the music industry in the online environment abound. They include reluctance of police in many places to investigate Internet piracy cases by using technical means and working with other divisions to track down pirates who operate on the Internet. These procedural and capacity problems are exacerbated by the fact that the Internet protocol (IP) addresses of music servers where unlicensed music content originates and the domain name system (DNS) servers of domains of unlicensed services are changed by the pirates frequently and easily. This causes concern among the law enforcement agencies as it affects the increasing costs of evidence collection and, in some cases, may cause concerns with respect to jurisdiction over the infringing services. In addition, in the mobile environment, it is difficult to identify the developers of unlicensed mobile applications when no identification details are made available through the online "app" marketplaces. In terms of the music industry's experience enforcing against online piracy in 2012, take down rates of unlicensed content listed in cease and desist notices were about 61% in 2012; however, the major problem is that the same infringing content may become available *via* a different URL at the same online service. Judicial enforcement continued in 2012 with several cases

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14.6% over the previous year, reaching 325 million people, while the utilization rate increased to 63.4%." CNNIC, *29th China Internet Development Statistics Report*, January 16, 2012, at [http://www.cnnic.cn/dtyqg/dtgg/201201/t20120116\\_23667.html](http://www.cnnic.cn/dtyqg/dtgg/201201/t20120116_23667.html).

<sup>13</sup>China's *Gougou.com* 'Pirate Search Engine' Shuts Down, BBC News, January 2, 2013, at <http://m.bbc.co.uk/news/technology-20888465>.

<sup>14</sup>Deep linking services like *Sohu/Sogou* collect links to infringing content and provide users the ability to engage in piracy through "deep linking," by which users bypass the homepage of the site where the pirated illegal content resides and link to it directly.

<sup>15</sup>Mobile broadband provides instant access to infringing copyrighted material, not only music, but also video, books, software and videogames. The recording industry notes that a wide range of unauthorized WAP sites and mobile applications, and other domestic mobile platforms offer infringing song files for streaming and download.

<sup>16</sup>The software industry also reports the emergence of cloud pirate lockers, in which pirated software titles are stored by users using "cloud" services and making them available to others, thus harming legitimate software copyright holders.

resulting in what were regarded as heavy penalties; unfortunately, these few cases do not seem to have had an overall deterrent effect on operators of many other unlicensed services.

**Online Motion Picture Piracy Update:** For the motion picture and television industry, the most significant commercial development in China in 2012 came with the conclusion of the U.S.-China Film Agreement. The industry also benefitted from increased pressure applied to online video piracy sites, e.g., through the U.S. government's Notorious Markets listings, and as a result, major motion picture companies have developed meaningful digital businesses in China and entered into major commercial deals with leading online websites in China. Nonetheless, Internet piracy remains the largest threat to the entire U.S. film and television industry in China. Online rogue video sites facilitated and/or supported by P2P streaming and download software, e.g., *QVOD*<sup>17</sup> and *Baidu Yingyin*, have become threats to legitimate websites as sources of pirated video content online. In addition to these rogue sites, increasingly, mobile apps facilitate copyright violations over many of the websites already under NCAC's monitoring list. Live sports telecasts also suffer from unlicensed programming retransmission, by which users or services on the Internet take protected telecasts and broadcasts and make them freely available, often simultaneously with the television broadcast.

Regarding enforcement, the motion picture industry reports fluctuations in takedown compliance rates for some of the larger-scale websites monitored under the NCAC's "self-discipline" list, notwithstanding a reported takedown rate of over 90% for other sites. Out of the 18 major online video websites under the NCAC monitoring, many still have a substantial amount of infringing content. One overriding enforcement concern is the increasingly transnational nature of the infringing activity. Some illegal Chinese online video sites locate their servers in third countries (e.g., in the U.S., Korea, or Taiwan). The off-shore location of the server poses jurisdictional problems and requires cross-border enforcement cooperation.

**Online Sale of Hard Goods Piracy:** Given China's explosive growth of e-commerce, the online sale of pirated hard goods, for example, through auction sites, business-to-business (B2B) sites, and business-to-consumer (B2C) sites, has become an increasing problem for the industry. This phenomenon consists of websites and/or online sellers targeting foreign buyers, distributing and selling illicit copies of copyright material, or other products, such as circumvention tools to bypass technological protection measures used by right holders to protect their works. In 2012, in part through pressure from the U.S. government's Notorious Markets list, some significant movement occurred on many such sites toward eradicating piracy or addressing right holder concerns; in some cases, significant voluntary agreements or MOUs resulted. There remain some problematic auction, B2B, and B2C sites. One specific problem regarding these sites is that pirates using them operate anonymously. As a result, the identification details of sellers are usually available only to the payment gateway and/or the online market operators, and further investigations into problematic test purchases were impossible by copyright owners. Another online commercial phenomenon involves "karaoke" players loaded with infringing music content and media boxes (such as the "Asibox") facilitating remote access to music videos sold at online marketplaces for both local consumption as well as for export.

**Online Journal Piracy:** The existence of unlicensed online journal delivery services continues to plague scientific, technical and medical (STM) publishers. As the result of attention from the industry, some services have become more cautious, keeping a lower profile and shifting their profiles to 'appear' more legitimate, but the core issues remain the same. *KJ Med* is an example of a site which provides and delivers unauthorized digital copies of millions of articles from leading academic, scientific, technical and medical journals on an illegal subscription basis to customers in libraries and hospitals throughout China, with neither the consent of, nor payment of subscription fees to, right holders. Despite the issue being a key agenda item in several years' JCCT dialogues,<sup>18</sup> and despite some

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<sup>17</sup>While it is difficult to peg QVOD as a direct infringer, since it merely facilitates others' provision of infringing materials, there may be some hooks that enable a finding of liability, particularly in light of the new Internet JIs. For example, the QVOD site has a search functionality called "Happy Search" which, if a link to QVOD can be shown, might be a basis for liability. Similarly, it should be noted that smaller websites that use QVOD to facilitate infringement would most certainly be considered infringing under the law and Internet JIs. Cf. Luo Yanjie, *Why It Is Not Easy to Combat QVOD Copyright Infringement?*, Bridge IP Law Commentary, August 27, 2012, at <http://www.chinainlawyer.com/easy-combat-qvod-copyright-infringement/>.

<sup>18</sup>The *KJ Med* issue was first raised with Chinese enforcement authorities in 2006. Following a number of transfers among several agencies, the case was lodged with the Beijing Copyright Administration Enforcement Department where it languished.

positive developments over the last year, the longstanding complaint against sites that provide unauthorized access to STM journal articles remains unresolved.<sup>19</sup> The unauthorized copying and distribution of publishers' content is in violation of the Copyright Law and applicable international norms, and should be meaningfully and expeditiously resolved. The Chinese government should make clear that such blatant copyright piracy will not be permitted under China's copyright regime, particularly in light of statements regarding the government's desire to develop an internationally competitive publishing industry and the still ongoing copyright law reform process.

**Online Videogame Piracy:** The entertainment software industry continues to report extreme levels of Internet piracy of videogames in China. P2P downloads of infringing video game files is fast becoming the predominant form of piracy along with websites that offer infringing videogame product that can be accessed from home PCs and from Internet cafés, which make available not only unauthorized games but also unauthorized videos and music for viewing, listening or copying by customers onto discs or mobile devices. In 2012, China placed eighth in the world in the number of connections by peers participating in the unauthorized file sharing of select Entertainment Software Association (ESA) member titles on public P2P networks.<sup>20</sup>

**Enterprise End-User Piracy:** The software industry continues to face unlicensed software use by enterprises on a massive scale – including private enterprises, state-owned enterprises and government agencies.<sup>21</sup> Piracy of U.S. software in China not only diminishes sales and exports for U.S. software companies, but gives an unfair competitive advantage to Chinese firms that use this unlicensed software without paying for it to produce products that come into the U.S. market and unfairly compete against U.S.-made goods produced using legal software.<sup>22</sup>

A significant hurdle to effectively dealing with enterprise end-user piracy in China remains the lack of clarity with respect to criminalization of this form of piracy. While the SPC indicated in a 2007 Judicial Interpretation (JI) that under Article 217 of the Criminal Law, unauthorized reproduction or distribution of a computer program qualifies as a crime, authorities remain unwilling to take criminal end-user cases. The Chinese government should take the necessary steps to clearly criminalize enterprise end-user piracy, through amending the Criminal Code and Copyright Law and issuance of a new judicial interpretation by the SPC and the Supreme People's Procuratorate (SPP). One hurdle to bringing criminal end-user cases has been Chinese authorities' narrow interpretation of the "for-profit" requirement in Article 217. The 2011 Criminal IPR Opinions could be helpful in this regard, since they define in Article 10(4) the criteria of "for profit" as including "other situations to make profit by using third parties' works." Since the unlicensed use of software in enterprises involves reproduction and/or distribution, and since use of unlicensed software lowers costs and allows enterprises to "make profit," the Opinions appear to support criminalization of enterprise end-user piracy. Another key hurdle is meeting the applicable thresholds, i.e., calculation of illegal revenue or illegal profit, even if determined to be "for profit."

Without a criminal remedy, the only avenues for seeking redress have been the administrative and civil systems, which are under-funded and under-resourced, and which generally result in non-deterrent penalties. First, administrative copyright authorities in most areas are reluctant to do raids against businesses suspected of using pirated software. IIPA remains disappointed with the lack of concrete results from administrative actions against businesses using unlicensed software.<sup>23</sup> Unfortunately, in 2010, software end-user complaints shifted jurisdiction from the local copyright administrations to the LCEAs, leading to even fewer administrative actions. In 2012, BSA

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<sup>19</sup>In the 2010 JCCT IPR Working Group meeting, the Chinese government requested that the publishing industry file its case anew with the NCAC, which publishers did in 2011. To date, the case remains under investigation.

<sup>20</sup>ESA's reporting on P2P activity does not take into account downloads of these titles that occur directly from hosted content, such as games found on "cyberlockers" or "one-click" hosting sites, which appear to account each year for progressively greater volumes of infringing downloads.

<sup>21</sup>See *supra* note 8.

<sup>22</sup>China's 77% software infringement rate means essentially that Chinese enterprises on average pay for only slightly more than 1 out of 5 copies of software they use and then compete unfairly with U.S. businesses that pay for more than 4 out of 5 copies of the software they use to run their businesses and improve productivity.

<sup>23</sup>For example, we still have not been provided with any information on progress or outcomes arising out of 23 administrative actions filed with NCAC during the Special IPR Enforcement Campaign in 2010.



lodged 12 complaints against enterprise end-user piracy, and only five administrative raids were conducted in 2012.<sup>24</sup> The situation remains difficult with regard to civil enforcement, but has seen some incremental improvement in recent years. The civil system is marred with difficulties when it comes to end-user piracy actions, as some courts set excessively high evidentiary burdens for evidence preservation, and pre-trial evidence preservation order applications or applications for injunctions are often rejected by the courts in some areas.<sup>25</sup> In addition, where a civil order is issued, right holders and authorities often face on-site resistance against evidence preservation (e.g., deletion of infringing software while enforcement authorities are carrying out an inspection) and have only a limited amount of time to conduct software infringement inspections. Another key hurdle is the accounting method for damages, highlighting the need to significantly increase statutory damages beyond that currently laid out in the most recent revised amendment to the Copyright Law.

**Government and Enterprise Legalization of Software and Related Issues:** Through both the JCCT and the S&ED, the Chinese government has repeatedly made commitments to ensure legal software use by government agencies and SOEs. These include the commitments made at the 2011 JCCT to: 1) ensure that government agencies at all levels use only legitimate software and that all types of software used by government agencies are licensed; 2) devote increased resources to conducting software license audits and inspections of government agencies and publish the results; 3) complete software legalization by provincial governments by mid-2012 and by municipal and county governments by 2013; and 4) promote and conduct enterprise software management pilot projects and publish progress reports. This was followed by a commitment at the 2012 S&ED that China would expand its efforts to promote legal software use by enterprises and conduct more regular audits of software on government computers. At the 2012 JCCT, the Chinese government gave assurances that it requires SOEs under the authority of the China Banking Regulatory Commission and the State-Owned Assets Supervision and Administration Commission of the State Council to purchase and use legitimate software, though no details were provided on how the Chinese government will ensure SOE's comply with these requirements. The Chinese government should follow through with these commitments by implementing transparent, verifiable and comprehensive software legalization programs at all levels of government (central, provincial, municipal, and local) and for all SOEs. These should include providing sufficient budgets for government purchases of legal software, targeting all categories of software (not just select ones) for legalization and instituting a process for government agencies and SOEs to implement software asset management (SAM) best practices to ensure compliance. The Chinese government must also follow through on its commitment in prior years to ensure that all computers produced or imported into China have legal operating systems.

**Pre-Installation Piracy (Hard Disk Loading):** The sale of hard drives or other devices with pre-installed illegal content in large computer malls or electronic shopping centers in Beijing and Guangdong, like *Buynow PC Malls*, remains a major problem for copyright holders. To “sweeten the deal,” merchants provide “value-added” services to download software, illegal films and television programs, or other content (very often the audiovisual content comes from illegal websites offering infringing HD content). The practice is now causing significant losses of revenue from Blu-ray disc sales for motion picture companies and unlicensed use of karaoke videos for the recording industry, in addition to traditional hard disk loading of software. Another serious problem is that it is common for PC resellers to install pirated software in new PCs shipped to large buyers including government, schools, hospitals, enterprises, etc. even though these buyers clearly required genuine software in their procurement requests. The practice is clandestine and enforcement authorities are reluctant to prioritize enforcement against it. The Chinese government should clarify criminal liability for “hard disk loading” and carry out deterrent enforcement efforts including criminal cases. Unfortunately, there have been very few cases, penalties awarded vary dramatically in different localities, and some refuse to apply “sampling” during the examination of computers in order to assess damages or

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<sup>24</sup>Not all cases resulted in administrative fines, and fines remain generally non-deterrent. In many of these cases, there were no seizures of the unlicensed software and computers employing it. In 2010, BSA lodged 36 complaints against end-users, including 13 with the local authorities, on top of the original 23 complaints filed with NCAC, but only 10 administrative raids resulted.

<sup>25</sup>The courts require copyright owners to provide preliminary evidence of infringement, which is difficult if not impossible since they are not in a position to check an alleged infringer's computers even for preservation of the evidence. The court has rejected applications for pre-trial evidence preservation orders or injunctions, claiming the preliminary evidence submitted is insufficient to prove infringing use of copyrighted software. This creates an impossible situation.

penalties. At least three cases are reportedly in the preliminary investigation phase by different local Public Security Bureaus (PSBs).<sup>26</sup>

**Book, Textbook, and Journal Piracy:** In addition to the online piracy issues described above, the U.S. publishing industry continues to suffer from physical piracy including unauthorized copying of academic textbooks, unauthorized printing of commercial bestsellers, print- or copy-to-order services, and the availability of pirated or counterfeit books through itinerant street vendors. Well known university presses suffer from trademark infringement as well, with university names and seals reproduced on content bearing no relation to the pertinent university press. Smaller, often private “copy shops” on or near university campuses, are now the norm and while local enforcement agencies appear willing to take action, the lack of adequate personnel and the one-off nature of the transactions (i.e., copy/print-to-order) make enforcement difficult. These shops engage in unauthorized copying of books to order (brought in by customers for copying) to having popular titles pre-printed and available for purchase, to the most serious and sophisticated arrangements where massive catalogues of thousands of titles in digital form are available for immediate printing-to-order. Pirated or counterfeit bestsellers remain available for sale openly on the streets of Beijing in a number of locations. Individual vendors are often mobile and do not carry large stocks. Wholesalers carry larger stocks, but typically the English language titles are only a relatively small proportion of their stocks. Previous attempts to disrupt the supply chain feeding the street and wholesale traders have been frustrated by the lack of available personnel, e.g., in the Beijing Copyright Bureau, to conduct coordinated or simultaneous raids on multiple targets at different levels of the chain. In one exceptional case, the industry referred two shops with a significant level of activity to local law enforcement. One of the shops also had an online store through which it offered for sale pirated copies of pirated text books. While the referrals themselves were not resolved conclusively against the shops, the local enforcement agency did take additional measures and, on their own initiative, conducted inspections against a number of other copy shops which resulted in the seizure of a large quantity of unauthorized copies of English Language Teaching (ELT) materials.

The partnership of the Ministry of Education (MOE) with GAPP, NCAC and local authorities remains essential to tackling the ongoing textbook piracy issues. The industry has positive relations with the authorities, but finds their attention is diverted as soon as pressure (e.g., out of the JCCT or a “special campaign”) wanes. Many limitations remain for addressing hard goods book and journal piracy in China, including a lack of resources in the administrative enforcement authorities, inability to react to time-critical information, inability to handle coordinated raids against multiple targets, lack of power and/or willingness to enter unmanned premises without very clear evidence of specific infringing copies being present in the premises at that time.

**Hard Goods Piracy and Availability of Circumvention Devices:** The industries note resurgent physical piracy in China,<sup>27</sup> including: the manufacture and distribution of factory optical discs (determined through forensic matches of pirate CDs submitted to the Ministry of Public Security (MPS) for testing);<sup>28</sup> the burning of recordable

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<sup>26</sup>For example, on September 3, 2012, the Shenzhen Municipal Cultural Market Administration Enforcement General Task Force conducted a raid on an illegal hard drive “loading” service supplier in Longgan District in Shenzhen. Seven computers, one notebook, two servers (each equipped with 24 hard drives of 1-2 TB each), one router, 45 hard disks and related business records were seized. One female computer operator and one male courier were taken into custody for questioning. During the preliminary search at the scene more than 1,000 movies and TV episodes indexed on one of the computers were found, of which more than 500 titles were infringing U.S. movies/TV shows. After the investigation, the police claimed that the evidence did not meet the criminal threshold requirement hence no criminal charges were filed and the two offenders were let go with a warning.

<sup>27</sup>Physical piracy harms the legitimate markets for all IIPA members but in different ways. For the independent film producers, physical piracy of DVDs remains a significant export constraint for independent producers and distributors, the majority of which are small- to medium-sized businesses. Independent producers partner with local authorized distributors to finance and distribute film and television programming. These authorized distributors find it nearly impossible to compete with pirates and report that both physical and Internet-based piracy have significantly contributed to the demise of what was left of the home video market in China. Producers and distributors confirm that DVD sales have been particularly impacted since pirated digital copies are offered for free online and with a similar quality viewing experience that a DVD can provide. Unable to compete with free, legitimate distributors often cannot commit to distribution agreements or they offer drastically reduced license fees which are inadequate to assist in financing of independent productions. Piracy undermines and may permanently damage legitimate distribution networks essential to reaching consumers and leaves little confidence for investment in intellectual property in China.

<sup>28</sup>Previous IIPA submissions have described in greater detail the number of factories, production over-capacity, inter-changeable production methods (e.g., from music CD to DVD), and fraudulent practices (such as false marking of VCDs or DVDs as “Blu-ray”). In May 2011, the recording industry obtained positive forensic examination reports from the “PRC Police Bureau for Disc Production Source Identification Center” implicating three optical disc plants. These reports were submitted to GAPP which reportedly initiated criminal investigations into the plants with the PSB. The recording industry was later informed that the PSB intended to initiate a criminal investigation into an optical disc plant in Sichuan. Copyright verification reports and an affidavit regarding the lack of a license were submitted to support the case in early 2012, but updates on the status of the case are not available despite repeated requests.

discs, either retail or industrial, using disc drives or towers; production and/or sale of pirate videogames and circumvention devices used for games; the production in China (generally for export) of high-quality counterfeit packages of software, music, movies, or games;<sup>29</sup> the loading of pirate music on karaoke machines; and sales of “media boxes” as discussed above.<sup>30</sup> The piracy levels for video and audio in physical formats, continue to range between 90% and 95% of the market. A noted problem remains shops in cosmopolitan areas in Shanghai and Beijing where pirated “AV” shops heavily target expatriate communities in China.<sup>31</sup> Recidivism is endemic. As an example, an “AV” shop and corner stand inside Beijing’s Silk Street Market to this day openly sells a large quantity of pirated optical discs, even after several “crackdowns” by law enforcement. The U.S. government and industry have noted in the “Notorious Markets” filing several markets which remain active and open for pirate and counterfeit business, including *China Small Commodities Market (Yiwu)*, *Luohu Commercial Center (Shenzhen)*, *Buynow PC Mall* (a very large personal computer mall chain in China, operating 22 stores across the country, known for selling computers with illegal operating system software and other unlawfully pre-installed software), the *Silk Market (Beijing)*, and *San Li Tun District (Beijing)* (where most shops openly sell infringing movies and television programs). Test purchases made at *Guangdong Audio Video Centre* in 2011 also indicated that pirate audiovisual products can still be easily found, and the wholesaling centre in Guangzhou is replete with pirate audiovisual materials.

Regarding enforcement against pirate optical disc plants, right holders have experienced procedural problems, since positive forensic matches of a pirate optical disc with an “exemplar” collected from the replication plant are needed to prove a *prima facie* case against the plant in China. However, in cases where positive forensic matches have been made and investigations by the authorities have been initiated, copyright owners are most often not informed of the status of the cases. Anecdotally, industry reports that most pirate optical discs identified have fake source identification (SID) code but features found in the pirate product indicate that they are manufactured in China. The existence of such product reflects either that underground plants have gone undetected by the GAPP, or that certain registered replication plants in China are taking the risk to manufacture pirate products. Unfortunately, law enforcement agencies have been unwilling to take up cases where no forensic match is available, and thus, industry has also seen fake mould codes used in pirate products to avoid detection. Right owners also report that Customs officials will not take *ex officio* actions regarding pirate optical discs, instead suggesting with regard to exports of discs that right owners file recordation to facilitate detection. Such a recordation system is unwieldy, since many right holders own thousands of titles and each recordation involves an administration fee of several hundred RMB.

**Media Box Piracy:** A new business model has emerged in China involving media boxes facilitating remote access to music videos, karaoke, audiovisual, and other creative materials. These boxes are being manufactured in China and exported to overseas markets throughout Asia. This next generation piracy threatens not only the Chinese market for content but is exported from China, harming other markets. For example, one of the well known products is called *AsiaBox*, which is a media box that enables streaming and downloading of online audio and visual content. A total of 70 applications are made available at the “Apps Market” of *AsiaBox* for installation. *AsiaBox* provides online streaming of content from sites like *PPSLive* and *PPStv* which are popular P2P online services in China. Three different companies are distributing *AsiaBox* in Malaysia, Singapore and Taiwan but *AsiaBox* can also be used in countries such as Japan, Australia, Hong Kong, China, and elsewhere. Right holder groups know that the country of origin of the product is China, though the details of manufacture are unavailable.

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<sup>29</sup>China remains a source country for manufactured counterfeit optical discs (particularly music box sets), harming markets in Hong Kong, Macau, Singapore, the Philippines, Russia, and the United Kingdom, the United States, and elsewhere.

<sup>30</sup>Media boxes, which can be plugged directly to TVs, facilitate easy access to remote online sources of unauthorized entertainment content including music, movies and TV dramas. Such media boxes are not only sold in China but also in Malaysia, Singapore and Taiwan and are believed to have been manufactured in China.

<sup>31</sup>U.S. Embassies have been helpful in spreading the word throughout the Embassy communities and to U.S. expatriates not to engage in the purchase of pirated or counterfeit merchandise. Such initiatives by the U.S. and other Embassies should be strengthened, and the Chinese government can assist by posting notices in airports and ports indicating that the export of pirated or counterfeit material out of China, and the importation of such materials into most countries, is illegal.

**Illegal Camcording:**<sup>32</sup> The number of forensic matches from illegal camcords of Motion Picture Association of America (MPAA) companies' major motion pictures traced to Chinese theaters in 2012 increased to ten (up from nine in 2011). Camcording piracy is a source of pirate films on major Chinese UGC sites and provides source material for infringing DVD masters. SARFT should immediately implement watermarking of theatrical prints and ensure that China Film Group and other exhibitors step up efforts to deter illegal camcording. The Copyright Law should be amended to add as a violation of law the use of, or attempt to use, an audiovisual recording device to make or transmit a copy of a cinematographic work or other audiovisual work, or any part thereof, from a performance of such work in an exhibition facility. Anyone committing this act should be subject to civil, administrative, and criminal remedies. Barring this, NCAC should coordinate with SARFT or through the State Council to ensure that the China Film Industry Promotion Act is amended to prohibit unlawful camcording. There is evidence that such a statute is needed in China, as the first camcording case in China (in November 2008), involving a Chinese film, resulted in the three suspects being released by the police. Chinese industry associations have been very cooperative working with the local MPAA in investigations and trainings, but Chinese government involvement is needed.

**Public Performance Piracy:** Another abiding problem in China involves the unauthorized public performance of U.S. motion pictures, music videos, and increasingly, music, which occurs mostly unchecked (and unpaid for) in hotels, bars (including "Karaoke" bars), clubs, mini-theaters (like KTV rooms), and karaoke establishments. In addition, there are instances of unauthorized broadcast by cable and/or satellite of the same.

**Pay-TV Piracy/Circumvention Devices:** While there are instances of pay-TV piracy occurring in China, the more serious problem is China's role as the manufacturing and export/distribution hub for pay-TV circumvention devices and services. According to the Cable and Satellite Broadcasters Association of Asia (CASBAA), these take two principal forms: 1) "hacked" set-top boxes and smart cards; and 2) control word/encryption key distribution. In the first instance, circumvented devices, when attached to cable systems or satellite antennas, permit the unauthorized reception of pay-TV programs. There are reportedly millions of these boxes installed throughout China. In addition, it is reported that circumvention devices numbering in the hundreds of thousands have been exported to, and are damaging legitimate TV suppliers in, among others, Hong Kong, the Philippines, Malaysia, Vietnam, Indonesia, the Middle East, and Latin America. It is reported that the syndicates selling the boxes often take non-infringing "generic" boxes and load software on them which enables the unauthorized receipt of programming. In the second instance, since the encryption software within many set-top boxes relies on a decryption key ("control word") which interacts in real time with software in the set top box to enable decryption of the signal, piracy syndicates extract the keys or "control words" from a legitimate box/smart card and use Internet servers to share them in real time with a multitude of other users, enabling those users to view the signal without authorization or remuneration to the broadcaster/content owner. The current Copyright Law and regulations prevent the circumvention of technological measures used by copyright owners to protect their works. The Copyright Law revision process should be used to further modernize protection by including prohibitions on trafficking in such hacking devices (or providing services as to them), the receipt and use of the signal unlawfully decrypted, and the onward distribution of unlawfully decrypted signals or even lawfully decrypted signals when such onward distribution is without authorization and done for commercial advantage. The entertainment software industry also registers its frustration in the failure of the Chinese government to bring criminal actions against manufacturers and distributors of pirated entertainment software and circumvention devices.

## **ADDITIONAL ENFORCEMENT OBSERVATIONS IN CHINA**

In addition to the enforcement issues related to the specific areas of piracy recounted above, there are also cross-cutting enforcement concerns affecting all the industries. Most notably, an overall lack of deterrence persists due to various factors, including over-reliance on the administrative enforcement system, difficulty in obtaining effective evidence and preserving it for criminal transfer, lack of transparency, and difficulty in obtaining deterrent

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<sup>32</sup>Among the harms of illegal camcording in China is that it fuels rampant online piracy negatively impacting worldwide distribution and prevents the establishment of legitimate online distribution platforms. Camcording also threatens the continued growth of the Chinese theatrical box-office marketplace.

criminal convictions. These deficiencies exist notwithstanding continued good relationships with China's law enforcement and a willingness to cooperate with foreign right holders. In general, right holders report criminal law enforcement in China against piracy did not significantly improve in 2012 except in a few notable cases,<sup>33</sup> as police authorities devoted more efforts in dealing with counterfeit drugs and shoddy food products. The Chinese government must send a strong message that piracy of all forms will not be tolerated by enforcing against key bad actors, including criminal enforcement to meet its TRIPS Article 61 requirements and drive down piracy levels. The following recount some specific enforcement hurdles that remain bottlenecks in the Chinese system.

**Criminal Thresholds:** IIPA has long complained about the unreasonably high thresholds for criminal liability under the laws, ancillary regulations, and previous Judicial Interpretations. Unfortunately, the thresholds remain too high to criminalize all piracy on a commercial scale as required by the TRIPS Agreement, and in practice, the thresholds are not being followed consistently by Chinese government authorities. As a case in point, many law enforcement agencies in China fail to follow the "500 copy" threshold (as set forth in the April 2007 SPC/Supreme People's Procuratorate JI) to prosecute infringing shop owners. However, according to some in the industry, this is slowly improving and now the Chaoyang District of Beijing, along with several other judiciary districts in China are more regularly prosecuting illegal optical disc vendors according to the threshold.<sup>34</sup> Unfortunately, other provinces and districts are not following the threshold. The January 2011 *Supreme People's Court, Supreme People's Procuratorate and Ministry of Public Security Promulgated Opinions on Certain Issues Concerning the Application of Laws for Handling Criminal Cases of Infringement of Intellectual Property Rights* (Criminal IP Opinions) appear to set out some important elements for Internet and related criminal cases and help clarify and address other ongoing issues related to criminal liability in China. The Opinions set out important clarifications with regard to thresholds for criminal liability. While it is yet to be seen how these new thresholds will be interpreted in practice, they appear to provide some flexibility and it is hoped they will ease the evidentiary burden to prove criminal liability in the online space.

The Criminal IP Opinions provide several criteria upon which the threshold for criminal liability can be met:

- illegal operation costs amount to over RMB50,000 (US\$8,020);
- disseminating over 500 copies of third parties' works (the "aggregate quantity of others' works being transmitted is more than 500 pieces");
- disseminating third parties' works with the actual number of clicks amounting to over 50,000 ("[w]here others' works being transmitted has been actually clicked for more than 50,000 times");
- disseminating third parties' works in a membership system with the number of members amounting to over 1,000;
- if the amount or quantities listed in the first four categories above are not met, but more than half of the amount or quantities in two of the above categories are met;
- in case of other serious circumstances.

Whereas the previous numerical threshold was "500 copies" it now appears possible to prove a combination of elements, e.g., proof of "250 copies" combined with proof of 25,000 downloads, for criminal liability, or as another example, in the case of a membership site, proof of 500 members combined with proof of dissemination of "250 copies." The Copyright Law amendment should specify that "copy" includes a download, so that the Opinions do not become an impediment for right holders in bringing criminal cases against copyright violators on the Internet. In addition, the decision as to whether the threshold is met should be vested with the Procuratorate, rather than with the MPS or PSB, since reports indicate MPS and PSB have refused to accept cases on the basis of onerous evidentiary requirements. MPS and PSB do appear, however, to be investigating the illegal gains of website operators and collecting evidence directly from advertising platforms and agencies, which is a positive sign.

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<sup>33</sup>Exceptions include the "Radish Garden" online software piracy case in Shanghai, the "Shang Yajun" counterfeit software case in Beijing Haidian District, and the cracking down on four counterfeit software groups in Shenzhen.

<sup>34</sup>The motion picture industry regularly helps the authorities from this District with "title verifications" in order to prosecute such cases. The industry indicates an average of 10 prison sentences have been meted out annually against illegal audiovisual shop owners.

**Problems with Reliance on Administrative Enforcement:** The significant hurdles in bringing civil and criminal enforcement actions in China has led to an over-reliance on non-deterrent administrative enforcement measures. Administrative enforcement, without the risk of criminal prosecution, has little effect against commercial pirates that have neither legitimate business enterprise nor any assets. The Chinese government has ironically failed to employ available administrative measures with respect to infringers for whom administrative measures might be effective, such as in the case of Internet infringements, where maximum daily fines, if employed, could have a devastating effect on the ability of online infringement models to operate. IIPA members also find administrative enforcement authorities inconsistent in their handling of foreign right holder complaints. For example, enforcement agencies in the provinces of Anhui, Jiangsu, and Zhejiang Provinces have been more cooperative and efficient in handling foreign right holder cases in recent years. However, the software industry's experience is different – it seems there are only very few cities, including Beijing, that will accept complaints against enterprise end-user piracy and most other regions do not accept such cases at all. There also remain problems in transfer of administrative cases for criminal prosecution. For example, regarding Internet cases, since there is a different standard of proof in a criminal case as in an administrative case, right holders sometimes find that evidence collected by administrative authorities may become inadmissible. IIPA urges greater coordination between administrative authorities and the Public Security Bureaus at the outset of the handling of a potential copyright criminal case.

**Burdensome and Costly Documentary Requirements Stymie Some Foreign Right Holders:** Foreign publishers have complained about the requirement to submit not only a notarized and legalized power of attorney, but also a notarized and legalized copyright registration certificate and certificate of legal representative. All of these documents have to be translated by a qualified translation organization. Further, in some legal actions, Chinese authorities require software owners to obtain a certification of copyright in the software from the local copyright authority. As previously reported, a copyright-owner/publisher brought suit against three different entities in China that were systematically republishing information from the publisher's proprietary database and related publications on a daily basis, and in direct competition with the publisher's own information service. Meeting the evidentiary burdens to prove the legitimate publisher's ownership of the infringed materials cost hundreds of thousands of dollars in legal fees. Unfortunately, the damages recovered were so small as to be non-deterrent, and represented only a fraction of the costs incurred by the publisher in bringing the actions.

**Concurrent "Civil Claim" to a Criminal Prosecution; Transfer of Cases to Intermediate Courts:** The industries have reported for several years that there is a jurisdictional bar limiting foreign right holders from commencing a private "civil claim" against those being prosecuted for copyright crimes in local district courts. In the *51wma.com* case, for example, despite the fact that the prosecutor initially invited sound recordings right holders to commence "incidental civil claims" against the defendant (the operator of an illegal music website) in the local district court, the Jiangsu Higher People's Court and the Suzhou Intermediate Court advised that jurisdiction to hear the civil claim rests with the Suzhou Intermediate Court because foreign right holders were involved. It appears from this that foreign right holders cannot commence "incidental civil actions" (running together with the criminal proceedings) against a defendant at the local court level in practice. The law should be amended to allow foreign right holders to commence "incidental civil claims" against copyright offenders at the local level court.

## **COPYRIGHT LAW AND REGULATIONS UPDATES**

The Copyright Law of the People's Republic of China, subordinate regulations, judicial interpretations, various rules, and "opinions," provide the basis for copyright protection in China.<sup>35</sup> The Chinese government has

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<sup>35</sup>Currently, copyright is governed by the basic law, the Copyright Law of the People's Republic of China (as last amended in 2010) ("Copyright Law"). In October 2001, the Standing Committee of the National People's Congress adopted the "Decision to Amend Copyright Law of the People's Republic of China," thereby amending the 1990 Copyright Law of the People's Republic of China. Copyright Law of the People's Republic of China, Adopted at the Fifteenth Session of the Standing Committee of the Seventh National People's Congress on September 7, 1990, Amended in Accordance with "Decision to Amend Copyright Law of the People's Republic of China," Adopted at the Twenty-fourth Session of the Standing Committee of the Ninth National People's Congress on October 27, 2001. The Copyright Law was further amended in 2010 to make minor changes to come into compliance with a decision of a World Trade Organization Panel. See "The Decision of the Standing Committee of the National People's Congress on Amending the Copyright Law of the People's Republic of China, adopted at the (...continued)

taken some significant steps in the past year toward establishing a stronger legal framework for the protection of copyright. The Chinese government is currently in the process of revising its Copyright Law, Criminal Code, and many related laws, and just passed new rules to deal with online infringements. These revision processes provide important opportunities to update the legal regime in China for more effective copyright protection and enforcement.

**Supreme People's Court Issues "2012 Network Rules" to Deal With Online Infringements:** On November 26, 2012, the SPC issued long-awaited *Judicial Rules on Several Issues concerning the application of Law in Hearing Civil Dispute Cases Involving Infringement of the Right to Network Dissemination of Information* (2012 Network Rules or Rules).<sup>36</sup> IIPA applauds the SPC for its issuance of the Rules, which went into force January 1, 2013, and which aim to improve the existing legal framework on the protection of online (information network) dissemination rights provided for in the Copyright law and in State Council regulations. The 2012 Network Rules provide relatively clear guidance for courts as to how to deal with ISP liability issues in civil cases (and replace the *Regulations on the Protection of the Right of Communication through Information Networks* in effect since July 1, 2006). We look forward to seeing these rules implemented in practice and hope that their effect will be immediate and robust, and will help to transition what is currently an internet landscape dominated by theft to a legitimate online marketplace.

**Draft Copyright Law Amendments at State Council:** In late 2011 and throughout 2012, NCAC engaged in a several-part drafting exercise for an overhaul and modernization of the Copyright Law. IIPA and various copyright industry associations and companies have provided comments. In October 2012, the third draft was apparently completed but was not made available for public comment. Many important topics were taken up in the second draft Copyright Law revision, and reportedly remain in the third draft, including setting forth liability principles for the online environment that appear aligned with the 2012 Network Rules.<sup>37</sup> In addition, the draft apparently also includes: 1) coverage of reproductions in the online environment; 2) the communication to the public right (including an interactive making available right as contemplated under the WIPO "Internet" Treaties, the WCT and WPPT); 3) technological protection measures (TPMs); 4) rights in broadcasts; 5) computer program protection provisions; 6) remedy provisions including an increase in statutory damages and punitive damages for repeat infringements,<sup>38</sup> and the addition of criminal remedies for the first time; 8) collective management; and 9) exceptions.

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13th Meeting of the Standing Committee of the Eleventh National People's Congress on February 26, 2010, is hereby promulgated and shall go into effect as of April 1, 2010," in Order of the President of the People's Republic of China No. 26. Implementing Regulations were issued on August 2, 2002 (effective September 15, 2002). Implementing Regulations of The Copyright Law of the People's Republic of China Issued by Premier Zhu Rongji on August 2, 2002, effective as of September 15, 2002. The 1991 Implementing Regulations were thereby abolished. Since the 2001 revision, very few changes have been made to the basic law (the Copyright Law) and no changes have been made to the Implementing Regulations. The Copyright Law was amended by, among other changes, replacing the original Article 4 with the following: "Copyright owners should not exercise their copyrights in a manner that violates the Constitution or relevant laws, or harms the public interests. The country will supervise publication and distribution of the works in accordance with law." Copyright protection in China cannot be understood fully, however, without reference to other basic laws, and a web of ancillary regulations, rules, judicial interpretations, and opinions, all of which inform Chinese government agencies having purview over various aspects of the copyright system in China, and the courts. Copyright protection in China has evolved since 2001 through the passage of other basic laws, such as the Criminal Law of the People's Republic of China (1997), which established crimes of copyright infringement in Articles 217 and 218, and through the issuance of other regulations, judicial interpretations, rules, and opinions. Among the most important of the ancillary laws for interpretation and understanding of the current Copyright Law are: 1) State Council Regulations for the Protection of the Right of Communication through Information Network (effective July 1, 2006) ("Network Regulations"); 2) Supreme People's Court Interpretation Concerning Some Issues Concerning Application of Law in Cases Involving Computer Network Copyright Disputes (Second Revision) (2006) ("Network JIs"); 3) NCAC Copyright Administrative Punishment Implementation Rules (effective June 15, 2009); and 4) Interpretations of the Supreme People's Court concerning the Application of Laws in the Trial of Civil Disputes over Copyright (2002). Criminal copyright protection has also evolved through the issuance of ancillary regulations, judicial interpretations, and opinions, including: 1) Interpretation by the Supreme People's Court and the Supreme People's Procuratorate on Several Issues of Concrete Application of Law in Handling Criminal Cases of Infringing Intellectual Property Rights (I) (2004); 2) Interpretation by the Supreme People's Court and the Supreme People's Procuratorate on Several Issues of Concrete Application of Law in Handling Criminal Cases of Infringing Intellectual Property Rights (II) (2007); 3) Supreme People's Court, Supreme People's Procuratorate and Ministry of Public Security Opinions on Certain Issues Concerning the Application of Laws for Handling Criminal Cases of Infringement of Intellectual Property Rights (issued January 11, 2011) ("2011 Criminal Opinions"); and 4) Opinions on the Timely Transfer of Suspected Criminal Cases Encountered in the Course of Administrative Law Enforcement.

<sup>36</sup>*Rules of Supreme Court on Several Issues Concerning the Application of Law in Adjudication of Civil Disputes Related to Infringement of Right of Communication over Information Networks*, Approved at No. 1561 Meeting of the Supreme People's Court Adjudication Commission held on November 26, 2012. In effect as of January 1, 2013, Fashi (2012) No. 20.

<sup>37</sup>The draft reportedly still attempts to adopt into the structure of this basic law some principles for determining the joint liability of service providers in the online environment (the second draft created aiding and abetting-type liability for services that abet or instigate infringements including non-hosted infringements of third parties), and reportedly aligns very closely to the 2012 Network Rules.

<sup>38</sup>Statutory damages are reportedly increased to maximum of RMB 1 million in the third draft, and punitive damages are provided for repeat infringements, at 2 to 3 times the damages amount.

Some of the current proposals need to be carefully considered and revised before enactment to avoid conflicts with China's WTO obligations. In particular, IIPA has identified potential issues with the proposed changes related to: 1) software protection (both definitions as well as a potentially harmful compulsory license); 2) evidence preservation orders; 3) *ex parte* civil search orders; 4) confiscation of tools and materials used in infringing activity; 5) a compulsory reprint license; 6) recovery of costs and attorneys' fees; 7) statutory/compulsory license provisions;<sup>39</sup> and in particular, 8) a compulsory license to create compilations. In addition to the above, we urge the Chinese government to take other important steps such as to increase statutory damages for copyright infringement and provide for criminal liability for enterprise end-user software piracy, hard disk loading piracy and the circumvention of technological protection measures.

Regarding collective management, reportedly, the third draft still introduces extended collective management, although the scope of extended collective licensing is limited to licensing of the use of karaoke works only in the third draft, which is an improvement over the first two drafts. It is a matter of great importance that extended collective licensing should not be introduced at this stage of development of the market for any categories of works.<sup>40</sup> The draft apparently still contemplates "single window licensing," so in the case two or more collective management organizations (CMOs) are collecting royalties from the same user, the CMOs are required to consult and agree in advance which of the CMOs would be responsible for the collection of the total royalties. In addition, the set up of CMOs reportedly requires approval of and supervision by NCAC regarding the establishment, modification, cancellation or other matters of regulations of the CMO. The requirement for pre-approval of tariffs with the Chinese Copyright Administration should not be introduced. CMOs should be allowed to determine their own tariffs in a manner that reflects the market value of their members' rights. IIPA's view is that further revisions in relation to CMOs are needed to address these deficiencies.

IIPA looks forward to the further opportunity to review the draft after being passed from NCAC to the State Council Legislative Affairs Office (SCLAO) in October 2012. SCLAO may then further amend the Bill and will pass the final version to State Council for approval, and the State Council approved version may then be sent to National People's Congress for review and enactment in 2013 or 2014.

**Criminal Law and Related Ancillary Regulations, Etc.:** IIPA has contended for many years that a credible criminal remedy in China (under Articles 217 and 218 of the Criminal Law and accompanying Judicial Interpretations) is needed to effectively curtail piracy and related violations in all their forms. Remaining gaps include thresholds that are too high (in the case of illegal income) or unclear (e.g., in the case of the copy threshold), proof requirements that may leave some critical commercial scale infringements without a remedy (e.g., the requirement to show that the infringement is carried out "for the purpose of making profits" which is undefined and in certain circumstances, like many forms of internet piracy, as well as enterprise end-user software or hard disk loading cases, it is difficult for law enforcement authorities or right holders to prove that the infringer is operating for the purpose of making profits), the failure to cover all piracy on a commercial scale as required by TRIPS Article 61,<sup>41</sup> the failure to separately define criminal violations related to the WCT and WPPT (e.g., violations involving TPMs), the limited criminal accomplice liability with respect to imports and exports (with lower penalties available), and uncertainties with respect to repeat offenders (the 1998 Jis included repeat infringers but were inadvertently not included in the 2004 JIs). The January 2011 *Supreme People's Court, Supreme People's Procuratorate and Ministry of Public Security Promulgated Opinions on Certain Issues Concerning the Application of Laws for Handling Criminal Cases of Infringement of Intellectual Property Rights* set out some important elements for Internet and related criminal cases and help clarify and address other ongoing issues related to criminal liability in China.<sup>42</sup>

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<sup>39</sup>A statutory license for the use of released musical works for broadcasting has reportedly and disturbingly been re-introduced in the third draft; it had been removed in the second draft.

<sup>40</sup>The concept of collective management is relatively new in China and existing CMOs may not have the necessary experience to deal with all aspects of licensing on behalf of their members. Right holders have concerns with respect to the transparency, governance and distribution practices of existing CMOs in China.

<sup>41</sup>For example, China fails to criminalize satellite, cable and broadcast piracy, bootlegging and a number of other acts of piracy when they are "on a commercial scale."

<sup>42</sup>IIPA does not at present possess a full English translation of the Opinions, but we have received summaries and refer to these herein. In addition to internal summaries, we draw points from Richard Wigley, *New Guidelines for Criminal Prosecutions of Online Copyright Infringement Provide Aid in Fight against Online* (...continued)



Importantly, and consistent with the liability provisions in the 2012 Network Rules, the Opinions appear to confirm criminal liability against a web service which does not directly receive revenues from the dissemination of copyright material, but which charges fees indirectly through “non-free advertisements.” This clearer understanding of “for the purpose of making profits” in the Criminal Law is welcome. What remains to be seen is how various hosted or non-hosted piracy situations will be regarded under Article 10 or 15 of the Opinions. For example, the second prong of Article 10 seems clearly aimed at infringements over user-generated content sites on which there is paid advertising. Article 15 would appear to reach one-click hosting sites over which infringement takes place (“network storage space”), infringing streaming sites (“communication and transmit channels”), web-hosting services, ISPs and payment processing companies. It is hoped the Opinions will also address IPR violations on auction websites dealing in hard goods piracy targeted toward foreign markets and services providing access to infringing content through deep links, and that the Opinions can address repeat infringers. To the extent they do not, coverage of such should be confirmed in other laws or regulations. It also remains to be seen how Article 10 (“[o]ther circumstances that make profits by taking advantage of others’ works”) will be interpreted. It is important to note that the Opinions are not limited to the online environment (dealing with other IPR crimes), and it is hoped that, for example, enterprise end-user piracy of software, which is clearly a circumstance which results in increased profits for an enterprise by taking advantage of others’ works, may be regarded as a crime under these Opinions. In the very least, the language lays the groundwork for such liability. The Opinions also set out important clarifications with regard to thresholds for criminal liability, discussed above.

**Administrative Criminal Transfer Regulations “Reasonable Suspicion” Rule Needed:** The amended Criminal Transfer Regulations leave unclear whether transfers are required upon “reasonable suspicion” that the criminal thresholds had been met, and thus, some enforcement authorities believe “reasonable suspicion” is insufficient to result in a transfer, requiring proof of illegal proceeds; yet, administrative authorities do not employ investigative powers to ascertain such proof. The “reasonable suspicion” rule should be expressly included in amended transfer regulations.

**TRIPS/Berne Obligation to Pay for Broadcasts of Musical Compositions:** China has long been in violation of its TRIPS/Berne Convention obligation to compensate copyright owners for the broadcast of musical compositions.<sup>43</sup> In late 2009, the State Council publicly announced that commencing January 1, 2010, China’s broadcasters must begin making payments to copyright owners of musical compositions (songwriters and music publishers, through performing rights societies). The *Measures on the Payment of Remuneration to the Copyright Owners of Audio Products* were intended to correct this longstanding TRIPS/Berne Convention violation to compensate copyright owners for the broadcast of musical composition. However, such payments are wholly inadequate and the tariff would result in one of the lowest payment rates in the world. Broadcasters could either choose to pay right holders based on very low percentage of a station’s advertising revenue or pay RMB0.3 (US\$0.05) per minute for music played on the radio or RMB1.5 (US\$0.24) for TV. Advertising revenue for Chinese broadcasting was reported to be US\$10.16 billion in 2008.<sup>44</sup> Since music performing rights payments in most countries are calculated as a percentage of such revenue, and it is estimated that 15% of music heard on Chinese broadcasting is U.S. music, the payment scheme is clearly tens of millions of dollars below what would be a fair rate. IIPA has urged that the new tariff be retroactive, at least to the date of China’s joining the WTO, but the new tariff is prospective only. In the 2011 JCCT, the Chinese government agreed to “hold government/industry roundtables in China to discuss online copyright protection and enforcement, including library copyright protection,” and agreed that an exchange will also be set up to deal with issues related to music “broadcast tariff rates” in China.<sup>45</sup>

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*Piracy*, China Law Insight, January 19, 2011, at <http://www.chinalawinsight.com/2011/01/articles/intellectual-property/new-guidelines-for-criminal-prosecutions-of-online-copyright-infringement-provide-aid-in-fight-against-online-piracy/>. See also Supreme People’s Court, Supreme People’s Procuratorate and Ministry of Public Security Promulgated Opinions on Certain Issues Concerning the Application of Laws for Handling Criminal Cases of Infringement of Intellectual Property Rights, Watson & Band, January 13, 2011, at [http://www.watsonband.com.cn/news/detail?id=182&language=en\\_US](http://www.watsonband.com.cn/news/detail?id=182&language=en_US).

<sup>43</sup>The recording industry also notes the desirability of a workable remuneration system for the public performance or other communication/broadcast of their recordings. With the increase in playing of recorded music in commercial premises as a primary form of commercial exploitation of music, public performance, communication to the public and broadcasting income is becoming a major potential source of revenue for record producers.

<sup>44</sup>*On Screen Asia, China in Focus*, April 1, 2009, at <http://www.onscreenasia.com/article-4897-chinafocus-onscreenasia.html>.

<sup>45</sup>See 21st U.S.-China Joint Commission on Commerce and Trade Fact Sheet, December 2011, at <http://www.commerce.gov/node/12467>.

**Other Regulations:** IIPA is also monitoring other regulatory developments, such as the MIIT proposal in June 2012 to revise the Draft Internet Administration Rules aimed at strengthening the regulation on online services such as forums and *weibo*. We are also aware of the State council adoption of Opinions on the Convergence Between Administrative Law Enforcement and Criminal Justice in the Work of Combating IPR Infringement and Selling Counterfeit and Shoddy Goods, issued on September 13, 2012. These Opinions provide guidelines/procedures for administrative law enforcement agencies and public security organs to handle evidence of infringement and counterfeiting offenses detected. We understand the full text of the Opinions are not available to the public, however. Finally, IIPA has been monitoring Draft Guidelines for the Implementation of the Anti-Monopoly Law, issued in August 2012. There are two potentially concerning provisions, one related to collective management organizations and one related to the use of technological protection measures. In short, IIPA views it as important that CMOs be permitted to operate without Chinese government interference and that normal day-to-day operations of CMOs should not be viewed as anti-competitive. Similarly, the use of TPMs on copyright materials should not be presumed to be an unreasonable restraint on competition.

## **MARKET ACCESS AND RELATED ISSUES**

IIPA has consistently stressed the direct relationship between the fight against infringement and the need for liberalized market access to supply legitimate product (both foreign and local) to Chinese consumers. Last year saw progress for some industries in the struggle to achieve market access. The February 2012 U.S.-China Film Agreement has already borne some fruit such as increased revenues for those films that secured quota slots, an uptick in licensing to Chinese distributors as well as numerous U.S.-Chinese co-productions, and the December 2011 amendments to the Catalog of Foreign Investment Guidelines promises to open the market for several creative product categories, creating new opportunities for foreign right holders. We recognize the Chinese government for having taken these important steps, although significant restrictions remain for many copyright industries.

**U.S.-China Film Agreement:** In February 2012, the United States and China reached an historic deal, in which the Chinese agreed to: 1) permit the importation by SOEs and the theatrical distribution of at least 34 foreign films into China annually on a revenue-sharing basis (up from 20 films), with the 14 additional films initially entering China in “enhanced formats” such as 3D or IMAX; 2) increase the percentage of revenue shared with the foreign producer to 25%; 3) actively promote and license Chinese companies to engage in national theatrical distribution providing competition in the market; 4) increase transparency to the administration of its content review process; and 5) observe commercial terms, consistent with the terms prevailing in comparable markets, in any contract for the distribution of “films other than revenue sharing films.” China has begun its implementation of the Film Agreement, which holds promise of greater predictability and increased access to the Chinese marketplace on more favorable terms for U.S. films. A couple of new problems have emerged, stemming mainly from measures purportedly aimed at protecting China’s domestic industry share of the film market. Chiefly among them were two month long periods during which no foreign films were scheduled for release and simultaneous release dates imposed upon major U.S. motion pictures (so-called “double-booking”).<sup>46</sup> While these serious issues appear to be resolved, the government must not permit discriminatory practices to reemerge or the potential gains out of the accord between the U.S. and the Chinese governments on the issue of film distribution in China will not be achieved. It has been almost a year since the Agreement was struck, and the two countries have agreed to consult and review the Agreement after five years to ensure it is working as envisioned. If necessary, the United States can return to the WTO to seek relief and it is hoped that the Chinese will vigorously and comprehensively implement the Agreement to achieve the agreed upon goals of a more robust Chinese marketplace and a transparent non-discriminatory distribution infrastructure.

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<sup>46</sup>The blackouts are unpredictable and the “double-bookings” force the limited supply of imported foreign films to compete head-on against each other, effectively cannibalizing the box office receipts for each film. Such restrictive release patterns present serious problems for U.S. right holders, who are prohibited from directly engaging in local marketing of a film until its release date is announced, often leaving only a limited period of time to promote the film’s release, further reducing the potential box office receipts. Similarly, Chinese film producers are negatively impacted by these sporadic release patterns, as they are forced to adapt to inflexible scheduling on short notice.

**WTO Market Access Case Implementation:** In the landmark market access case (DS 363) brought by the U.S. in 2007 and which concluded in 2009,<sup>47</sup> the United States prevailed on many claims against China's regime restricting the importation (trading rights) and distribution of publications, sound recordings, audiovisual home entertainment, and films for theatrical release. As a result of the case, China must:

- allow U.S. companies to import freely into China (without going through the government monopoly) films for theatrical release, DVDs, sound recordings, and books, newspapers, and periodicals. This is a significant market opening result.
- provide market access to, and not discriminate against, foreign companies wishing to distribute their books and periodicals, electronic publications, audiovisual materials and sound recordings, including through sound recording distribution services and electronic distribution products in China.<sup>48</sup>
- discard discriminatory commercial hurdles for imported reading materials, sound recordings intended for electronic distribution, and films for theatrical release.<sup>49</sup>

On December 24, 2011, China's National Development and Reform Commission (NDRC) and Ministry of Commerce (MOC) jointly issued a newly revised version of its Foreign Investment Industries Guidance Catalogue. The Catalogue went into effect on January 30, 2012. As a result, at least on the books, importation of "books, newspapers and periodicals," as well as "audio-visual products," "electronic publications," and online music, have been moved off of the "prohibited" investment list (although audio-visual products remain on the "restricted" list). The amended Catalogue goes part of the way toward meaningfully implementing the WTO Market Access case. IIPA urges the U.S. government to stock-take as to these and other steps the Chinese government has taken to ease any WTO-incompatible restrictions and take other market-opening steps.<sup>50</sup>

**Discriminatory Censorship Practice With Respect to Sound Recordings (and AV Works):** For several years, IIPA has complained that U.S. (and other foreign) right holders in music have to go through an onerous and discriminatory censorship review process from Chinese right holders with respect to online music. While the WTO Panel and Appellate Body, in a technical finding, concluded that they lacked sufficient information to determine

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<sup>47</sup>China – Measures Affecting Trading Rights And Distribution Services For Certain Publications And Audiovisual Entertainment Products, WT/DS363/AB/R, December 21, 2009, at <http://www.wto.org>. The U.S. government requested consultations in this case on April 10, 2007, supported by the China Copyright Alliance (a coalition consisting of MPA, IFTA, RIAA, IFPI and AAP).

<sup>48</sup>Specifically, China must fix its measures in ways which will: open its market to wholesale, master distribution (exclusive sale) of books and periodicals, as well as electronic publications, by foreign-invested companies including U.S. companies; permit sound recording distribution services, including electronic distribution, by Chinese-foreign contractual joint ventures, including majority foreign-owned joint ventures; allow the participation of foreign capital in a contractual joint venture engaged in the distribution of reading materials or audiovisual home entertainment products; ease commercial presence requirements for the distribution of DVDs; and do away with China's 15-year operating term limitation on foreign joint ventures.

<sup>49</sup>For example, China must not improperly and discriminatorily limit distribution for imported newspapers and periodicals to "subscriptions," and must not limit such materials and other reading materials to Chinese wholly state-owned enterprises, and may not limit the distributor of such reading materials to a State-owned publication import entity particularly designated by a government agency. China may also not prohibit foreign-invested enterprises from engaging in the distribution of imported reading materials.

<sup>50</sup>IIPA would be interested to know, for example:

- 1) steps being taken to provide a simple process for foreign enterprises to exercise their publication importation rights, and confirm that certain parts of the Regulations on Administration of Publishing (for example, Article 42) do not create new requirements on foreign enterprises to exercise their importation rights as to publications;
- 2) how Chinese laws provide market access to, and do not discriminate against, foreign companies wishing to engage in wholesale, master distribution (exclusive sale) of books and periodicals, as well as electronic publications, and allow the participation of foreign capital in a contractual joint venture engaged in the distribution of reading materials or audiovisual home entertainment products;
- 3) how Chinese laws allow foreign-invested enterprises to engage in the distribution of imported reading materials;
- 4) how Chinese laws ease commercial presence requirements for the distribution of DVDs; and do away with China's 15-year operating term limitation on foreign joint ventures;
- 5) how Chinese laws discard discriminatory commercial hurdles for imported reading materials, sound recordings intended for electronic distribution, and films for theatrical release, and in particular, how the laws avoid: improperly and discriminatorily limiting distribution for imported newspapers and periodicals to "subscriptions"; limiting such materials and other reading materials to Chinese wholly state-owned enterprises; and limiting the distributor of such reading materials to a State-owned publication import entity particularly designated by a government agency; and
- 6) how the revised GAPP rules on imported subscription publications ease the ability for persons in China to subscribe to imported publications, including those in the so-called "non-limited category," and how an individual wanting to subscribe to an imported publication may submit a subscription application to the publisher or distributor directly.

whether this discriminatory censorship regime with respect to online music violated China's General Agreement on Trade in Services (GATS) commitments, this was not a "green light" for the Chinese government to continue its discriminatory censorship practices. China's discriminatory regime is unfair and highly suspect under WTO rules. Promulgation of the September 2009 Circular on Strengthening and Improving Online Music Content Examination only exacerbated and complicated the issue by putting into place a censorship review process premised on an architecture ruled to be in violation of China's GATS commitments, namely, that only wholly-owned Chinese digital distribution enterprises may apply for censorship approval.<sup>51</sup> The Circular violates China's WTO commitments under GATS to provide nondiscriminatory market access for foreign suppliers of sound recording distribution services; it violates China's commitments on trade in goods under the General Agreement on Tariffs and Trade 1994 (GATT); and it violates China's Accession Protocol commitment to authorize trade in goods by any entity or individual. China must revoke or modify the Circular to avoid making the country subject to an immediate challenge at the WTO. A set of newly amended Measures on the Administration of Importation of AV Products (2011), introduced a new definition for the term "publication of audio-video product" to include "dissemination via Information Network." As a result, the Measures impose an additional, duplicative, and possibly confusing layer of censorship on online music.

**"Network Publications Service Management Regulations" Draft Contains Potentially Concerning Market Access and Censorship Provisions:** In December 2012, the General Administration of Press and Publications (GAPP) released for comment a draft set of "Network Publications Service Management Regulations," in addition to two other proposed measures.<sup>52</sup> The draft Network Publications Regulations contain some positive elements related to online copyright protection, but also almost entirely exclude foreigners from "network publishing services" in China (even "cooperation" must be approved by GAPP),<sup>53</sup> and contain potentially onerous censorship provisions.<sup>54</sup> The music industry is concerned that these draft Regulations would, if finalized, create confusion in the market, since, for example, it is unclear whether approval for network distribution will have to be obtained both from the Ministry of Culture (as required under the Circular) and/or from the Publication Importation Unit (as required under the Draft Rules). The publishing industry raised concerns regarding the draft measures, the additional or new restrictions they would impose on online or network publishing, and how they might implicate China's WTO commitments.

**Delays in Content Review of Entertainment Software Products/Ban on Consoles:** The entertainment software industry continues to face lengthy delays of weeks or sometimes even months in the GAPP censorship approval process, wiping out the already-short window for legitimate distribution of entertainment software products. The Chinese government also fails to immediately seize infringing copies of titles intended for release while they are still undergoing censorship review, resulting in inadequate protection and enforcement. In addition, an onerous ban on the sale and importation of videogame consoles remains a major barrier. The current ban on the sale and importation of electronic gaming devices (i.e., video game consoles), in effect since a 2000 Opinion on the Special Administration of Electronic Gaming Operating Venues, stymies the growth of the entertainment software sector in China and denies Chinese consumers the benefits of these technologies, including use of parental controls. The ban

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<sup>51</sup>Under the Circular, pre-release content examination procedures apply to imported online music products, whereas domestic online music products go through a post-release examination and filing procedure only. Further, titles for imported music products previously cleared by GAPP for publication in the physical format have to be submitted to MOC for additional content examination prior to online distribution, whereas for previously published domestic music products, a mere self-examination and filing by the domestic producer is sufficient. Imported music products and domestic music products should have the same treatment in relation to content examination.

<sup>52</sup>GAPP issued a notice related to the draft provisions on: 1) network publications service management; 2) news publishing industry standardized management (revised draft); and 3) administrative measures on foreign press and publishing institutions establishing an office in China (draft). These measures may touch upon WTO issues related to publishing as well as other industries. See <http://www.chinalaw.gov.cn/article/cazjgg/201212/20121200379100.shtml>.

<sup>53</sup>A number of articles limit the establishment of network publishing businesses. Most onerous is the provision prohibiting foreigners from engaging in network publishing services at all. Article 10 provides, "Sino-foreign joint venture operations, Sino-foreign cooperative operations and foreign-invested operations may not engage in network publishing services." Even cooperation involving foreigners must go through GAPP (the controlling entity of all activities).

<sup>54</sup>Two provisions target online games: 1) Article 25, which provides, "Before network games are published online, an application must be put forward with the provincial, autonomous region or municipal administrative publishing controlling department, after examination, verification and agreement, they are to be reported to the General Administration of Press and Publications for examination and approval;" and 2) Article 51, which provides, "Those who, without approval, engage in unauthorized network publishing services, or provide unauthorized network publications provided by foreigners, or publish unauthorized network games online (including network games authorized by foreign copyright holders), will be banned by the administrative publishing controlling department and administrative industry and commerce management department, according to statutory powers, according to the provisions of Article 61 of the 'Publishing Management Regulations,' and the local provincial-level telecommunications management department may cease allowing access and close the website."

has also been extended to development kits used in the creations and development of video games. The ban impacts not only foreign game publishers, but also domestic Chinese developers, who are unable to obtain such kits given the prohibition on their importation.

**Import Monopoly and Distribution Duopoly for Films/Master Contract:** While the WTO Panel and Appellate Body concluded that the China Film Group duopoly did not constitute a “measure,” and cited the lack of evidence that a third distributor had been denied upon an application from operating in the Chinese market, the decisions equally make clear that if a *de facto* duopoly exists as to foreign films only, China would be in violation of its WTO obligations. The decisions confirm that, to be consistent with WTO rules, China must approve legitimate applications for other theatrical film importers and distributors in China, a key step that would significantly open up this market to competition, and additionally, would open up to competition and negotiation the underlying agreements upon which foreign films are now distributed in China. Furthermore, such approval of other importers and distributors of foreign films in China along with the corresponding importation rules and processes should be applied in a transparent, timely, non-discretionary and non-discriminatory manner. By the terms of the U.S.-China Film Agreement, China affirmed that additional Chinese firms could be eligible to distribute foreign revenue sharing films and to move to approve and license such firms. This is an important step, and U.S. industry expects meaningful movement in 2013 to ensure a more competitive and robust marketplace.

Unfortunately, there remain a range of market access restrictions that affect most of the copyright industries. Chinese market access restrictions include:

- restrictions on the ability to engage fully in the development, creation, production, distribution, and promotion of music and sound recordings;<sup>55</sup>
- the inability to fully engage in the import and export, distribution, and marketing online of published materials in China;
- an onerous ban on the manufacture, sale and importation of videogame consoles;
- a range of policies that China has developed under the banner of promoting “indigenous innovation” that have the effect of discriminating against foreign software and other technology products or compelling transfers of technology and intellectual property to China in order to access the market;<sup>56</sup> and
- ownership and investment restrictions (some of which were addressed in the amendments to the Catalog of Foreign Investment Guidelines).

**Addressing Other Barriers and Discriminatory Industrial Policies, Including Indigenous Innovation:**

The Chinese government must continue to address other barriers and industrial policies, including indigenous innovation policies, that impose discriminatory requirements on foreign right holders and/or deny them the exercise of their IP rights, and must not erect or retain barriers to entry such as outright bans on products or services or other onerous requirements that shut out foreign right holders from the Chinese market.

**Indigenous Innovation:** Over the past several years, China has rolled out a series of policies aimed at promoting “indigenous innovation.” The apparent goal of many of these policies is to develop national champions by discriminating against foreign companies and compelling transfers of technology. Of particular concern are policies that condition market access on local ownership or development of a service or product’s intellectual property or aim to compel transfers of foreign intellectual property and research and development to China. A broad array of U.S. and international industry groups have raised serious concerns that these policies will effectively shut them out of the rapidly growing Chinese market and are out of step with international best practices for promoting innovation. IIPA shares these concerns and strongly believes that the best ways for China to further enhance its innovative capacity are to: further open its market to foreign investment; provide incentives to innovate by ensuring full respect for

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<sup>55</sup>For example, the recording industry notes that the MOC Circular dealing with online music contains a restriction on “exclusive licenses” of online music services. Currently, there are very few licensed services in China providing repertoire from non-local record companies. There should not be any problem for MOC to regulate these services and conduct anti-piracy actions against other infringing sites. Record companies should be free to choose their licensees.

<sup>56</sup>These policies limit market access for software and other IIPA member products and undermine the IP development of U.S. and other foreign copyright industries.

intellectual property rights including patents, copyrights and trademarks; avoid policies which establish preferences based on nationality of the owners of the intellectual property rights; and act forcefully and promptly to prevent misappropriation of such rights. Last year, the Chinese government announced they would be investing US\$1.7 trillion over the next five years in designated “Strategic Emerging Industries” (SEIs). This initiative, on top of a SPC Opinion on IP released in mid-December 2011 which seems to instruct lower courts to make decisions that assist domestic “cultural” industries, once again raised the specter of discriminatory policies. The 2011 JCCT outcomes included China’s commitment to eliminate catalogues or other measures by provincial and municipal governments and autonomous regions linking innovation policies to government procurement preferences. This follows Chinese commitments made in prior JCCT and S&ED negotiations to “delink” innovation policies from government procurement. At the 2012 S&ED, China made a broader commitment to treat IPR owned or developed in other countries on the same basis as IPR owned or developed in China. These commitments must be fulfilled to give copyright industries fair access to China’s vast procurement market.

***Software Procurement Preferences:*** The software industry remains concerned that China’s efforts to legalize software use in government agencies and SOEs may be accompanied by mandates or preferences favoring the acquisition of Chinese software over non-Chinese software. This is inconsistent both with China’s efforts to join the WTO’s Government Procurement Agreement and with China’s commitment in its WTO working party report that the government “would not influence, directly or indirectly, commercial decisions on the part of state-owned or state-invested enterprises, including the quantity, value or country of origin of any goods purchased or sold ... .” The Chinese government should, consistent with its WTO, JCCT, and S&ED obligations, refrain from instructing or encouraging government agencies or SOEs to implement preferences for Chinese software in carrying out its legalization efforts, and should communicate this policy to relevant government agencies at the central, provincial and local levels.

***Local IP Ownership Requirements for Information Security Products Including Software:*** The “Multi Level Protection Scheme” (MLPS) imposes major restrictions on procurement of software and other information security products for an overly broad range of information systems the government considers sensitive. Among other requirements, procurements of such products are limited to those with IP rights owned in China. This applies to procurements by the government and increasingly to procurements by SOEs and others in the public sector. IIPA is concerned that the MLPS defines “critical infrastructure” in too broad a way, thus restricting foreign cyber-security products from the Chinese market based on nationality of the owner of the IP. This results in an undue market access restriction for foreign software and other information security products and will in many cases prevent information systems in China from procuring the most effective security tools to meet their needs. We welcome the commitment made by China in the 2012 JCCT that it will review and revise the MLPS rules through a process that will seek the views of all parties, including through dialogue with US parties.

***Additional Barriers for the Independent Film Industry:*** The independent film industry continues to experience limited access to the Chinese marketplace, although the expanded 34 foreign film quota system provides some additional opportunities for revenue-sharing. However, most independent films imported and theatrically distributed in China are on a non-revenue share basis. It remains the case that both the financial return and the license fees for the underlying films are massively eroded by the lack of qualified theatrical distributors who can adequately support a nationwide theatrical release and a relatively non-competitive and non-transparent marketplace. The lack of certainty in China’s censorship process for films causes unstable commercial transactions and poses a market access barrier to independent film producers. For example, local distributors have reported the inability to obtain official written responses from the censorship authorities and some continue to use a film’s censorship rejection as a way to avoid payment of license fees. Additionally, uncertainty regarding the releases of foreign and domestic films in China negatively impacts all independent film producers and their local Chinese distribution partners. As part of the U.S.-China Film Agreement, the Chinese government committed to actively promote and license qualified entities to engage in national theatrical distribution to create a competitive market where commercial terms prevail. It is critical that signals of this commitment begin to emerge in China. The hope is that comparable commercial terms in all licensing arrangements will increase the overall demand for films in China and more opportunities for independent foreign producers will rapidly stem from such increased competition.



IIPA members hope for several important changes by the Chinese Government in the coming year:

1) follow-through with Joint Commission on Commerce and Trade (JCCT) and Strategic & Economic Dialogue (S&ED) commitments to:

- a) ensure legal software use by government agencies and state-owned enterprises (SOEs) by implementing transparent, verifiable and comprehensive software legalization programs at all levels of government (central, provincial, municipal, and local) and for all SOEs;
- b) fully implement recent Judicial Interpretation (JI) to significantly reduce incidents of Internet infringements, including by holding liable businesses that promote online infringement and sites that do not expeditiously remove or deal with infringing materials made available through the sites;
- c) resolve the longstanding complaint regarding entities engaged in unauthorized copying and distribution of academic, scientific, technical and medical journal; and
- d) making the State Council-level enforcement leadership structure more effective.

2) enactment of modern copyright (and related) reforms, including through amendments to the Copyright Law of the People's Republic of China, which would, among other improvements:

- a) address digital or online piracy by confirming liability standards and fostering cooperation among services which build on or otherwise encourage infringement of creative materials;
- b) strengthen rules related to evidence preservation orders;
- c) increase statutory damages for copyright infringement; and
- d) criminalization (if necessary through amending the thresholds) of: 1) unauthorized use of software by enterprises (enterprise end-user software piracy); 2) hard disk loading of software or other copyright materials; 3) Internet piracy including the communication to the public or the making available of any work/related right; and 4) circumvention of technological protection measures, trafficking in circumvention technologies, and providing circumvention services.

3) continued meaningful implementation of the two WTO cases, in order to provide creators with access to the Chinese markets for their goods and services, commercially meaningful changes to eradicate discriminatory censorship of online music, and continued progress toward full implementation of the U.S.-China Film Agreement;

4) addressing other market access barriers and industrial policies, including indigenous innovation policies, that impose discriminatory requirements on foreign right holders and/or deny them the



exercise of their IP rights, and refraining from erecting or retaining barriers to entry such as outright bans on products or services that shut out foreign right holders from the Chinese market; and

5) sending a strong message that piracy of all forms will not be tolerated by enforcing against key bad actors, including criminal enforcement to meet its TRIPS Article 61 requirements and drive down piracy levels.

IIPA believes that these steps are crucial components to a successful U.S. trade and economic policy with China. During the 2012 S&ED, China recognized the importance of increasing sales of legitimate IP-intensive products and services in line with China's status as a globally significant consumer of these goods. This was an important recognition by the Chinese Government that real progress on IP protection and enforcement must be measured based on whether there have been significant increases in sales of copyright and other IP-intensive products. Sadly, for IIPA members, this has yet to be realized. We urge that increased sales of IP-intensive products and services continue to be used as the benchmark of progress in bilateral negotiations with China on IP issues. Thus, we believe it is imperative that progress in China be measured based on results related to legitimate industry sales in the country. We appreciate the efforts already underway by the U.S. Government to develop appropriate sales metrics to measure progress on key commitments and ensure they translate into tangible results for U.S. industries and U.S. economic and job growth.

We thank the TPSC for permitting us to testify in this proceeding.

Respectfully submitted,

Michael Schlesinger  
International Intellectual Property Allian

Attachments: 1 – IIPA Testimony  
2 – IIPA 2013 Special 301 Country Report on China



# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE®



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## TESTIMONY OF MICHAEL SCHLESINGER INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

### PUBLIC HEARING CONCERNING CHINA'S COMPLIANCE WITH WTO COMMITMENTS

TO BE DELIVERED FRIDAY, OCTOBER 4, 2013  
BEFORE THE TRADE POLICY STAFF COMMITTEE  
WASHINGTON, DC



Good morning. My name is Michael Schlesinger, and I appreciate the opportunity to appear on behalf of the International Intellectual Property Alliance (IIPA) – a coalition of seven member associations each of which represents a significant segment of the U.S. copyright industries.<sup>1</sup> This year, we highlight the reasons we believe China's enforcement infrastructure for copyright requires further improvements to fully meet the standards of the WTO TRIPS Agreement and how the products of U.S. creative industries continue to face some significant market access restrictions. While there continue to be some signs of positive change in the IP infrastructure in China, piracy remains a serious problem. This year, IIPA members hope for several important changes by the Chinese Government in the coming year:

- 1) follow-through with Joint Commission on Commerce and Trade (JCCT) and Strategic & Economic Dialogue (S&ED) commitments to:
  - a) ensure legal software use by government agencies and state-owned enterprises (SOEs) by implementing transparent, verifiable and comprehensive software legalization programs at all levels of government (central, provincial, municipal, and local) and for all SOEs;
  - b) fully implement recent Judicial Interpretation (JI) to significantly reduce incidents of Internet infringements, including by holding liable businesses that promote online infringement and sites that do not expeditiously remove or deal with infringing materials made available through the sites;
  - c) resolve the longstanding complaint regarding entities engaged in unauthorized copying and distribution of academic, scientific, technical and medical journal; and

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<sup>1</sup> The IIPA is a private sector coalition, formed in 1984, of trade associations representing U.S. copyright-based industries in bilateral and multilateral efforts working to improve international protection and enforcement of copyrighted materials and open up foreign markets closed by piracy and other market access barriers. IIPA's seven member associations represent over 3,200 U.S. companies producing and distributing materials protected by copyright laws throughout the world—all types of computer software, including business applications software, entertainment software (interactive games for videogame consoles, handheld devices, personal computers and the Internet), and educational software; theatrical films, television programs, DVDs and home video and digital representations of audiovisual works; music, records, CDs, and audiocassettes; and fiction and non-fiction books, education instructional and assessment materials, and professional and scholarly journals, databases and software in all formats. Members of the IIPA include [Association of American Publishers](#), [BSA | The Software Alliance](#), [Entertainment Software Association](#), [Independent Film & Television Alliance](#), [Motion Picture Association of America](#), [National Music Publishers' Association](#), and [Recording Industry Association of America](#). In November 2011, IIPA released the latest update of the comprehensive economic report, *Copyright Industries in the U.S. Economy: The 2011 Report*, prepared by Stephen Siwek of Economists Inc. This report details the economic impact and contributions of U.S. copyright industries to U.S. Gross Domestic Product, employment, and trade. The "core" copyright-based industries in the U.S. continue to be major contributors to the U.S. economy, accounting for an estimated \$931.8 billion or 6.36% of the U.S. gross domestic product (GDP) in 2010. These industries provide nearly 5.1 million U.S. jobs, which is 4.75% of the entire private sector labor force in 2010, and pay on average over \$78,000, 27% higher than the overall workforce average. Estimated 2010 foreign sales and exports of key sectors of the core copyright industries amounted to \$134 billion, a significant increase over previous years, and more than foreign sales of other major U.S. industry sectors such as aircraft, automobiles, agricultural products, food, and pharmaceuticals.



- d) making the State Council-level enforcement leadership structure more effective.
- 2) enactment of modern copyright (and related) reforms, including through amendments to the Copyright Law of the People's Republic of China, which will, among other improvements:
- a) address digital or online piracy by confirming liability standards and fostering cooperation among services which build on or otherwise encourage infringement of creative materials;
  - b) strengthen rules related to evidence preservation orders;
  - c) increase statutory damages for copyright infringement; and
  - d) criminalization (if necessary through amending the thresholds) of: 1) unauthorized use of software by enterprises (enterprise end-user software piracy); 2) hard disk loading of software or other copyright materials; 3) Internet piracy including the communication to the public or the making available of any work/related right; and 4) circumvention of technological protection measures, trafficking in circumvention technologies, and providing circumvention services.
- 3) continued meaningful implementation of the two WTO cases, in order to provide creators with access to the Chinese markets for their goods and services, commercially meaningful changes to eradicate discriminatory censorship of online music, and continued progress toward full implementation of the U.S.-China Film Agreement;
- 4) addressing other market access barriers and industrial policies, including indigenous innovation policies, that impose discriminatory requirements on foreign right holders and/or deny them the exercise of their IP rights, and refraining from erecting or retaining barriers to entry such as outright bans on products or services that shut out foreign right holders from the Chinese market; and
- 5) sending a strong message that piracy of all forms will not be tolerated by enforcing against key bad actors, including criminal enforcement to meet its TRIPS Article 61 requirements and drive down piracy levels.

IIPA believes that these steps are crucial components to a successful U.S. trade and economic policy with China. During the 2012 S&ED, China recognized the importance of increasing sales of legitimate IP-intensive products and services in line with China's status as a globally significant consumer of these goods. This was an important recognition by the Chinese Government that real progress on IP protection and enforcement must be measured based on whether there have been significant increases in sales of copyright and other IP-intensive products. Sadly, for IIPA members, this has yet to be realized. We urge that increased sales of IP-intensive products and services continue to be used as the benchmark of progress in bilateral negotiations with China on IP issues. Thus, we believe it is imperative that progress in China be



measured based on results related to legitimate industry sales in the country. We appreciate the efforts already underway by the U.S. Government to develop appropriate sales metrics to measure progress on key commitments and ensure they translate into tangible results for U.S. industries and U.S. economic and job growth.

Previous testimony has well documented the challenges faced by the movie, music, software, publishing, and entertainment software industries, and the 2013 IIPA Special 301 report survey on China (which is appended to our testimony for the record) provides great detail on the situation as it stood in February of this year. The following discusses how addressing the five key areas of change noted above can secure positive commercial gains for the creative industries, and raises some additional WTO concerns in China's laws.

### ***1. Following Through on China's JCCT and S&ED Commitments***

The U.S.-China Joint Commission on Commerce and Trade (JCCT) and U.S.-China Strategic and Economic Dialogue (S&ED) have played an important role in securing commitments from China on issues of importance to IIPA members. Addressing the issues discussed below will ensure that right holders can operate in China on a more level playing field with Chinese counterparts and would bring significant commercial benefits to affected U.S. companies trying to do business in China.

#### ***Government and SOE Software Legalization***

The Chinese Government has issued a number of directives to legalize software at all levels of government (central, provincial, municipal, local). These efforts have resulted in some U.S. software companies experiencing an incremental or modest increase in sales to the Chinese Government, while others have made no meaningful progress. Overall, U.S. software sales to the Chinese Government lag far behind what would be expected if the government had implemented a comprehensive legalization program for agencies at all levels. The Chinese Government has not launched any comparable legalization efforts for the much larger and commercially important state-owned enterprise (SOE) sector. In the 2012 JCCT, the Chinese Government confirmed that SOEs under the authority of the China Banking Regulatory Commission and the State-Owned Assets Supervision and Administration Commission of the State Council are required to purchase and use legitimate software, but provided no details on a process to ensure this. In the 2013 S&ED, China further committed to promote the use of legal software by SOEs by strengthening supervision of central SOEs and large state-owned financial institutions through establishing software asset management systems (SAM), enforcing China's requirement to purchase and use legitimate software by SOEs, providing budget guarantees for software and promoting centralized procurement.

As such, the Chinese Government should follow through on commitments to ensure legal software use by government agencies and SOEs by implementing transparent, verifiable and comprehensive software legalization programs at all levels of government (central, provincial, municipal, and local) and for all SOEs. These should include providing sufficient budgets for



government purchases of legal software, targeting all categories of software (not just select ones) for legalization and instituting a process for government agencies and SOEs to implement SAM best practices to ensure compliance. The Chinese Government must also follow through on its commitment in prior years to ensure that all computers produced or imported into China have legal operating systems.

### ***Full Implementation of Judicial Interpretation to Significantly Reduce Incidents of Internet Infringements***

On November 26, 2012, the Supreme People's Court (SPC) issued long-awaited *Judicial Rules on Several Issues concerning the application of Law in Hearing Civil Dispute Cases Involving Infringement of the Right to Network Dissemination of Information* (Internet JIs), which went into force January 1, 2013. The Internet JIs aim to improve the existing legal framework on the protection of online (information network) dissemination rights provided for in the Copyright law and in State Council regulations. The Internet JIs provide relatively clear guidance for courts as to how to deal with ISP liability issues in civil cases (and replace the Regulations on the Protection of the Right of Communication through Information Networks in effect since July 1, 2006).

The Chinese Government should now fully implement the Internet JIs to significantly reduce incidents of Internet infringements, including by holding liable businesses that promote online infringement and sites that do not expeditiously remove or deal with infringing materials made available through the sites. A new campaign, imposing maximum administrative penalties on Internet infringers to clamp down on Internet piracy (drawing on a 2009 JCCT commitment) would be instrumental (including daily fines for failure to remove infringing materials). In particular, China should commit to increase actions by SARFT, the General Administration on Press and Publication (GAPP), the Ministry of Culture (MOC), and the Ministry of Industry and Information Technology (MIIT) to revoke business licenses and halt online services by enterprises that deal in/provide access to infringing materials, and shut down websites that engage in such activities.

### ***Addressing Unauthorized Copying and Distribution of Journals***

China must follow through with JCCT commitments to resolve the longstanding complaint regarding entities engaged in unauthorized copying and distribution of academic, scientific, technical and medical journals. An investigation remains ongoing into a major online service facilitating online infringement of academic journals, but there remains no framework under which libraries will be subject to review for compliance with the requirements of a 2009 public "Notice" (conveying to state-run libraries the importance of strengthening protection of copyright-protected academic and medical journals). It is critical that previous commitments be adhered to, including but not limited to successfully concluding investigations into, and taking prompt action against, complaints by academic journal publishers about web-based enterprises' piracy of library academic journals, and confirming liability for "those who facilitate online



infringement.” The U.S. should also seek commitments to make libraries subject to review for compliance with the requirements of the 2009 Notice.

***Make State Council Leadership Structure for Enforcement More Effective, Increase Government Resources, and Permit Staffing Increases in Foreign Right Holder Organizations***

China has established a Vice Premier-led State Council-level leadership structure, to lead and coordinate intellectual property rights (IPR) enforcement across China. This leadership structure should be employed to follow through on commitments to enhance crackdowns on IPR infringements, including by increasing available resources to National Copyright Administration of China (NCAC), holding local provincial governments accountable,<sup>2</sup> and effectively and measurably reducing piracy levels both in the physical and online environments, including Internet and mobile piracy and enterprise end-user piracy of business software. An important measure of continued success in enforcement by the Chinese Government should include establishment of a central authority responsible for compiling statistics of ongoing and completed civil, administrative, or criminal enforcement actions and cases involving copyright infringement, and providing those statistics to the U.S. Government and affected stakeholders.

In addition, it has been well documented for many years that NCAC, local copyright administrations and Law and Cultural Enforcement Administrations (LCEAs) have been under-resourced. A simple comparison of human resources at SAIC and local AICs demonstrates the gap in coverage for copyright enforcement in China. The Chinese Government should be urged to commit to expand resources at the NCAC, local Copyright Administrations, and LCEAs, commensurate with the scale of the piracy problem. Along with inadequate resources within Chinese Government agencies responsible for enforcement of copyright, for many years, foreign copyright associations have been prohibited from properly staffing their offices in order to assist authorities in combating copyright infringements in China. The Chinese Government should be urged to allow foreign right holder associations to increase staff and conduct anti-piracy investigations.

**2. *Enact Modern Copyright Law (and Related Measures) to Strengthen Protection and Remedies Against All Forms of Infringement***

The Chinese Government has taken some significant steps in the past year toward establishing a strong WTO-consistent legal framework for the protection of copyright, particularly to address rampant online infringements. For example and as noted, on November 26, 2012, the Supreme People's Court (SPC) issued long-awaited Internet JIs. The Chinese Government is also currently in the process of revising its Copyright Law, Criminal Code, and

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<sup>2</sup> On November 9, 2010, the State Council issued *Opinions of the State Council on Strengthening the Building of a Government Ruled by Law*. The State Council then announced that it would implement mechanisms, including transparent performance indicators, to hold local government officials responsible for effectively enforcing IP violations.



related laws. IIPA has provided its views in these processes, which provide important opportunities to update the legal regime in China for more effective copyright protection and enforcement.

The draft overhaul of the Copyright Law has gone through several iterations and now reportedly sits with the State Council Legislative Affairs Office. The current draft, while differing in certain respects from the JIs discussed above, establishes a framework for cooperation to remove online infringements, specifically, by adopting principles of potential joint liability of service providers that knowingly and actively encourage infringement, including the creation of aiding and abetting-type liability for services that abet or instigate infringements (including non-hosted infringements) of third parties. In so doing, the law may make it possible to efficiently remove infringing materials from the Internet as well as halt people from engaging in massive infringements, but much would depend on the implementation of these measures.

Other important topics taken up in the draft Copyright Law revision include coverage of reproductions in the online environment, the communication to the public right (including an interactive making available right as contemplated under the WIPO “Internet” Treaties, the WCT and WPPT), technological protection measures (TPMs), rights in broadcasts, computer program protection provisions, remedy provisions, statutory/compulsory license provisions, collective management, and exceptions. Some of the current proposed provisions need to be carefully considered and revised before enactment to avoid conflicts with China’s WTO obligations or charting a path that is inconsistent with current international practice or veers from common commercial practices.<sup>3</sup> IIPA has identified some significant issues with the current proposed changes in previous filings and submissions. Included in those are: a) clarifying that enterprise

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<sup>3</sup> As an example of proposed measures which would interfere with current commercial practices, the collective management provisions of the latest Draft Copyright Law we have reviewed remain concerning, in that they appear to exert state control over collective management. They appear to provide that the state administration shall determine the “scope of business” of CMOs in China, a troubling sign of exertion of state control. There is also the concern that the latest draft would allow CMOs to assert the authority to manage rights for entities on a non-voluntary basis. In this regard, it should be noted that extended collective licensing has been adopted only in a limited number of jurisdictions (and where there is a strong tradition of collective management) and under limited circumstances. The language in the current draft is dangerously vague with respect to the circumstances under which collective licensing organizations may represent the interests of right holders at a nationwide level. It states that a collective licensing organization may represent right holders in general “[w]here collective copyright management organizations obtain authorization from right holders and can represent the interests of right holders at a nationwide level.” It does not state how many right holders must authorize it or provide any criteria for determining whether a particular organization “can represent the interests of right holders at a nationwide level.” The requirement should be that a majority of right holders have authorized the organization to represent them. In addition, the latest draft refers to “the entire body of rights owners,” particularly troubling given the expansion of this language from broadcasting to all public dissemination of audiovisual works in that same Article. While the draft provides right owners with the possibility of rejecting the collective management in writing, this presumption should essentially be reversed by requiring right holders to opt in rather than opt out. The latest draft also remains concerning since it appears to mandate a joint “unified standard of royalty fee.” CMOs acting on behalf of different categories of right holders should remain free to collect their remuneration separately; the draft creates a default presumption that the “unified standard of royalty fee” will be collected by a joint CMO, which is not in line with current best practice.



end user software piracy is subject to criminal penalties;<sup>4</sup> b) strengthening rules related to evidence preservation orders;<sup>5</sup> c) increasing statutory damages for copyright infringement;<sup>6</sup> and d) providing for criminal liability for other key copyright offenses, including hard disk loading of unlicensed software or other copyright materials;<sup>7</sup> Internet piracy including the communication to the public or the making available of any work/related right; and circumvention of technological protection measures, trafficking in circumvention technologies, and providing circumvention services.

Several other issues should be addressed when engaging in copyright reform that would significantly improve available protection and enforcement in China. One would be to lift the jurisdictional bar limiting foreign right holders from commencing a private “civil claim” against those being prosecuted for copyright crimes in local district courts. In the 51wma.com case, for example, despite the fact that the prosecutor initially invited sound recordings right holders to commence “incidental civil claims” against the defendant (the operator of an illegal music

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<sup>4</sup> A significant hurdle to effectively dealing with enterprise end-user piracy in China remains the lack of clarity with respect to criminalization of this form of piracy. While the SPC indicated in a 2007 Judicial Interpretation (JI) that under Article 217 of the Criminal Law, unauthorized reproduction or distribution of a computer program qualifies as a crime, authorities remain unwilling to take criminal end-user cases. The Chinese Government should take the necessary steps to clearly criminalize enterprise end-user piracy, through amending the Criminal Code and Copyright Law and issuance of a new judicial interpretation by the SPC and the Supreme People's Procuratorate (SPP). One hurdle to bringing criminal end-user cases has been Chinese authorities' narrow interpretation of the “for-profit” requirement in Article 217. The 2011 Criminal IPR Opinions could be helpful in this regard, since they define in Article 10(4) the criteria of “for profit” as including “other situations to make profit by using third parties' works.” Since the unlicensed use of software by enterprises involves reproduction and/or distribution, and since use of unlicensed software lowers costs and allows enterprises to “make profit,” the Opinions appear to support criminalization of enterprise end-user piracy. Another key hurdle is meeting the applicable thresholds, i.e., calculation of illegal revenue or illegal profit, even if determined to be “for profit.” The latest draft Copyright Law dealing with end-user software infringement remains objectionable in that it creates a general limitation on liability for end-user software infringement unless the user “knows” or “should know” the “duplicate copy is an infringing copy.” The provision should be converted into a workable solution against the severe problem of unauthorized uses of computer programs, including by 1) confirming liability for the possessor, including a legal entity, of unauthorized computer programs, 2) confirming liability for the unauthorized use of computer programs, and 3) confirming that end-user piracy of software is subject to criminal penalties (and making corresponding amendments to the Criminal Code and the Copyright Law and case referral rules for the Ministry of Public Security and Supreme People's Procuratorate as needed).

<sup>5</sup> We remain concerned that the latest drafts dealing with preservation orders, including the possibility of *ex parte* civil searches (which has been relegated to a single provision in the latest draft) do not on their face meet the TRIPS Article 50 obligations, and wish to ensure, for example, that: preservation orders would issue within 48 hours of receipt of the application; written decisions regarding applications be provided, and an opportunity to appeal a written decision be afforded.

<sup>6</sup> The draft Copyright Law should be revised to provide a minimum of 10,000 RMB per work in the statutory damages section. While the maximum administrative penalties have been increased, a minimum daily administrative fine could also be extremely effective in the context of combating Internet infringements in China.

<sup>7</sup> Regarding “hard-disk loading” the Chinese Government should clarify criminal liability and carry out deterrent enforcement efforts including criminal cases. Unfortunately, there have been very few criminal prosecutions for this form of piracy, penalties awarded vary dramatically in different localities, and some refuse to apply “sampling” during the examination of computers in order to assess damages or penalties. At least three cases were, as of early 2013, reportedly in the preliminary investigation phase by different local Public Security Bureaus (PSBs).





website) in the local district court, the Jiangsu Higher People's Court and the Suzhou Intermediate Court advised that jurisdiction to hear the civil claim rests with the Suzhou Intermediate Court because foreign right holders were involved. It appears from this that foreign right holders cannot commence "incidental civil actions" (running together with the criminal proceedings) against a defendant at the local court level in practice. The law should be amended to cease such an apparent discriminatory practice and should allow foreign right holders to commence "incidental civil claims" against copyright offenders at the local level court.

The Chinese Government should also be urged to make it a violation of law to use, or attempt to use, an audiovisual recording device to make or transmit a copy of a cinematographic work or other audiovisual work, or any part thereof, from a performance of such work in an exhibition facility. Anyone committing this act should be subject to civil, administrative, and criminal remedies. Barring this, NCAC should coordinate with State Administration of Radio, Film, and Television (SARFT) or through the State Council to ensure that the China Film Industry Promotion Act is amended to prohibit unlawful camcording. There is evidence that such a statute is needed in China. The number of forensic matches from illegal camcords of Motion Picture Association of America (MPAA) companies' major motion pictures traced to Chinese theaters increased to ten in 2012 (up from nine in 2011). Camcording piracy is a source of pirate films on major Chinese UGC sites and provides source material for infringing DVD masters. Legal reform is needed, since the first camcording case in China (in November 2008), involving a Chinese film, resulted in the three suspects being released by the police. In addition, SARFT should implement watermarking in theatrical prints and ensure that the Chinese Government, China Film Group, and those involved in the value chain for theatrical distribution step up efforts to deter illegal camcording.

### ***3. Meaningfully Implementing the WTO Cases Brought Against China***

The dominance of piracy and market access barriers (which are well documented in detail in previous IIPA submissions), led most creative industries to conclude in 2007 that the best alternative to seek redress was through the WTO dispute settlement process. As a result, two WTO cases were launched, one focused on IPR inadequacies, and one focused on deficiencies in China's compliance with its WTO commitments on market access for published materials and audio and audiovisual entertainment products. In 2009, both cases concluded, with a WTO dispute settlement Panel rendering its decision in the IPR case in January 2009, and with the WTO Appellate Body rendering its decision in the market access case in December 2009. In both cases, the U.S. largely prevailed, but evaluation of success will be based on the details of implementation.

#### ***IPR Case***

In the IPR case (DS 362), the WTO Panel set out a comprehensive market-based test for what constitutes "piracy on a commercial scale" which must be subject to criminal penalties under TRIPS. China must be fully subjected to this market-based test, which we believe continues to require China to examine and lower its current thresholds for criminal liability, in



order to criminalize all “copyright piracy on a commercial scale” as required by TRIPS Article 61.<sup>8</sup>

### *Market Access Case*

In the landmark market access case (DS 363),<sup>9</sup> the United States prevailed on many claims against China’s regime restricting the importation (trading rights) and distribution of publications, sound recordings, audiovisual home entertainment, and films for theatrical release. As a result of the case, China must:

- allow U.S. companies to import freely into China (without going through the government monopoly) films for theatrical release, DVDs, sound recordings, and books, newspapers, and periodicals. This is a significant market opening result.
- provide market access to, and not discriminate against, foreign companies wishing to distribute their books and periodicals, electronic publications, audiovisual materials and sound recordings, including through sound recording distribution services and electronic distribution products in China.<sup>10</sup>
- discard discriminatory commercial hurdles for imported reading materials, sound recordings intended for electronic distribution, and films for theatrical release.<sup>11</sup>

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<sup>8</sup> The U.S. challenged two other measures and prevailed on both claims. The U.S. challenged China’s copyright law which denied copyright protection for content deemed objectionable by the government and which was prohibited from being distributed within China. The Panel ruled this measure, codified in old Article 4 of China’s Copyright Act, to be inconsistent with China’s WTO obligations. The Panel decision made clear that China must protect all works regardless of content including, in particular, works which are pending censorship review and which were banned from distribution pending conclusion of such review. The U.S. finally challenged several of China’s Customs rules for releasing into the marketplace counterfeit goods once the infringing mark has been removed. The Panel found this default rule to be inconsistent with Articles 46 and 59 of the TRIPS Agreement. China implemented the Panel finding related to Article 4 by amending its Copyright Law in March 2010, and implemented the Panel finding related to the Customs rules by amending its Customs Regulations in April 2010.

<sup>9</sup> *China – Measures Affecting Trading Rights And Distribution Services For Certain Publications And Audiovisual Entertainment Products*, WT/DS363/AB/R, December 21, 2009. The U.S. Government requested consultations in this case on April 10, 2007, supported by the China Copyright Alliance (a coalition consisting of MPAA, IFTA, RIAA/IFPI, AAP, and others).

<sup>10</sup> Specifically, China must fix its measures in ways which will: open its market to wholesale, master distribution (exclusive sale) of books and periodicals, as well as electronic publications, by foreign-invested companies including U.S. companies; permit sound recording distribution services, including electronic distribution, by Chinese-foreign contractual joint ventures, including majority foreign-owned joint ventures; allow the participation of foreign capital in a contractual joint venture engaged in the distribution of reading materials or audiovisual home entertainment products; ease commercial presence requirements for the distribution of DVDs; and do away with China’s 15-year operating term limitation on foreign joint ventures.

<sup>11</sup> For example, China must not improperly and discriminatorily limit distribution for imported newspapers and periodicals to “subscriptions,” and must not limit such materials and other reading materials to Chinese wholly state-owned enterprises, and may not limit the distributor of such reading materials to a State-owned publication import entity particularly designated by a government agency. China may also not prohibit foreign-invested enterprises from engaging in the distribution of imported reading materials.



In December 2011, China's National Development and Reform Commission (NDRC) and Ministry of Commerce (MOC) jointly issued a newly revised version of its Foreign Investment Industries Guidance Catalogue. The Catalogue went into effect on January 30, 2012. As a result, at least on the books, importation of "books, newspapers and periodicals," as well as "audio-visual products," "electronic publications," and online music, have been moved off of the "prohibited" investment list (although audio-visual products remain on the "restricted" list).

It is well past the time for the market access decision to be meaningfully implemented, in order to provide the publishing, audiovisual, music, and other industries with access to the Chinese markets for their goods and services. Specifically, the March 19, 2011 deadline for full implementation has now long passed. IIPA views it as a critical part of this docket for the U.S. Government to take a proactive approach with respect to Chinese Government implementation of its commitments. In this WTO review, IIPA urges the U.S. Government to ascertain what steps the Chinese Government has taken to ease other WTO-incompatible restrictions and take other market-opening steps. There remain many technical violations of WTO rules along the lines of the Appellate Body Report.<sup>12</sup> Commercially meaningful implementation would also include addressing discriminatory online music censorship, and continuing implementation of the U.S.-China Film Agreement.

***Discriminatory Censorship Practice With Respect to Sound Recordings (and AV Works)***

For several years, IIPA has complained that U.S. (and other foreign) right holders in music have to go through an onerous and discriminatory censorship review process from Chinese right holders with respect to online music. While the WTO Panel and Appellate Body, in a technical finding, concluded that they lacked sufficient information to determine whether this discriminatory censorship regime with respect to online music violated China's General Agreement on Trade in Services (GATS) commitments, this was not a "green light" for the Chinese Government to continue its discriminatory censorship practices. China's discriminatory regime is unfair and highly suspect under WTO rules. Promulgation of the September 2009 *Circular on Strengthening and Improving Online Music Content Examination* only exacerbated and complicated the issue by putting into place a censorship review process premised on an architecture ruled to be in violation of China's GATS commitments, namely, that only wholly-owned Chinese digital distribution enterprises may apply for censorship approval. The *Circular* violates China's WTO commitments under GATS to provide nondiscriminatory market access for foreign suppliers of sound recording distribution services; it violates China's commitments on trade in goods under the General Agreement on Tariffs and Trade 1994 (GATT); and it violates China's Accession Protocol commitment to authorize trade in goods by any entity or individual. China must revoke or modify the Circular to avoid making the country subject to an immediate challenge at the WTO. A set of amended Measures on the Administration of Importation of AV Products (2011) introduced a new definition for the term "publication of audio-video product" to include "dissemination via Information Network." As a result, the

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<sup>12</sup> IIPA has highlighted these many commitments in previous submissions in this docket and in other contexts.



Measures impose an additional, duplicative, and possibly confusing layer of censorship on online music.

***China-U.S. Film Agreement, Remaining Restrictions on Importation of Film Prints, and Problematic “Blackouts” on U.S. Film Releases and Restrictive Release Patterns***

In February 2012, and as part of the meaningful implementation of the WTO market access case, the United States and China reached an historic deal, in which the Chinese agreed *inter alia* to: 1) permit the importation by SOEs and the theatrical distribution of at least 34 foreign films into China annually on a revenue-sharing basis (up from 20 films), with the 14 additional films initially entering China in “enhanced formats” such as 3D or IMAX; 2) for these 34 films only, increase the percentage of revenue shared with the foreign producer to 25%; 3) actively promote and license Chinese companies to engage in national theatrical distribution providing competition in the market; 4) increase transparency to the administration of its content review process; and 5) observe commercial terms, consistent with the terms prevailing in comparable markets, in any contract for the distribution of “films other than revenue sharing films.” It is important to note that, each year, there are as many or more films licensed theatrically in China on a non-revenue sharing model, than films that are theatrically distributed under the limited quota for revenue sharing.

It is critical that the United States maintain pressure on China to implement the U.S.-China Film Agreement fully, including those elements designed to introduce broader competition and transparency into the Chinese marketplace, rather than allowing China to concentrate only on the superficial increases to the revenue sharing quota. Specifically, the U.S. Government must continue to seek the active promotion and approval of Chinese companies to engage in national distribution of theatrical films, transparency in the censorship process, elimination of the special periods of protection for domestic films, so as to permit foreign films to be released and scheduled (permitting both the Chinese distributor and the producer to achieve maximum commercial benefits) and to ensure that other actions taken by the Chinese Government and SOEs (formal or otherwise) do not have a discriminatory impact on foreign producers.

Problems emerged in 2012 and into 2013, stemming mainly from measures purportedly aimed at protecting China’s domestic industry share of the film market. Chiefly among them were two unpredicted month long periods during which no foreign films were scheduled for release (so called “blackouts”) and simultaneous release dates imposed upon U.S. films. In addition, the Chinese Government often announces release dates with only a few weeks’ notice, and even so, such dates are routinely moved, perhaps multiple times. Recently, there was also major confusion on whether the non-Chinese producer’s share of film revenue was subject to a newly levied national value-added tax in China. However, the language of the U.S.-China Film Agreement clearly states that, “the Chinese state enterprise shall be responsible for the payment of all taxes, duties and expenses.” While these serious issues appear to be resolved for the moment, the Chinese Government must not permit discriminatory practices to reemerge. The U.S. and China have agreed to consult and review the Agreement after five years to ensure it is working as envisioned. If necessary, the United States can return to the WTO to seek relief.



#### ***4. Addressing Other Market Access Barriers and Discriminatory Industrial Policies, Including Indigenous Innovation***

The Chinese Government must address other market access barriers and industrial policies, including indigenous innovation policies, that impose discriminatory requirements on foreign right holders and/or deny them the exercise of their IP rights, and must not erect or retain barriers to entry such as outright bans on products or services or other onerous requirements that shut out foreign right holders from the Chinese market.

##### ***Indigenous Innovation, Strategic Emerging Industries, and Multi Level Protection Scheme***

Over the past several years, China has rolled out a series of policies aimed at promoting “indigenous innovation.” The apparent goal of many of these policies is to develop national champions by discriminating against foreign companies and compelling transfers of technology. Of particular concern are policies that condition market access on local ownership or development of a service or product’s intellectual property or aim to compel transfers of foreign intellectual property and research and development to China.

For example, in 2012, the Chinese Government announced they would be investing US\$1.7 trillion over the next five years in designated “Strategic Emerging Industries” (SEIs). This initiative, on top of a SPC Opinion on IP released in mid-December 2011 which seems to instruct lower courts to make decisions that assist domestic “cultural” industries, raised the specter of discriminatory policies. China had, in 2011, committed to the U.S. to eliminate catalogues or other measures by provincial and municipal governments and autonomous regions linking innovation policies to government procurement preferences. This follows Chinese commitments made in prior years to “delink” innovation policies from government procurement. At the 2012 S&ED, China made a broader commitment to treat IPR owned or developed in other countries on the same basis as IPR owned or developed in China. These commitments must be fully satisfied to give copyright industries fair access to China’s vast procurement market.

##### ***Software Procurement***

The software industry remains concerned that China’s efforts to legalize software use in government agencies and SOEs may be accompanied by mandates or preferences favoring the acquisition of Chinese software over non-Chinese software. This is inconsistent both with China’s efforts to join the WTO’s Government Procurement Agreement (to date, China has not made an acceptable offer to join the GPA) and with China’s commitment in its WTO working party report that the government “would not influence, directly or indirectly, commercial decisions on the part of state-owned or state-invested enterprises, including the quantity, value or country of origin of any goods purchased or sold . . . .” The Chinese Government should, consistent with its WTO obligations (and JCCT and S&ED commitments), refrain from instructing or encouraging government agencies or SOEs to implement preferences for Chinese software in carrying out its legalization efforts, and should communicate this policy to relevant



government agencies at the central, provincial and local levels. The Chinese Government should also enhance its past offer to join the GPA so that it provides significant protection against procurement discrimination.

In May 2013, China's Ministry of Finance issued new rules on software procurement, the "Notice on Generic Software Assets Allocation Standards in Government Agencies," that impose price caps and preferred licensing terms on procurement of software that appear aimed at discriminating against the purchase of foreign brands. Moreover, the directive focuses on the procurement of only certain types of software – operating systems, office productivity software, and anti-virus software – suggesting that procurement may not be authorized or, at a minimum, that budget will not be made available for other types of software. This directive does not comport with best practices for software procurement, does not adequately take into account the speed with which software products and services are developing and appears to put in place de facto preferences for procuring domestic software products and services that are not in keeping with China's commitments in bilateral negotiations with the United States.

#### ***Local IP Ownership Requirements for Information Security Products Including Software***

China's "Multi Level Protection Scheme" (MLPS) imposes significant restrictions on procurement of information security products for an overly broad range of information systems the government considers sensitive. Among other requirements, procurements of such products are limited to those with IP rights owned in China. This applies to procurements by the Chinese Government and increasingly to procurements by SOEs and others in the public sector. This results in an undue and discriminatory market access restriction for foreign information security products and will in many cases prevent information systems in China from procuring the most effective security tools to meet their needs. We welcome the commitment made by China in the 2012 JCCT that it will review and revise the MLPS rules through a process that will seek the views of all parties, including through dialogue with U.S. parties, and urge that China use this process to remove requirements that discriminate against products that are foreign-owned or have foreign-owned IP.

#### ***Delays in Content Review of Entertainment Software Products and the Console Ban***

The entertainment software industry continues to face lengthy delays of weeks or sometimes even months in the GAPP censorship approval process, wiping out the already-short window for legitimate distribution of entertainment software products. The Chinese Government also fails to immediately seize infringing copies of titles intended for release while they are still undergoing censorship review, resulting in inadequate protection and enforcement. In addition, an onerous ban on the sale and importation of videogame consoles remains a major barrier. The current ban on the sale and importation of electronic gaming devices (i.e., video game consoles), in effect since a 2000 Opinion on the Special Administration of Electronic Gaming Operating Venues, stymies the growth of the entertainment software sector in China and denies Chinese consumers the benefits of these technologies, including use of parental controls. The ban has



also been extended to development kits used in the creations and development of video games. The ban impacts not only foreign game publishers, but also domestic Chinese developers, who are unable to obtain such kits given the prohibition on their importation.

### ***TRIPS/Berne Obligation to Pay for Broadcasts of Musical Compositions***

China has long been in violation of its TRIPS and Berne Convention obligations to compensate copyright owners for the broadcast of musical compositions.<sup>13</sup> In late 2009, the State Council publicly announced that commencing January 1, 2010, China's broadcasters must begin making payments to copyright owners of musical compositions (songwriters and music publishers, through performing rights societies). The *Measures on the Payment of Remuneration to the Copyright Owners of Audio Products* were intended to correct the longstanding TRIPS/Berne Convention violation to compensate copyright owners for the broadcast of musical composition. However, such payments are wholly inadequate and the tariff would result in one of the lowest payment rates in the world. Broadcasters could either choose to pay rights holders based on very low percentage of a station's advertising revenue or pay RMB0.3 (US\$0.05) per minute for music played on the radio or RMB1.5 (US\$0.23) for TV. Advertising revenue for Chinese broadcasting was reported to be US\$10.16 billion in 2008.<sup>14</sup> Since music performing rights payments in most countries are calculated as a percentage of such revenue, and it is estimated that 15% of music heard on Chinese broadcasting is U.S. music, the payment scheme is clearly tens of millions of dollars below what would be a fair rate. IIPA has urged that the new tariff be retroactive, at least to the date of China's joining the WTO, but the new tariff is prospective only.

In the 2011 JCCT, the Chinese Government agreed to "hold government/industry roundtables in China to discuss online copyright protection and enforcement, including library copyright protection," and agreed that an exchange will also be set up to deal with issues related to music "broadcast tariff rates" in China.<sup>15</sup> Very little progress has been made to date with this commitment. To our knowledge, no meeting has occurred between stakeholders, including MCSC and U.S. right holders, with the support of the U.S. and Chinese Governments. The U.S. should commence bilateral consultations into the non-payment of royalties for broadcasts of works from the period 2001-2009, and seek commitments to increase royalties in commercially relevant increments royalty payments to be made going forward.

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<sup>13</sup>The recording industry also notes the desirability of a workable remuneration system for the public performance or other communication/broadcast of their recordings. With the increase in playing of recorded music in commercial premises as a primary form of commercial exploitation of music, public performance, communication to the public and broadcasting income is becoming a major potential source of revenue for record producers.

<sup>14</sup>*On Screen Asia, China in Focus*, April 1, 2009, at <http://www.onscreenasia.com/article-4897-chinainfocus-onscreenasia.html>.

<sup>15</sup>See *21st U.S.-China Joint Commission on Commerce and Trade Fact Sheet*, December 2011, at <http://www.commerce.gov/node/12467>.



### ***Restriction on Licensees for Online Music Distribution***

The MOC *Circular on Strengthening and Improving Online Music Content Examination* dealing with online music contains a restriction on “exclusive licenses” of online music services. Currently, there are very few licensed services in China providing repertoire from non-local record companies. The Chinese government should commit to revise the Circular to allow record companies to more freely choose their licensees.

### ***Cloud Computing***

Cloud computing is quickly becoming a major way in which legitimate software products and services are utilized the world over. A U.S.-China Cloud Computing Seminar was held in April 2012 with participants from government and industry from both countries. This Seminar laid an important foundation for future discussions on cloud policy issues. We urge the governments to continue to build on the 2012 Seminar to address particular areas of policy concern, including licensing restrictions on foreign companies wishing to offer Internet-based services and the inclusion of cloud computing services in China's Telecom Services Catalogue.

## ***5. Criminal Penalties “To Be Applied” for Deterrent Enforcement***

The Chinese Government must send a strong message that piracy of all forms will not be tolerated by enforcing against key bad actors, including criminal enforcement to meet its TRIPS Article 61 requirements and drive down piracy levels. The WTO cases discussed above did not cover all the statutory TRIPS deficiencies that exist in the Chinese criminal enforcement system. For example, China's Criminal Law fails to subject to criminal liability the infringement of some exclusive rights<sup>16</sup> which constitute “copyright piracy on a commercial scale,” all arguably in violation of Articles 41 and 61 of the TRIPS Agreement. China has also never brought a criminal case against the unauthorized use (usually involving reproduction, distribution, or both) of software in a business setting, so-called enterprise end-user piracy of software, even in egregious cases involving many computers being used in a commercial enterprise for business profits. In this regard, the Supreme People's Court and the Supreme People's Procuratorate (SPP) should issue a Judicial Interpretation clarifying that enterprise end-user piracy of software is subject to criminal penalties and make corresponding amendments to the Criminal Code and Copyright Law and case referral rules for the Ministry of Public Security and SPP as needed.<sup>17</sup>

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<sup>16</sup> For example, China fails to criminalize satellite, cable and broadcast piracy, bootlegging and a number of other acts of piracy when they are “on a commercial scale.”

<sup>17</sup> The 2011 Criminal Opinions, discussed below, appear to create an opening for the possibility that end-user piracy of software could be criminalized since Article 10 of the Opinions criminalizes infringements occurring with “[o]ther circumstances that make profits by taking advantage of others' works.” Enterprise end-user piracy of software is clearly a circumstance which results in increased profits for an enterprise by taking advantage of others' works, and thus it may be questioned whether end-user piracy is considered a crime under these Opinions.





### ***Reliance on Administrative Enforcement; Possible Strengthening of Such in the Internet Context***

Another serious problem in China is the failure to provide effective and deterrent enforcement required under Article 41 and 61 of TRIPS, although as noted, we are beginning to see some increasing criminal enforcement activity against notorious websites engaged in online infringement which is a positive sign. This reliance on administrative enforcement measures in the past was largely to blame for the failure of the criminal enforcement system to properly deter piracy. Administrative enforcement, without the risk of criminal prosecution, has little effect against commercial pirates that have no legitimate business enterprise nor any assets. In other cases, the Chinese Government has ironically failed to employ available administrative measures with respect to infringers for whom administrative measures might be effective. Administrative measures such as minimum and maximum daily fines should be employed. We urge the Chinese Government to develop a TRIPS compatible anti-piracy enforcement regime that employs both administrative and criminal measures where appropriate in order to create meaningful deterrence.

### ***Criminal Thresholds***

IIPA has long complained about the unreasonably high thresholds for criminal liability under the laws, ancillary regulations, and previous Judicial Interpretations. Unfortunately, the thresholds remain too high to criminalize all piracy on a commercial scale as required by the TRIPS Agreement, and in practice, the thresholds are not being followed consistently by Chinese government authorities. As a case in point, many law enforcement agencies in China fail to follow the “500 copy” threshold (as set forth in the April 2007 SPC/Supreme People’s Procuratorate II) to prosecute infringing shop owners. However, according to some in the industry, this is slowly improving and now the Chaoyang District of Beijing, along with several other judiciary districts in China are more regularly prosecuting illegal optical disc vendors according to the threshold.

Unfortunately, other provinces and districts are not following the threshold. The January 2011 Supreme People’s Court, Supreme People’s Procuratorate and Ministry of Public Security Promulgated Opinions on Certain Issues Concerning the Application of Laws for Handling Criminal Cases of Infringement of Intellectual Property Rights (Criminal IP Opinions) appear to set out some important elements for Internet and related criminal cases and help clarify and address other ongoing issues related to criminal liability in China. The Opinions set out important clarifications with regard to thresholds for criminal liability. While it is yet to be seen how these new thresholds will be interpreted in practice, they appear to provide some flexibility and it is hoped they will ease the evidentiary burden to prove criminal liability in the online space.

The Criminal IP Opinions provide several criteria upon which the threshold for criminal liability can be met, including “disseminating over 500 copies of third parties’ works (the ‘aggregate quantity of others’ works being transmitted is more than 500 pieces’); “disseminating third parties’ works with the actual number of clicks amounting to over 50,000



(‘[w]here others’ works being transmitted has been actually clicked for more than 50,000 times’); and “disseminating third parties’ works in a membership system with the number of members amounting to over 1,000.”

Whereas the previous numerical threshold was “500 copies” it now appears possible to prove a combination of elements, e.g., proof of “250 copies” combined with proof of 25,000 downloads, for criminal liability, or as another example, in the case of a membership site, proof of 500 members combined with proof of dissemination of “250 copies.” The Copyright Law amendment should specify that “copy” includes a download, so that the Opinions do not become an impediment for right holders in bringing criminal cases against copyright violators on the Internet. In addition, the decision as to whether the threshold is met should be vested with the Procuratorate, rather than with the MPS or PSB, since reports indicate MPS and PSB have refused to accept cases on the basis of onerous evidentiary requirements. MPS and PSB do appear, however, to be investigating the illegal gains of website operators and collecting evidence directly from advertising platforms and agencies, which is a positive sign.

#### ***Establish Voluntary Government-Backed Online Copyright Bulletin Boards***

As a related matter, we believe the Chinese Government should enhance “pre-release” administrative enforcement for motion pictures, sound recordings, and other works, e.g., by establishing voluntary government-backed online copyright bulletin boards. This would effectively help address “pre-release” piracy by which pirates take advantage of right holders by beating the release date of the legitimate product, which as mentioned, could be held up due to delays (sometimes discriminatory censorship delays).

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Thank you for the opportunity to share the copyright industries’ experiences in China. I would be pleased to answer any questions you may have.

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