



September 21, 2006

By E-MAIL to fr0622@ustr.eop.gov

Gloria Blue
Executive Secretary
Trade Policy Staff Committee (TPSC)
Office of the U.S. Trade Representative
1724 F Street, N.W.
Washington, D.C. 20508

Re: China WTO Compliance: Written Comments
Regarding Copyright Protection and Services/Market
Access in China in response to the Request for
Comments and Notice of Public Hearing Concerning
China's Compliance with WTO Commitments, 71 Fed.
Reg. 42886 (July 28, 2006)

Dear Ms. Blue:

This submission by the International Intellectual Property Alliance ("IIPA") responds to the Trade Policy Staff Committee's (TPSC) request for comments in the July 28, 2006 Federal Register notice. The request invites comments on China's compliance with its commitments made in connection with its accession to the World Trade Organization (WTO) as well as other commitments made to the United States. Specifically, the TPSC's request states:

In accordance with section 421 of the U.S.-China Relations Act of 2000 (P.L. 106-286), USTR is required to submit, by December 11 of each year, a report to Congress on China's compliance with commitments made in connection with its accession to the WTO, including both multilateral commitments and any bilateral commitments made to the United States.

IIPA has separately submitted a request to testify at the September 28, 2006 TPSC hearing along with testimony. IIPA hereby submits its views on China's lack of compliance with its copyright enforcement obligations under the WTO TRIPS Agreement. IIPA also takes this opportunity to append to this filing a report on China (see Appendix) submitted to the United States Trade Representative on February 13, 2006, as part of IIPA's filing in the annual Special 301 process.



A. IIPA AND THE COPYRIGHT INDUSTRIES' INTEREST IN THIS DOCKET

The International Intellectual Property Alliance (IIPA) is a private sector coalition formed in 1984 to represent the U.S. copyright-based industries in bilateral and multilateral efforts to improve international protection of copyrighted materials. IIPA's seven members are the Association of American Publishers (AAP), the Business Software Alliance (BSA), the Entertainment Software Association (ESA), the Independent Film & Television Alliance (IFTA), the Motion Picture Association of America (MPAA), the National Music Publishers' Association (NMPA), and the Recording Industry Association of America (RIAA).¹

In October 2004, the IIPA released its latest economic report entitled *Copyright Industries in the U.S. Economy: The 2004 Report*, the tenth such study written by Stephen Siwek of Economists Inc. for IIPA.² This report details the economic impact and contributions of U.S. copyright industries to U.S. Gross Domestic Product, employment, and trade. The latest data shows that in 2002, the U.S. "core" copyright industries³ accounted for an estimated 6% of U.S. Gross Domestic Product (GDP), or \$626.6 billion and the "total" copyright industries accounted for an estimated 12% of U.S. GDP or \$1.25 trillion. The "core" copyright industries employed 4% of U.S. workers in 2002 or 5.48 million persons. Factoring out the difficult economic year of 2002, between 1997-2001 the "core" copyright industries' employment grew at an annual growth rate of 3.19% per year, a rate more than double the annual employment rate achieved by the U.S. economy as a whole (1.39% per year). In 2002, the U.S. copyright industries achieved foreign sales and exports estimated at \$89.26 billion, leading other major industry sectors such as: chemicals and related products, motor vehicles, equipment and parts, and aircraft and aircraft parts.

IIPA will shortly be releasing its 2006 report, covering data for 2004 and 2005. Preliminarily, these new data show the same upward growth path of the copyright sector in terms of value added to GDP, overall contribution to the growth of the U.S. economy, rate of employment and exports and foreign sales.

It is essential to the continued growth and future competitiveness of these industries that China provide free and open markets and high levels of copyright protection. China made commitments to open its market during the WTO accession negotiations, as well as the commitment immediately to comply with TRIPS enforcement and substantive standards, the legal foundation for adequate and effective substantive levels of copyright protection and copyright enforcement. IIPA's members were intimately involved in the discussions in 1992 that led to the signing of a Memorandum of Understanding between the United States and China. That MOU obliged China to protect copyright in line with international standards in place at the time.

¹ IIPA is comprised of seven trade associations, each representing a significant segment of the U.S. copyright community. These member associations represent over 1,900 companies producing and distributing materials protected by copyright laws throughout the world — all types of computer software including business applications software and entertainment software (such as videogame CDs and cartridges, personal computer CD-ROMs and multimedia products); theatrical films, television programs, home videos and digital representations of audiovisual works; music, records, CDs, and audiocassettes; and textbooks, tradebooks, reference and professional publications and journals (in both electronic and print media). See the IIPA website for full details, www.iipa.com.

² *Copyright Industries in the U.S. Economy: The 2004 Report*, by Economists Inc. for the International Intellectual Property Alliance (IIPA) (October 2004), available on IIPA's website at http://www.iipa.com/pdf/2004_SIWEK_FULLL.pdf.

³ According to the terminology found in the IIPA economic reports, the "core" industries are those copyright industries whose primary purpose is to produce and/or distribute copyright materials. The "total" copyright industries contain four sub-sectors including the "core" industries, plus the partial, non-dedicated support, and interdependent sectors.



Preceding that process, IIPA's members were again at the forefront of USTR-led negotiations in 1995 and 1996, resulting in exchanges of letters, by which China undertook to close down factories producing and exporting pirate optical media product with impunity (causing catastrophic disruption of global markets) and commence a nationally-coordinated enforcement regime for copyright protection. IIPA and its members were heavily involved in a number of sectoral negotiations in connection with China's WTO accession, and supported the renewal of normal trade relations annually, and eventually permanent normal trade relations (PNTR). Finally, IIPA and its members closely watched the developments that led to China's entry to the WTO on December 11, 2001.⁴ Each of these events has had significant commercial ramifications for the U.S. copyright industries doing business in China.

Summary of IIPA's Views:

The U.S. copyright industries face the most onerous market access barriers, due both to staggering piracy rates and a variety of stringent market access restrictions, of any other major sector of the U.S. economy. In spite of the huge demand for U.S. copyright products in China, legitimate U.S. companies and legal copyright products cannot take full advantage of these market opportunities: copyright pirates control a staggering 85%-90% of the market and US companies are doubly handicapped by the restrictions the Chinese government places on their ability to compete fairly and effectively in the market. IIPA estimates that the piracy rate in China is approximately 85%-90% of the entire market in virtually all copyright sectors and that losses to these industries exceeded **\$2.6 billion** in 2005.

As the result of market access barriers and rampant piracy, the United States is being blatantly denied a major trade comparative advantage, resulting in billions of dollars of foregone revenue, further exacerbating the large U.S. trade deficit with China, and the loss of hundreds of thousands of high-paying U.S. jobs.

With respect to piracy, China, despite many promises from high-level government officials, continues to fail to provide deterrent enforcement against the blatant and widespread piracy of U.S. copyright products including meaningful, deterrent criminal actions. Taking effective criminal action against piracy is a key WTO TRIPS requirement and likewise key to China reducing the staggering piracy rates and creating a market both for U.S. and local right holders.

China has established "thresholds" for criminal liability that provide a huge and WTO-inconsistent "safe harbor" within which pirates can operate with little risk other than meaningless, small administrative fines or short-term store closures. These "thresholds" render China's enforcement system in clear violation of its WTO TRIPS obligations to criminalize acts of "copyright piracy on a commercial scale." Moreover, Chinese authorities almost never initiate criminal proceedings even when the thresholds are exceeded. In the almost five years that China has been a WTO member, IIPA is aware of no more than two criminal cases having been concluded involving U.S. copyrights and only five cases involving copyrights of any other WTO member – or approximately **one criminal case per year**. Given the magnitude of the piracy problem, no conceivable interpretation of China's TRIPS obligations can render

⁴ The terms of China's accession to the WTO are contained in the Protocol on the Accession of the People's Republic of China (including its annexes) (Protocol), the Report of the Working Party on the Accession of China (Working Party Report), and the WTO Agreement. The Protocol and Working Party Report can be found on at <http://www.mac.doc.gov/China/WTOAccessionPackage.htm>, or on the WTO website <http://www.docsonline.wto.org>. Specific copyright commitments are made in Section 6 of the Protocol and Section 5 of the Working Party Report.



this record as TRIPS-compliant. In addition, China's Criminal Law fails to subject to criminal liability the violation of many exclusive rights which, when infringed, constitute clear "copyright piracy on a commercial scale," all in violation of Articles 41 and 61 of the TRIPS agreement.

China also has failed to implement its clear WTO market access commitments with respect to trading rights for the book publishing industry. Other market access commitments, including the audiovisual industry, and those related to transparency, have not been met. Additional barriers, which were unfortunately not addressed under China's WTO accession terms, continue to produce further nearly insurmountable hurdles to legitimate market entry for U.S. and foreign right holders, thus contributing to and exacerbating the effects of the so very widespread piracy of American product that the Chinese government continues to permit.

U.S. government efforts to engage the Chinese government in a heightened dialogue on these matters, through the Joint Commission on Commerce and Trade (JCCT), almost five years after China's WTO accession, have resulted in a number of additional Chinese commitments, including to "significantly reduce IPR infringements." However, more than two years after the Chinese authorities made this commitment, piracy rates remain at virtually the same levels; the market has only very marginally improved for some industries, and actually worsened for others. It is clear that a new and tougher dialogue with China is needed to deal both with this rampant piracy and oppressive market access barriers.

B. OBSERVATIONS ON THE JCCT PROCESS – 2004-2006

As noted, the U.S. government has engaged the Chinese, beginning in 2004, through a new version of the Joint Commission on Commerce and Trade (JCCT), which established a new high level dialogue between the two governments on key trade issues. The JCCT has featured discussions on many important IPR matters. The IIPA and its members have been supportive of the JCCT process, and we continue to look forward to concrete results promised by the dialogue which lower piracy rates and improve market access.

In the 2004 JCCT meeting, the U.S. government and the Chinese government (led by Vice Premier Wu Yi) agreed that the long-standing IPR issues had to be elevated in importance on the trade agenda. Following those meetings, the Chinese government committed to "substantially reduce piracy levels" and promised to take a number of actions in the area of piracy and counterfeiting which the Vice Premier indicated were intended to respond to the U.S. government's concerns. Those 2004 meetings gave rise to some optimism that China would commence taking the actions that the copyright industries had for years deemed essential to reducing piracy levels. The foremost among these actions was reforming its criminal law system to address "commercial scale" (the TRIPS requirement) acts of piracy, starting with re-issuance of Supreme People's Court's (SPC) "interpretations" to lower the high "thresholds" for criminal liability under Articles 217 and 218 of China's Criminal Law. New thresholds were issued at the end of 2004, as discussed below.

As a result of these 2004 JCCT talks, the U.S. government decided to conduct an "out-of-cycle" Special 301 review of China's progress in meeting the benchmarks. On February 9, 2005, IIPA submitted



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its comments⁵ to USTR on China's progress in implementing the commitments it undertook under the JCCT, its WTO commitments and its 1995 and 1996 bilateral agreements and action plans to provide adequate and effective protection and enforcement for U.S. copyrighted products. IIPA concluded, in summary, that: (1) piracy levels had not been "significantly reduced" — they still remained around 90% in all sectors; (2) the recently-amended (December 2004) Supreme People's Court's "Judicial Interpretations" ("JIs") left unanswered questions about China's political will to bring criminal prosecutions and impose deterrent penalties; but (3) IIPA sounded a positive note by reporting that raiding activity (but not prosecutions with deterrent penalties) had increased for most sectors in the late 2004-early 2005 timeframe. Because of this lack of real progress, and despite Wu Yi's efforts, USTR determined to elevate China to the Special 301 "Priority Watch List" on April 29, 2005.⁶ IIPA supported USTR's decision.

On July 11, 2005, senior U.S. and Chinese officials met again through the JCCT process. USTR reported that "some progress was made to enforce intellectual property rights; to delay restrictive software regulations; and, to strengthen market access."⁷ BSA noted its approval⁸ of the JCCT-generated commitment to criminalize end-user piracy "in appropriate circumstances" but, subsequently, it became apparent that the Chinese government had in fact not agreed to criminalize end user software piracy and no such cases have been brought. BSA also supported the long-sought-after clarification that software end-user piracy is fully subject to administrative remedies; and China's decision to "delay issuing draft regulations on software procurement, as it further considers public comments and makes revisions in light of WTO rules." The Chinese government also promised that by the end of 2005, it would "complete its legalization program to ensure that all central, provincial and local government offices are using only licensed software, and will extend the program to enterprises (including state-owned enterprises) in 2006."

The Motion Picture Association of America (MPAA) noted with approval its agreement with the Chinese government on a Memorandum of Understanding whereby Chinese officials promised to take anti-piracy actions to improve enforcement against pirated versions of movie titles which appeared in the retail market before the title cleared censorship.⁹ For the videogame industry (represented by the Entertainment Software Association (ESA)) the promise of enhanced enforcement at internet cafés was viewed as a step forward. The JCCT announcements included confirmation from the Chinese

⁵ See IIPA, Comments on Special 301 Out-of-Review Cycle of the People's Republic of China, February 9, 2005, at http://www.iipa.com/rbc/2005/CHINA%202005_Feb9_PRC_OCR_Submission.pdf.

⁶ See USTR, "Special 301 Report Finds Progress and Need for Significant Improvements," April 29, 2005, at http://www.ustr.gov/Document_Library/Press_Releases/2005/April/Special_301_Report_Finds_Progress_Need_for_Significant_Improvements.html.

⁷ See USTR Press Release, "Following U.S.-China Trade Talks, USTR Portman Says Measured Progress Made," More Action Needed, July 11, 2005, at http://www.ustr.gov/Document_Library/Press_Releases/2005/July/Following_US-China_Trade_Talks_USTR_Portman_Says_Measured_Progress_Made_More_Action_Needed.html. See also, USTR Fact Sheet, "The U.S. – China Joint Commission on Commerce and Trade (JCCT) Outcomes on Major U.S. Trade Concerns," July 11, 2005 at [http://www.ustr.gov/Document_Library/Fact_Sheets/2005/The_US_China_Joint_Commission_on_Commerce_Trade_\(JCCT\)_Outcomes_on_Major_US_Trade_Concerns.html](http://www.ustr.gov/Document_Library/Fact_Sheets/2005/The_US_China_Joint_Commission_on_Commerce_Trade_(JCCT)_Outcomes_on_Major_US_Trade_Concerns.html).

⁸ See BSA, "BSA Encouraged by Outcome of U.S. – China JCCT Meetings," July 11, 2005 at <http://www.bsa.org/usa/press/newsreleases/US-China-JCCT-Meetings.cfm>.

⁹ See MPAA, "Glickman: Trade Talks Yield Modest Progress," July 11, 2005 at http://www.mpaa.org/MPAAPress/2005/2005_07_11.doc. See also, MPAA, "China's Ministry of Culture, SARFT Sign First Anti-Piracy Memorandum with MPA," July 15, 2005 at http://www.mpaa.org/MPAAPress/2005/2005_07_15.doc.



government that the criminal thresholds in the 2004 Judicial Interpretations (JIs) are applicable to sound recordings and that the JIs can be interpreted to make importers and exporters subject to independent criminal liability, albeit as accomplices, and subject to much weaker criminal penalties. Finally, the JCCT also specified that "China has agreed to increase the number of criminal prosecutions for IPR violations relative to the total number of IPR administrative cases. Subsequently, the Supreme People's Procuratorate, and the Ministry of Public Security then issued draft guidelines for public comment to ensure the timely referral of IPR violations from administrative bodies to criminal prosecution.

Unfortunately, the 2005 JCCT meetings resulted in no progress on any of the critical market access issues relevant to IIPA members including the trading rights issues affecting the book publishing industry as well as restrictions the motion picture industry faces, including opening the market beyond China's severely limited WTO obligations.

The next round of JCCT meetings took place in April 2006 and resulted in some modest gains and the partial implementation of a few commitments made in 2004-2005. Most important was the commitment of the Chinese government to allow only the sale of computers containing pre-loaded authorized operating systems and for government agencies to purchase only computers with such pre-loaded operating systems. China also committed to move to complete legalization of software use in provincial and local government and in state-owned and private enterprises. Recent reports are that sales of legitimate operating systems are up as a result of these actions. However, Chinese authorities did not agree to software industry calls for effective software asset management systems inside government ministries in the JCCT process and remains an essential component of such a legalization effort.

China also agreed to provide better reporting on court cases and this was followed by the creation of a new website, which is a positive development. Still missing from the transparency commitments (and results) are meaningful statistics dividing actions by type of IPR, the location of actions and the amount and type of administrative fine or criminal punishment ultimately meted out in such cases.

China also announced in March 2006 actions against 14 optical disk plants. Industry recently learned that 6 of these plants were reportedly closed (although it remains unclear whether such closures were permanent). The March announcement also indicated that the operating licenses of the other 8 of the 14 plants were temporarily suspended, although IIPA understands that all 8 of these plants are fully operational once again. Most disappointingly, IIPA understands that only one or two of the fourteen plants were under "criminal investigation" despite pirate production levels that we believe far exceed even China's high thresholds for criminal prosecution, and it remains unclear which of the fourteen plants are under investigation, or whether criminal actions have ever been or will ever be brought, now months after the initial enforcement actions reportedly took place.

Again, in 2006 there was no upswing in the filing or conclusion of criminal prosecutions against copyright piracy, as far as industry has been able to ascertain. As noted above, IIPA has only been able to uncover **five criminal cases** in China involving the works of WTO member countries and only **two of these cases are known to have involved U.S. copyright products**. Given the severity of the piracy problems in China, the bringing of only one criminal case per year involving copyright piracy involving a WTO member simply cannot be deemed compliance with China's TRIPS enforcement commitments.



In addition to optical disk piracy which continues to emanate from Chinese factories, piracy in Internet cafés and on the Internet generally has increased in 2006. China's announcement of its 100 day enforcement campaign in July 2006 has resulted in a number of take downs of pirate sites and a few fines, but there have been no reports of any criminal prosecutions resulting from such actions. A new set of Internet regulations, effective July 2006, have thus far resulted in increased take down compliance by ISPs and, in general, the regulations are viewed as a positive development, raising the possibility that, with the devotion of adequate resources to administrative and deterrent criminal enforcement, such piracy could be effectively fought by the authorities.

The publishing industry began reporting in 2005 the existence of "textbook centers" run on the campuses of many of China's major universities. These centers engage in the wholesale unauthorized copying and sale of bound reprints of English and Chinese works and the photocopying of entire works for sale to students. At the request of AAP, some actions have been taken against a few of these centers and small fines issued. These piracy centers must be eliminated through aggressive enforcement, both administrative and where appropriate, criminal.

Notwithstanding three years of JCCT meetings and commitments made by the Chinese government, and notwithstanding some modest progress on certain industry sectoral issues, piracy remains an endemic problem in China, essentially because the criminal copyright system has provided almost no relief to foreign right holders and fails to deter piracy activities, while the Chinese Government not only has maintained but in some instances has even bolstered market access barriers for cultural industries which in turn contributes to the prevalence of piracy since legitimate products cannot enter the market or only enter the market with great difficulty. Promises made by China over two years ago in the April 2004 JCCT¹⁰ to "significantly reduce IPR infringement levels" and "increase penalties for IPR violations" by subjecting a greater range of IPR violations to criminal investigation and criminal penalties, applying criminal sanctions to the import, export, storage and distribution of pirated and counterfeit products, and applying criminal sanctions to on-line piracy, have simply not yet occurred, and, as a result, it is disappointing, but not surprising, that piracy levels remain at unacceptably high levels.

C. CHINA'S COMPLIANCE WITH ITS WTO TRIPS COMMITMENTS

For the fifth year in a row, IIPA must report, unfortunately, little positive development regarding China's efforts to accomplish improved copyright protection and effective criminal copyright enforcement, as required under its WTO TRIPS Agreement obligations. Our conclusion this year – the same as in the four prior years (2002,¹¹ 2003,¹² 2004,¹³ and 2005¹⁴) – is that the same two primary

¹⁰ See Fact Sheet, "USTR Lists Outcomes of Commission Meeting on U.S.-China Trade, "April 21, 2004 at <http://hongkong.usconsulate.gov/uscn/trade/general/ustr/2004/042103.htm>.

¹¹ In 2002 (the first year the TPSC evaluated China's WTO compliance), IIPA informed the TPSC of its view that "the [Chinese] enforcement system to date has failed to provide effective remedies and deter further infringement, as required by TRIPS Articles 41, 50 and 61." In particular, we noted that "the most significant deficiency in the legal framework ... is the continued failure of the Chinese government to make 'available' a TRIPS-compatible criminal remedy against copyright infringement." There we noted further that without bringing criminal cases against pirates, China's piracy rates would continue at the then-current levels of 90% and above. See IIPA's 2002 filing to the TPSC at http://www.iipa.com/pdf/2002_Sep10_WTO_China.pdf.

¹² In 2003, IIPA again informed the TPSC that "the Chinese enforcement system has failed to significantly lower such [still 90% or above] piracy levels, and therefore, cannot be said to provide adequate procedures and effective legal remedies to protect copyright, as is required by the TRIPS enforcement provisions." We added that "because of high [criminal] thresholds and a lack of prosecutions in practice, it is clear that foreign right holders do not enjoy a WTO-compatible criminal remedy in China."



problems – rampant copyright piracy¹⁵ and market access barriers – have kept China's market largely closed and have prevented copyright owners from benefiting from China's accession to the WTO.

PEOPLE'S REPUBLIC OF CHINA										
Estimated Trade Losses Due to Copyright Piracy										
(in millions of U.S. dollars)										
and Levels of Piracy: 2001-2005¹⁶										
INDUSTRY	2005		2004		2003		2002		2001	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures ¹⁷	244.0	93%	280.0	95%	178.0	95%	168.0	91%	160.0	88%
Records & Music ¹⁸	204.0	85%	202.9	85%	286.0	90%	48.0	90%	47.0	90%
Business Software ¹⁹	1554.0	86%	1488.0	90%	1787.0	92%	1637.3	92%	1140.2	92%
Entertainment Software ²⁰	589.9	92%	510.0	NA	568.2	96%	NA	96%	455.0	92%
Books	52.0	NA	50.0	NA	40.0	NA	40.0	NA	130.0	NA
TOTALS	2643.9		2530.9		2859.2		1893.3		1932.5	

While we noted some progress, the bottom line was that piracy levels continued at staggering levels and the criminal prosecutions IIPA members deemed necessary to begin lowering piracy levels were not brought. See IIPA's 2003 filing to the TPSC at http://www.iipa.com/pdf/2003_Sep10_WTO_China.pdf.

¹³ In 2004, IIPA told the TPSC that we "must unfortunately report, once again, no lowering of piracy levels in China and only a token number of criminal prosecutions for piracy which have had no effect in the marketplace. Piracy levels for 2003 remained at 90% or above and IIPA members do not report a lowering of these rates to date in 2004." There we also indicated our mixed concerns about the Chinese ability to meet the various benchmarks then set out under the JCCT process, and to be reviewed by USTR in a Special 301 out-of-cycle review in early 2005. See IIPA's 2004 filing to the TPSC at http://www.iipa.com/rbi/2004_Oct12_IIPA_CHINA_WTO_TPSC_Submission-rev.pdf.

¹⁴ <http://www.iipa.com/pdf/IIPA%20China%20TPSC%20WTO%20compliance%20Written%20Comments%20FINAL%2009092005.pdf>

¹⁵ Continuing hard goods piracy – motion pictures, records, books, videogames, software – remains widespread. Optical media plants in China continue to produce pirate CDs, VCDs and DVDs, and there is now ample evidence, including one of the only criminal convictions for export piracy – the Guthrie case – from 2005, that pirate producers in China are again exporting pirate product. While most pirate products in the Chinese market are produced in China, imports of pirate product from other countries in Asia are also a problem. Internet piracy is an ever-growing phenomenon in China today, including so called peer to peer (P2P) piracy, unauthorized or pirate servers for entertainment software, and piracy in Internet cafés. Piracy levels for 2005 remained in the 85-95% range for most of the industries. Both the business software and filmed entertainment industries reported slight drops in estimated losses and piracy levels from 2004 to 2005. Still, the industries collectively estimated \$2.64 billion in estimated trade losses due to piracy in China in 2005.

¹⁶ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in Appendix B of IIPA's 2006 Special 301 report at.

¹⁷ MPAA's trade losses and piracy levels for 2005 are available for a limited number of countries and are based on a methodology that analyzes physical or "hard" goods and Internet piracy. For a description of the new methodology, please see Appendix B of IIPA's 2006 report.

¹⁸ The estimated losses to the sound recording/music industry due to domestic piracy are US\$202.9 million for 2004, and exclude any losses on sales of exported discs. This number is also based on a "displaced sales" methodology.

¹⁹ BSA's 2005 statistics are final. BSA's 2005 estimates in IIPA's February 2006 Special 301 report were preliminary. They represent the U.S. publishers' share of software piracy losses in each country, and follow the methodology compiled in the Third Annual BSA/IDC Global Software Piracy Study (May 2006), available at <http://www.bsa.org/globalstudy/>. These figures cover, in addition to business applications software, computer applications such as operating systems, consumer applications such as PC gaming, personal finance, and reference software.

²⁰ ESA's reported dollar figures reflect the value of pirate product present in the marketplace as distinguished from definitive industry "losses." The methodology used by the ESA is further described in Appendix B of IIPA's 2006 report.



As these statistics indicate, the problem of piracy is widespread in China,²¹ despite some modest progress evidenced by slight dips in the piracy levels for 2005 (compared with the same in 2004). As a result, in the annual Special 301 process, IIPA has of late recommended moving China back onto the Special 301 lists, and as mentioned above, on April 29, 2005, USTR decided to elevate the People's Republic of China to the "Priority Watch List" to demonstrate continuing concern at the lack of definitive action against piracy. On April 28, 2006, in the 2006 Special 301 cycle, USTR announced that it was keeping China on the Priority Watch List, and made key statements regarding China's WTO commitments:

With respect to China, this year's Special 301 Report describes the United States' plan to continue heightened scrutiny of China by maintaining China on the Priority Watch List and continuing Section 306 monitoring, as well as stepping up consideration of World Trade Organization (WTO) dispute settlement options.

USTR also undertook to obtain information from the Chinese Government through the use of the TRIPS transparency mechanism under Article 63 of TRIPS, and noted in the Special 301 report:

The United States, in cooperation with other WTO members, has also made innovative use of WTO tools other than dispute settlement. For instance, in October 2005, the United States, Japan, and Switzerland made simultaneous transparency requests to China under Article 63.3 of the TRIPS Agreement.

Unfortunately, the Chinese government, to this day, has yet to provide a meaningful response to this request and continues to provide statistics which lump together all IPR infringements rendering the data essentially unusable.²² What those responses do demonstrate, however, is that the Chinese enforcement system for protection of copyright is overly reliant on non-deterrent administrative measures and fails to meet the standards of effective criminal enforcement required by TRIPS.

Overall, China's enforcement system, as IIPA has pointed out to the TPSC in our prior submissions, fails to meet minimum TRIPS standards. For example:

- With right holders reporting estimated piracy levels around the 90% range (meaning approximately 9 of every 10 copies in the Chinese market is unauthorized), there is no argument that can be made that China complies with its TRIPS enforcement obligations under Article 41. China is obligated under TRIPS Article 41 to ensure that enforcement procedures "are available under [its] national law so as to permit effective action against any act of [copyright] infringement..., including expeditious remedies to prevent infringements and remedies which

²¹ Even local Chinese copyright interests recognize the serious nature of the piracy problem in China. A recent study (June 2006) undertaken by the Center for American Economic Studies under the Institute of World Economics & Politics, Chinese Academy of Social Sciences (CASS), indicated that Chinese film producers, exhibitors and distributors are suffering badly from widespread film piracy, and that few are optimistic that the situation will improve any time soon.

²² USTR reported in the 2006 Special 301 announcement that

"According to Chinese data provided in response to U.S. requests, China initiated no copyright retail cases under Article 218 of its Criminal Law in 2004 and six cases in 2005. Under Article 217 of the same law, covering copyright reproduction and distribution, the number of cases initiated rose from 13 to 28."



constitute a deterrent to further infringements.” There is no question but that with nearly everyone who deals in copyright materials continuing to engage in infringing activities, remedies against copyright infringement in China do not “constitute a deterrent to further infringements.”

- Furthermore, with only one criminal copyright conviction per year on average dealing with a WTO member's copyright materials, it cannot be said that China applies criminal remedies against “copyright piracy on a commercial scale” as required by TRIPS Article 61. As one example of the way in which the Chinese system fails to address copyright piracy, the high “thresholds” established in the 2004 Judicial Interpretations provide a huge “safe harbor” for “commercial scale” piracy of all kinds throughout China, in clear violation of TRIPS Article 61. Furthermore, the absence of criminal cases even against commercial scale piracy that meets China's high thresholds compounds the Article 61 (and Article 41) violation. As we have noted on many occasions, criminalizing all commercial scale piracy and then taking effective criminal action against it is a key WTO TRIPS requirement and is likewise key to China reducing staggering piracy rates and creating a market both for U.S. and local right holders.
- Anti-piracy enforcement in China for foreign rightsholders has continued to involve only administrative enforcement actions, chiefly aimed at seizing infringing materials. Administrative enforcement, however, has been an ineffective avenue for deterring piracy in China, since administrative cases result in notoriously low fines and no imprisonment. China is currently engaged in a 100-day enhanced administrative enforcement campaign which appears to involve the fairly active inspection of Chinese retail operations and the well-reported seizure of millions of pirated optical discs. However, as is China's practice, we are not aware of any of these seizures leading to criminal actions and deterrence despite the magnitude of the product being seized. We also note, with dismay, that even this campaign, with its enhanced efforts, will expire in just a few weeks, after which China's pirates will presumably re-establish their thriving businesses. There have also been very few effective administrative enforcement actions against end-user piracy of software in China. Only in the 2005 JCCT “outcomes” has this been recognized as a problem by the Chinese government but since then actions taken against end-user piracy of software have been sparse and non-deterrent.

In addition to these enforcement “as such” and in-practice failings, there are other TRIPS problems, a few of which are detailed below (for full details, please review our prior Special 301 submissions, including the 2006 301 filing, attached). For example, Articles 217 and 218 of the Chinese Criminal Code only criminalize infringements of certain exclusive rights and not others, even though TRIPS requires criminalizing all acts of copyright piracy on a “commercial scale.” (Criminal sanctions do not appear in the Copyright Law but rather, in the Criminal Law). Rights not included in the Criminal Law are the right of public performance, broadcast and associated rights, adaptation rights, importation of pirate product (However the JCCT “outcomes” seek to change this result, though doing so without legislative change leaves coverage incomplete in our view, since it would criminalize only the companies that engage in import, and then, only as accomplices), bootlegging of performances, rental rights, and other rights. Some of these infringements could be criminalized, in effect, by the Supreme People's Court, recognizing them as “distributions” but the SPC failed to take this course in the JIs, despite requests by IIPA and the U.S. government to do so. While these Criminal Law Articles are deficient on their face, we have received no indication that the National People's Congress intends to introduce amendments to



correct this problem. Other problems include the Chinese Copyright Law's exclusion from protection *ab initio* subject matter which must be protected, in clear violation of TRIPS.

D. CHINA'S COMPLIANCE WITH ITS WTO MARKET ACCESS COMMITMENTS, AND OTHER BARRIERS TO TRADE IN COPYRIGHT MATERIALS

Even if the Chinese Government was to succeed, as already promised, in reducing copyright piracy by half, under the present circumstances most of the U.S. copyright industries could not satisfy the huge local demand because of continuing and onerous barriers to effective market entry.

Providing market access to allow more legitimate product into China is an essential element of an effective anti-piracy strategy in the country. China, through its WTO commitments, has agreed to open, at least partially, its market in various ways to different copyright industry sectors. For example, it is noteworthy that China has provided trading rights for books, motion pictures, sound recordings, and other copyright materials, and has agreed to open its market to wholesale and retail distribution of books by wholly-owned foreign enterprises in China though key publishing activities and activities related to home entertainment audiovisual products remain severely restricted or prohibited, limiting the practical utility of these market-opening measures. Unfortunately, China has failed to meet all of its WTO obligations in the market access area. These commitments on trading rights and on permitting wholesale and retail distribution of books are important and attempts to thwart their full impact (such as through debilitating investment restrictions that negate these commitments, film blackouts and other measures designed to limit the ability of foreign right holders to fully exercise their rights in China) must not be permitted. China made these commitments nearly five years ago, and its failure to ease market access restrictions in China fuels continued high piracy levels in China.

The Book Publishing Industry: IIPA believes that China has failed to afford full trading rights to foreign entities as to books, newspapers and periodicals. Specifically, provisions of the Chinese Foreign Trade Law,²³ the Chinese Guidelines for Foreign Investment,²⁴ and other measures, especially, the Chinese Administrative Regulations on Publishing²⁵ are inconsistent "as such" with the obligation to provide trading rights for books, newspapers, and magazines under Article 5 of the Chinese Protocol of Accession to the WTO.²⁶

²³ See Foreign Trade Law of the PRC, FBIS Translated Text (April 6, 2004, adopted on 12 May 1994 at the Seventh Session of the Standing Committee of the Eighth NPC and amended on 6 April 2004 at the Eighth Session of the Standing Committee of the Tenth NPC).

²⁴ Order (No. 24) of the State Development and Reform Commission, the Ministry of Commerce of the People's Republic of China amending the "Catalogue for the Guidance of Foreign Investment Industries and its Attachment" (November 30, 2004; in force January 1, 2005) [the "Guidelines"].

²⁵ Administrative Regulations on Publishing, State Council Order No. 343, approved on December 12, 2001 at the 50th session of the State Council's Standing Committee, signed by Prime Minister Zhu Rongji on December 25, 2001, promulgated on December 31, 2001, and effective as of February 1, 2002.

²⁶ See, e.g., World Trade Organization, Report of the Working Party on the Accession of China, Addendum, Schedule CLII—The People's Republic of China, Part II—Schedules of Specific Commitments on Services, List of Article II MFN Exemptions, WT/MIN(01)/3/Add.2, Nov. 10, 2001 ("Working Party Report"). The Working Party Schedules superseded (but largely track in substance if not exactly in terms of time commitments) the bilateral commitments made by China to the United States in the Agreement on Market Access Between the People's Republic of China and the United States of America, Nov. 15, 1999 (on file with the International Intellectual Property Alliance).



Article 5 of the Chinese Protocol of Accession provides,

“within three years after accession, all enterprises in China shall have the right to trade in all goods throughout the customs territory of China, except for those goods listed in Annex 2A which continue to be subject to state trading in accordance with this Protocol. Such right to trade shall be the right to import and export goods. [All such goods shall be accorded national treatment under Article III of the GATT 1994, especially paragraph 4 thereof, in respect of their internal sale, offering for sale, purchase, transportation, distribution or use, including their direct access to end-users.]”²⁷

Books, magazines, and newspapers are not listed among the products in Annex 2A. On December 11, 2004 (three years after accession), U.S. (and other WTO Member) publishers were to be afforded full trading rights as to books, magazines, and newspapers. However, Order No. 24, the Catalogue for the Guidance of Foreign Investment Industries’ “Catalogue of Prohibited Foreign Investment Industries” provides that the “[b]usiness of publishing, producing, master issuing, and *importing of books, newspaper and periodical*” is prohibited. We believe this measure establishes an “as such” WTO violation arising out of China’s agreement in its WTO Protocol of Accession. Other legal authorities exist reiterating that importation of books is prohibited, e.g., a State Council “Decision” from August 2005 on private enterprises participating in “cultural industries” which expressly provides, “[n]on-public capitals cannot invest [in] ... the import of books and newspaper...”²⁸

IIPA also notes that China has the WTO obligation to provide distribution rights to WTO Members’ companies, both wholesale and retail, relating to all “books, newspapers, and magazines.” Specifically, the Schedule of Specific Commitments on Services which is annexed to the Protocol of Accession of China obliges China to allow WTO Members’ “foreign service suppliers” to establish “commercial presence” (Mode 3) to engage in “Wholesale Trade Services” of books, magazines, and newspapers” within three years of accession to the WTO (December 11, 2004),²⁹ and to engage in “Retailing Services,” except for “chain stores,” for books, magazines, and newspapers” within one year of accession to the WTO (December 11, 2002).³⁰ IIPA is concerned that China, while permitting, with

²⁷ As a U.S. Department of Commerce Fact Sheet on China’s WTO Accession stated, “All enterprises in China will be granted full trading rights within three years after accession (except for limited products reserved for trade by state enterprises as identified in Annex 2A to the Protocol).” See <http://www.mac.doc.gov/China/Docs/exportamerica/WTOChina.html>.

²⁸ Certain Determinations of State Council on Non-Public Capitals Entering into the Cultural Industry, August 8, 2005, at <http://finance.people.com.cn/GB/1037/3600495.html>.

²⁹ The “Schedule of Specific Commitments on Services” attached to the Working Party Report defines “Distribution Services” to include wholesale services, retail services, as well as commission agents’ services, franchise services and the like. With regard to “Distribution Services,” China has committed to allow “foreign service suppliers” to “engage in the [wholesale] distribution of books, newspapers, [and] magazines” without market access restrictions no later than December 11, 2004, which is “three years after China’s accession.” By that time, there must also be no restrictions on foreign majority ownership and no geographic or quantitative restrictions. “Distribution Services” are defined in Annex 2 of the Working Party Report, which is adopted from Annex I of the Agreement on Market Access Between the People’s Republic of China and the United States of America, Nov. 15, 1999. Restrictions on foreign majority ownership and geographic and quantitative restrictions had to be lifted on December 11, 2003.

³⁰ With regard to “Retailing Services,” China committed that “[f]oreign service suppliers will be permitted to engage in the retailing of . . . books, newspapers and magazines within one year after accession,” or December 11, 2002. There are various geographic and equity ownership limitations in place until December 11, 2004, at which time all restrictions on commercial presence are lifted except as to “chain stores.” The term “chain stores” is defined as stores “which sell products of different types and brands from multiple suppliers with more than 30 outlets.” For those stores, foreign majority ownership will not be



certain restrictions, wholly foreign invested enterprises to distribute books, magazines, and newspapers at wholesale or retail, defines "books, magazines, and newspapers" in the Measures for the Administration of Foreign-Invested Books, Newspapers and Magazines Distribution Enterprises narrowly in a way that excludes whole categories of books etc., apparently including imported books, newspapers, and magazines. If true, this would be inconsistent with China's WTO obligations.

In addition to the WTO issues, continued severe restrictions on activities of paramount importance to U.S. publishers, such as printing (which is "restricted"), and failure to define key activities which are prohibited, for example, "master issuing" and "producing" cast doubt on whether China is meeting its WTO obligations. Specifically, the Chinese government must explain how "printing" is restricted, and whether China's prohibition on foreign investment/engagement in "master issuing" of books, newspapers and periodicals runs afoul of China's WTO commitments. Severe restrictions on related activities, such as printing (which is considered by the Chinese as a "restricted" activity) call into doubt whether China can meet its WTO obligations (to allow unfettered distribution) in a way that is meaningful to foreign publishers under the current system.

Disturbingly, in early August 2005, five ministries in China, including the Ministry of Culture, issued a document which reportedly "forbids foreign investors from undertaking businesses such as book and magazine publishing, wholesale and imports," and which reportedly states, "[f]oreign investors [may] not enter into the publication field in the name of book distribution, printing, advertising and culture facility reconstruction."³¹ This can hardly be a WTO-compatible move.

The Film Entertainment Industry: IIPA believes that China has violated its WTO commitment to provide trading rights (i.e. the right to import/export) to U.S. and other foreign motion picture companies, and requires all imported motion pictures, in DVD home video format, to go through state-owned audio-visual (AV) publishers or Chinese licensees. Specifically, in its accession agreement, China committed to giving trading rights to all sectors, except those for which specific exclusions were taken, and China did not include videos/audiovisual works among those products for which it took a specific exclusion. Therefore, the motion picture companies should have the right to import home entertainment audiovisual products.

The filmed entertainment industry continues to suffer from China's quota restricting to 20 the number of foreign films allowed annually into the Chinese market, and then under discriminatory commercial terms. The government restricts the amount of theatrical revenue U.S. companies can earn to levels below those of virtually every other market. High import duties and restrictions on licensing in home video formats also negatively affect the industry, to the advantage of Chinese companies and, of

permitted if they sell, among other products, books, newspapers, and magazines. In addition to the specific commitments on wholesale and retail distribution, immediately upon accession (December 11, 2001), "[f]oreign-invested enterprises" are permitted to distribute (both wholesale and retail) their products (including those listed in the commitments, which include books, newspapers and magazines) as long as they are "manufactured in China." Both wholesalers and retailers may also, as of the date of China's accession, December 11, 2001, "provide the full range of related subordinate services . . . for the products they distribute." The "subordinated services" are defined in Annex 2 of the Working Party Report Addendum as including "inventory management; assembly, sorting and grading of bulk lots; breaking bulk lots and redistributing into smaller lots; delivery services; . . . storage, warehousing and garage services; sales promotion, marketing and advertising . . . and after sales services including . . . training services."

³¹ *China Bans Foreign Investment in Publishing, News Organizations*, People's Daily, August 6, 2005. See <http://www.ccnt.gov.cn/content.php?GName=whxx&id=4075>.



course, pirates. The Chinese government restricts foreign satellite programming on local cable channels, in addition to the regular censorship requirements.

The Recording Industry: The recording industry also faces serious market access hurdles for every essential activity to their business in China, which severely hamper the ability of the Chinese government and the recording industry to effectively fight piracy. Unfortunately, weak WTO obligations do not help promote a strong recording industry in China, but instead engrains a faulty commercial system and promotes piracy.

The WTO commitments include full trading rights for sound recordings. However, the absence of other WTO commitments and China's restrictive laws and rules governing foreign entities prevent U.S. record companies from engaging in the integrated operations that they practice throughout the rest of the world which enable them to realize essential economies of scale needed to produce efficiently and effectively get legitimate product onto the Chinese market. China's limited WTO commitments oblige it to open wholesale and retail distribution to foreign (record) companies but only via minority contractual joint ventures with Chinese firms (but not majority or wholly-owned foreign entities).³² Wholesale and retail distribution, the signing of recording artists, artist management, the production and publication of sound recordings, are not covered by China's WTO commitments. Chinese guidelines make it clear that "publishing, producing, master issuing and importing" of records in China are prohibited foreign investment activities, as is broadcasting,³³ while distributing and selling records is a "restricted" activity. In practice, certain "cooperative" agreements (not joint ventures) may allow foreign entities under certain circumstances and with inadequate legal certainty to publish and produce in China, and foreign entities may also apparently sign and manage artists as long as they have proper permits, but China's WTO commitments do not appear to cover these activities..

The overall restrictive nature of China's laws and regulations confronting the recording business makes it impossible for U.S. companies to effectively enter the market and fight the piracy of foreign recordings. Perhaps more importantly to the Chinese people and the Chinese economy, China's failure to open its market to those with the bulk of the wherewithal and know-how to make records makes it impossible for the vast majority of record producers worldwide to bring local Chinese content to the Chinese people and to make those artists and the music known to the world. The record industry also suffers from censorship delays which permit pirated product to monopolize the market during the critical first few weeks after the public release of a new sound recording.

Entertainment Software Industry: Entertainment software companies remain concerned about the timeliness in the approval process for entertainment software titles. Online versions of games go through an approval process at the Chinese Ministry of Culture before distribution is allowed, while hard goods versions go through an approval process with the General Administration for Press & Publication (GAPP). For entertainment software products, in many instances, the approval process takes several weeks to several months to complete. Given the prevalence of piracy, it is important that any content

³² World Trade Organization, Report of the Working Party on the Accession of China, Addendum, Schedule CLII—The People's Republic of China, Part II—Schedules of Specific Commitments on Services, List of Article II MFN Exemptions, WT/MIN(01)/3/Add.2, Nov. 10, 2001.

³³ The chief piece of legislation governing the record industry in China is the Administrative Regulations on Audio-Visual Products, State Council Order No. 341, Approved December 12, 2001 at the 50th session of the State Council's Standing Committee, signed and promulgated December 25, 2001 by Premier Zhu Rongji, and effective from February 1, 2002).



review process be undertaken in as expeditious a manner as possible. It is also important that the review process be streamlined and lodged with only one agency to avoid a bifurcated process that can only add to the delay in the approval process.

Having to undergo two separate content review processes before two different agencies would be burdensome to entertainment software publishers, adding not only additional costs but also further delay in releasing new product into the market. Further, transparency in the review process would help game companies in preparing games for the market.

Business Software Industry: BSA welcomed the 2005 JCCT "outcomes" which resulted in the Chinese government reevaluating its government procurement plans.³⁴

China needs to do much more, however, to follow through on its JCCT commitment to subject software end user piracy to administrative penalties nationwide. As part of its overall commitments to government legalization, China should also ensure that government offices have adequate budgets for software purchases. We also look to China to implement solid measures to implement its JCCT commitment to extend the legalization program to enterprises, included state-owned enterprises, in the end of 2006 and in 2007.

The Censorship Process for Many Copyrighted Products: Delays in getting product through the censorship process have a severe adverse impact on the movie, home video, recording and entertainment software industries. These delays invite pirates to exploit the time gap between a "pirate" release and a legitimate release by the real right holder, delivering millions of dollars of illicit profits and robbing the government of millions of dollars of tax revenue.

E. CONCLUSION

Nearly five years have passed since China's accession to the WTO and China's progress, if any, in reducing copyright piracy, improving enforcement and reducing market access barriers has been very modest at best. Given the more than 15 years that the U.S. has been engaging China on these same issues, it is increasingly less viable and credible for China to attempt to justify its failure to deliver at least TRIPS-compatible copyright protection with the argument that it still "needs more time." Fundamental change is needed; while there does appear to be political will in some quarters of the Chinese government to accomplish this change, there appears to still be much resistance and/or apathy in many other quarters. Concrete results are the only measure of progress; further promises will not suffice. Market access commitments must be strictly enforced and, as part of the anti-piracy fight (and for good economic reasons as well), China must now fully open its market to copyright products of all kinds.

IIPA appreciates the opportunity to provide its views on China's compliance with its obligations under the WTO and the TRIPS Agreement in the area of copyright. We look forward to our continued

³⁴ While the business software industry does not suffer from the onerous market access barriers that affect the rest of the copyright industries, the attempt by China in 2005 to adopt its then pending software procurement regulation would have erected a huge barrier for that industry. This proposed regulation would have effectively prevented U.S. software companies from selling software products and services to the Chinese government, would have eliminated the U.S. software industry's most meaningful opportunity to expand exports to China, and would have set a dangerous precedent for China's procurement policies in other major economic sectors.



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work with USTR and other U.S. agencies to bring about major improvements in copyright protection and enforcement worldwide.

Respectfully submitted,

Eric H. Smith
International Intellectual Property Alliance

Attached: Appendix A, copy of IIPA's 2006 Special 301 Report on China
at <http://www.iipa.com/rbc/2006/2006SPEC301PRCrev.pdf>



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APPENDIX A

REPORT on the PEOPLE'S REPUBLIC OF CHINA

Written by

THE INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

for

**IIPA 2006 SPECIAL 301 REPORT
ON GLOBAL COPYRIGHT PROTECTION AND ENFORCEMENT
SUBMITTED TO
THE UNITED STATES TRADE REPRESENTATIVE
FEBRUARY 13, 2006**

Also available at

<http://www.iipa.com/rbc/2006/2006SPEC301PRC.pdf>



INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE 2006 SPECIAL 301 REPORT PEOPLE'S REPUBLIC OF CHINA (PRC)

EXECUTIVE SUMMARY

Special 301 Recommendation: IIPA recommends that USTR maintain China on the Priority Watch List, pending a revisiting of this recommendation based on the outcomes of the scheduled April 2006 U.S.-China Joint Commission on Commerce and Trade (JCCT).

Actions to be Taken in 2006:

- **Follow Through on Key JCCT Commitments:** The Chinese Government committed in April 2004³⁵ and again in July 2005 to take some significant steps to improve copyright protection. The Chinese Government must take the following actions, among others, to make good on its commitments, including the general commitment to “significantly reduce” piracy levels:
 - **Bring a Significant Number of Criminal Prosecutions for Copyright Piracy:** Due to a reluctance on the part of many in China to provide a meaningful criminal remedy in copyright cases, which are effectively thwarted by continued overly high and complex thresholds and structural difficulties in the transfer of cases for criminal prosecution to the People's Procuratorate, the Chinese Government has still not met this JCCT commitment from 2004, or its TRIPS obligations. It is essential that the Supreme People's Procuratorate begin taking significant numbers of criminal cases, leading to deterrent sentences, and that the new Regulations on Timely Transfer of Suspected Criminal Cases in the Enforcement of Administrative Law allow for “on the spot” referrals where there is a “reasonable suspicion” that the infringer has done acts which, upon further investigation, would meet the criminal thresholds. Failure to bring more prosecutions for copyright piracy raises a serious question about China's compliance with its international legal obligations by failing to provide a deterrent to further infringements.
 - **Prosecute Software End-User Piracy:** The Chinese government declared that “software end-user piracy is considered to constitute ‘harm to the public interest’ and as such will be subject to administrative penalties nationwide,” and that “software end-user piracy is

³⁵ In April 2004, China agreed to “Significantly reduce IPR infringement levels,” “Increase penalties for IPR violations by ... [s]ubject[ing] a greater range of IPR violations to criminal investigation and criminal penalties ... [, a]pply criminal sanctions to the import, export, storage and distribution of pirated and counterfeit products ... [, and a]pply criminal sanctions to on-line piracy.” On services, China agreed to “accelerate steps necessary to allow U.S. companies to import, export, distribute and sell their products in China,” including to “[i]mplement its WTO trading rights obligations by July 1, 2004,” meaning “U.S. companies will be free to ship American products into China without using local middlemen.” China promised to “publish its draft implementing regulations on trading rights for public comment by June 1, 2004,” and to provide distribution rights to “allow U.S. firms to engage in wholesaling and retailing of U.S. products directly within China, as well as providing related services.”



subject to criminal penalties in appropriate circumstances." IIPA is unaware of a single criminal case against end-user piracy; without such cases, China cannot live up to this JCCT commitment or its international obligations.

- **Bring Criminal Cases Involving Sound Recordings as Well as Other Works:** The Chinese Government confirmed that "the criminal thresholds in the 2004 Judicial Interpretation (JIs) are applicable to sound recordings," and yet, IIPA is unaware of a single criminal copyright case in China involving sound recordings.³⁶ The commitment in the JCCT to cover sound recordings is meaningless if the Chinese Government does not bring a single case.
- **Bring Criminal Cases Against Exporters:** The Chinese Government confirmed that the "JI makes exporters subject to independent criminal liability," and yet, IIPA is unaware of a single criminal copyright case in China convicting a pirate for the crime of exporting pirate product. Meanwhile, once again in 2005 significant quantities of pirate product seized around the world, particularly optical discs, were sourced from China.³⁷
- **Ensure Use of Legal Software by Government and SOEs:** China promised that "[b]y the end of 2005, the Chinese government will complete its legalization program to ensure that all central, provincial and local government offices are using only licensed software, and will extend the program to enterprises (including state-owned enterprises) in 2006." We have seen no evidence indicating China has met this 2005 goal, nor have we seen final plans to implement the promise with respect to SOEs in 2006.
- **Ensure Pre-Release Enforcement for Motion Pictures, and Include Other Works as Well:** China promised to "regularly instruct enforcement authorities nationwide that copies of films and audio-visual products still in censorship or import review or otherwise not yet authorized for distribution are deemed pirated and subject to enhanced enforcement." This should also apply to other subject matter, such as entertainment software, sound recordings, books and periodicals. In particular, the content review process for entertainment software products on all platforms should be conducted in as expeditious a manner as possible so as to reduce delays in getting legitimate products to market.
- **Crack Down on Internet Piracy:** China promised to run a "nationwide crack-down on Internet piracy, including through enforcement at Internet cafes." Such efforts must be sustained far beyond a few months and significantly enhanced in 2006 in order to stem the massive and growing Internet piracy in China. Important steps to ensure proper legal norms governing the Internet include issuance of improved regulations (now in the drafting stage) regarding enforcement of copyright on the Internet (discussed below) and the establishment of a dedicated government task force to be responsible for strictly enforcing these regulations.

³⁶ One case, involving defendants WANG Jinsheng, SONG Chundong, and LIU Chunshu, reportedly involved "570,000 optical discs" but the type of work involved is unspecified in published reports IIPA has seen. All the other criminal copyright cases known to IIPA involved product other than sound recordings.

³⁷ EU statistics from 2004 show that 30% of IP-related contraband (which includes but is not limited to copyright piracy) seized in EU ports emanated from China, making it the number one country of origin, and 26% of all cases involving pirate "audio CDs, games, software, DVDs etc." were from China, again leading the pack. Thailand came in second (21%), followed by Malaysia (9%), Pakistan (8%), Indonesia (6%), and Hong Kong (5%). *DG TAXUD European Commission*. These statistics on seizures from the EU demonstrate anecdotally that China is not providing effective deterrence against piracy, including exports.



- **Join the WCT and WPPT:** China promised to “submit to the National People’s Congress the legislative package needed for China to accede to the WIPO Internet Treaties” by June 30, 2006. China should join these important treaties in 2006.
- **Impose Deterrent Administrative Penalties:** The Chinese Government must, in addition to providing deterrent criminal enforcement, significantly increase the level of administrative penalties/remedies imposed on pirates, including shop closures, if it is ever to lower piracy levels.
- **Legitimize Book Distribution Practices on University Campuses:** The National Copyright Administration (NCA), in cooperation with local copyright bureaus and rightholders, should take action to ensure that universities throughout the country are distributing only legitimate books to their students. Rampant unauthorized photocopying at university textbook centers across China is causing tremendous harm to the market for both Chinese and English language educational materials. Photocopied textbooks, either kept in stock in a warehouse separate from the textbook center storefront or produced on demand, often bear the crest of the universities themselves.
- **Issue Revised Internet Regulations with Robust Notice and Takedown:** The State Council is set to issue a set of regulations governing copyright protection on the Internet, including notice and takedown. IIPA has recommended changes necessary to provide adequate protection for temporary reproductions and communications to the public (including an interactive “making available” right), and effective “notice and takedown” mechanisms. These important recommendations should be adopted so that judges, law makers, and enforcement authorities will have clear and fair rules to protect content in China in the digital age.
- **Amend the Criminal Law to Bring It into Compliance with TRIPS:** China must at least criminalize copyright piracy “on a commercial scale,” including piracy involving acts not currently cognizable under China’s Criminal Law. Criminal enforcement of copyright piracy also continues to be burdened by the fact that in order for any act under Article 217 to be punishable, it must have been done “for the purpose of making a profit.” An amended law should ensure that thresholds are low enough to criminalize all “copyright piracy on a commercial scale” as required by the TRIPS Agreement. China is also the only country in the world that calculates a threshold for bringing criminal cases based on pirate profits and business volume at pirate prices.
- **Investigations by Foreign Right Holders:** Foreign right holders cannot reasonably be expected to fully avail themselves of the Chinese legal system unless they can investigate suspected infringements. China should open the way for foreign right holders and their association representatives to do so, and make evidence rules for administrative and court actions more transparent and logical.
- **Assign Specialized IPR Judges to Hear Criminal Cases, and Move Cases to the Intermediate Courts:** The record of China’s development of a cadre of well trained IPR judges to sit on specialized IPR tribunals at the Intermediate level courts in China to hear civil cases has been a success. Now China should commit and implement similar reforms in the criminal justice system to enhance deterrent enforcement against copyright piracy.
- **Provide Effective Market Access for All Copyright Materials:** In addition to fully implementing China’s minimum WTO market access commitments (particularly in the area of trading rights), the Chinese Government must, if it wishes to address rampant piracy in the country and foster the growth of creative industries in China, provide effective market



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access to all copyright industries, looking beyond the bare minima of WTO toward a fairer and more open market for all.

For more details on China's Special 301 history, see IIPA's "History" Appendix to this filing at <http://www.iipa.com/pdf/2006SPEC301HISTORICALSUMMARY.pdf>, as well as the previous years' country reports, at <http://www.iipa.com/countryreports.html>.



PEOPLE'S REPUBLIC OF CHINA
Estimated Trade Losses Due to Copyright Piracy
(in millions of U.S. dollars)
and Levels of Piracy: 2001-2005³⁸

INDUSTRY	2005		2004		2003		2002		2001	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures ³⁹	244.0	93%	280.0	95%	178.0	95%	168.0	91%	160.0	88%
Records & Music ⁴⁰	204.0	85%	202.9	85%	286.0	90%	48.0	90%	47.0	90%
Business Software ⁴¹	1276.1	88%	1488.0	90%	1787.0	92%	1637.3	92%	1140.2	92%
Entertainment Software ⁴²	589.9	92%	510.0	90%	568.2	96%	NA	96%	455.0	92%
Books	52.0	NA	50.0	NA	40.0	NA	40.0	NA	130.0	NA
TOTALS	2366.0		2530.9		2859.2		1893.3		1932.5	

PIRACY AND ENFORCEMENT UPDATES IN CHINA

Physical Piracy Remains Rampant: It is not surprising, with the lack of criminal prosecutions and the lack of deterrence in administrative enforcement in China, that piracy rates of physical copyright products remain virtually the highest in the world, at 85-95% depending on the industry sector and product format (e.g., 95% of DVDs in China are pirate). Raiding activity continued in 2005, under Vice Premier Wu Yi's leadership. A 15-month national anti-piracy campaign ended in December 2005 (IIPA is unaware of any decision to maintain this enhanced anti-piracy campaign). Despite seizures of millions of discs in raids run by the Beijing Copyright Administration or the Guangzhou and Shenzhen Municipal General Culture Market

³⁸ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2006 Special 301 submission at www.iipa.com/pdf/2006spec301methodology.pdf.

³⁹ MPAA's trade losses and piracy levels for 2005 are available for a limited number of countries and are based on a methodology that analyzes physical or "hard" goods and Internet piracy. For a description of the new methodology, please see Appendix B of this report. As loss numbers and piracy levels become available for additional countries at a later time, they will be posted on the IIPA website, <http://www.iipa.com>.

⁴⁰ The estimated losses to the sound recording/music industry due to domestic piracy are US\$202.9 million for 2004, and exclude any losses on sales of exported discs. This number is also based on a "displaced sales" methodology. 2005 loss estimates were unavailable.

⁴¹ BSA's 2005 statistics are preliminary. They represent the U.S. publishers' share of software piracy losses in China, and follow the methodology compiled in the Second Annual BSA/IDC Global Software Piracy Study (May 2005), available at <http://www.bsa.org/globalstudy/>. These figures cover, in addition to business applications software, computer applications such as operating systems, consumer applications such as PC gaming, personal finance, and reference software. BSA's 2004 piracy statistics were preliminary at the time of IIPA's February 11, 2005 Special 301 filing; the 2004 data has been revised and is reflected above.

⁴² ESA's reported dollar figures reflect the value of pirate product present in the marketplace as distinguished from definitive industry "losses." The methodology used by the ESA is further described in Appendix B of this report.



Administrative Enforcement Task Forces (many jointly with the Motion Picture Association,⁴³ with the recording industry,⁴⁴ and with a local video distributors' group),⁴⁵ IIPA members report no deterrence and no meaningful decrease in the widespread availability of pirate products. Thus, this campaign resulted in no meaningful reduction in piracy rates. None of the raids involving sound recordings will apparently result in criminal prosecution despite massive seizures; stores raided are often back in business the day following the raid.⁴⁶ Recent raids outside the major cities or the South are encouraging indications of hopefully greater transparency of enforcement efforts in outlying cities.⁴⁷ Raids involving product from other sectors, including the book publishing sector, continue to be non-transparent and appear to target only Chinese language publications.

Internet Piracy Threat Rapidly Growing: Internet piracy is progressively worsening as the number of Internet users and broadband penetration increase in China.⁴⁸ While the penetration rate per capita and per household is still relatively small, the sheer numbers of broadband lines (reported to be 35 million as of September 2005) makes China one of the world's largest potential markets in terms of Internet delivery of copyright content, and unfortunately, one of the world's largest emerging Internet piracy problems.⁴⁹ Hundreds of websites emanating from China now offer streams, downloads or links to unauthorized files of copyright materials (music, films, software, and books). Disturbingly, there are many Bit Torrent (BT) sites based in China now (BT is a recent P2P architecture which allows for faster file sharing due to the way users cooperate in uploading and downloading pirate content

⁴³ The Motion Picture Association reports 125 joint raids with the two authorities against 49 warehouses, 6 packing factories and 70 retail shops resulting in the arrest of four persons, revocation of eight audiovisual licenses and seizure of over 5.5 million pirated optical discs.

⁴⁴ The recording industry group operating in China, the International Federation of Phonographic Industries, reports 33 raids in 2005, mostly in southern China, resulting in a seizure of well over 2.5 million discs.

⁴⁵ The Guangdong Chamber of Audiovisual Distributors (GDCAVD) reports that it conducted 907 raids in various cities in Guangdong Province and seized a total of 20,810,000 illegal optical discs. GDCAVD reports that 23 of the raids have been referred to the Ministry of Public Security for criminal investigation; however, to our knowledge, no criminal proceedings have yet been instituted.

⁴⁶ For example, the recording industry reports that a major retail pirate distributor in Shenzhen was raided in May 2005, resulting in seizure of 40,000 pirate sound recordings and motion pictures, but was back in business shortly after the raid and even increased its business volume. Two storage facilities in Guangzhou were raided in August and September 2005, resulting in seizure of over 60,000 pirate optical discs. Again, the facilities were back in business shortly after the raid and have since grown their operations.

⁴⁷ In December 2005, the Chaoyang police department took raids with the Motion Picture Association on two shops, and filed a complaint with the district prosecutor, seeking a criminal charge against a major supplier of pirate product. Unfortunately, the two shops raided were back in business the next day, and no criminal charges are likely to be filed.

⁴⁸ China saw rapid expansion in 2005 in terms of the number of broadband lines. By the end of September 2005, there were 35 million broadband lines in China (up from over 25 million in December 2004), with lines split between roughly 25 million DSL lines and 10 million cable lines. See Point Topic Ltd., *World Broadband Statistics Q3 2005*, December 2005, Press Release at <http://www.point-topic.com/content/dslanalysis/ukbb051229.htm>. The Chinese newspaper, Economic Daily, reported in January 2006 that the number of Internet users in China grew by 18 percent in 2005 to 111 million. *In China, 111 Million Net Users Counted*, ZDNet (Reuters), January 18, 2006, at http://news.zdnet.com/2100-1035_22-6027969.html.

⁴⁹ *Id.* The Economic Daily (China) reported that as of the end of 2005, 64 million Chinese accessed the Internet via broadband connections.



simultaneously). There are at least four “eMule/eDonkey” servers; at least seven specialized “MP3 search engines” which offer deep links to thousands of infringing song files for instant downloads or streaming; and at least eight China-based peer-to-peer (P2P) services (including Kuro China, whose Taiwanese affiliate has been found guilty in a criminal court in Taiwan). The largest MP3 search engine is Baidu, the subject of two civil lawsuits in 2005; it lost one in September 2005 but has appealed.⁵⁰ Most of the pirate websites in China generate income through advertising, so they are profit-making ventures even though the copyright materials are provided for free. At least three of the P2P services (including Kuro China) charge subscription fees. Unfortunately, the availability and use of these services, spurred by the rapid growth of broadband technologies in China, indicate that Internet piracy will be one of the greatest challenges industry and the Chinese Government must face.

Entertainment software publishers also face the problem of so-called “offline server” piracy in China. These servers make unauthorized or pirate online games readily available or without adherence to terms or conditions set forth in a licensing agreement. The “offline server” operator creates a “mirror” server to the legitimate servers operated by entertainment software companies, not only diverting traffic and subscription revenue from the legitimate site but also, by bypassing authentication and verification processes, allowing the play of pirated games.

Enforcement against Internet piracy in China in 2005 has been made more difficult by recent Chinese government decisions. In 2003 and 2004, thousands of takedown notices were sent to ISPs and content providers, and, for the music industry, for example, the actual takedown rate was quite high.⁵¹ However, the April 2005 “Administrative Measures on Protecting Copyright on the Internet made such takedowns more difficult and compliance by ISPs fell precipitously in 2005.”⁵² The Administrative Measures appear not to allow e-mail notices and require that the notices include, for each infringing site, evidence of all infringements and proof of copyright ownership for each book, song or film infringed, among other things. The ISPs thus ignored notices that do not meet this unrealistically burdensome standard.⁵³

As discussed below, the State Council is expected soon to issue new Internet regulations which would reportedly replace these Administrative Measures. The current draft, would lessen the notice requirements. However, there are other concerns with the draft Regulations which need to be addressed prior to its issuance (including provisions on protection of technical protection measures, the scope of limitations on liability of ISPs, and the form of the notices to be sent to ISPs).

⁵⁰ On September 16, 2005, the People's Court of Haidian District in Beijing reportedly ordered Baidu to pay RMB68,000 (US\$8,400) to mainland music company Shanghai Busheng Music Culture Media for unauthorized downloads of 46 songs. Baidu has reportedly appealed the ruling.

⁵¹ The music industry achieved takedowns of three China-based servers of at least seven international sites (Supermusic, Crazymp3, 21century-mp3, Mp3explosion, Easym3s, Realalbums, and Finestmp3s), infringing music files hosted on large Chinese portals like Wanwa, Hitmusic, Sohu, and 9sky (9sky has since become a licensed music site, as have four other sites), and 17 “eDonkey” servers based in China.

⁵² From September to November 2005, the takedown rate by ISPs was as low as 25%.

⁵³ Administrative Measures on Protecting Copyright on the Internet, issued by the National Copyright Administration of China (NCAC) and the Ministry of Information Industry (MII), effective April 30, 2005.



Record Industry Takedown Rate of Suspected Infringing Websites in China			
	Number of notices	Number of sites	Takedown rate
2003	1320	2509	29%
2004	2632	7170	61%
2005	1778	4711	40%

In October 2005, the NCA together with seven other government agencies (Ministry of Propaganda, GAPP, MII, MPS, National Anti-Pornography and Publication Office, and the Beijing Copyright Administration) announced a special campaign from October 2005 to February 2006 to target Internet piracy. Right holder organizations were asked to provide information on infringing sites. Pursuant to this campaign, the recording industry filed complaints in November with the NCA against about 120 large illegal dedicated music sites and by mid-January 2006, at least 24 of these sites had been closed.⁵⁴ The motion picture industry made complaints against 88 sites and reports that the PSB handled case investigations involving two websites (these were subsequently returned for failure to meet the criminal threshold). Criminal charges also may be sought against a third site. NCA and the Motion Picture Association are also working on formalizing closer relations to combat Internet piracy.

Internet piracy in China is also infecting neighboring markets. For example, of 154 pirate websites found in Taiwan in 2002, the recording industry in Taiwan found that 102 (66%) were located in China. In 2005, the number of pirate websites in Taiwan grew to 469, of which 393 were reported to be located in China, or almost 84%.

China Once Again Takes Center Stage as Mass Producer of Optical Media for Export: We believe there are roughly 86 optical disc plants in China, with 1,374 total lines bringing total disc capacity based on IIPA's conservative methodology to a staggering 4.8 billion discs per year. Most of the production lines are interchangeable, switching easily between audio CD, VCD, DVD, and even CD-R or DVD-R production. Unfortunately, a considerable amount of China's production is once again destined for export. In 2005, infringing product from China has been found in nearly every major market in the world, including (but not limited to): Germany, Italy, Australia, Norway, Belgium, Canada, Mexico,⁵⁵ the United States, Russia, the United Kingdom, the Netherlands, Israel, Paraguay, Lithuania, Singapore, Taiwan, the Philippines, Indonesia, Vietnam, Hong Kong, Malaysia, Thailand, Chile, and South Africa. Some shipments are disguised in container shipments of electronic and other goods or are sent via express mail and courier companies. The known shipments and seizures around the world are, of course, only the tip of the iceberg of the total exports of pirate optical discs from China. China's factories

⁵⁴ In one case, the recording industry requested NCAC to take action against a large fee-charging site claiming to be the largest Chinese music site, against which the industry had filed a formal complaint with NCA in April 2005. The site's web records include false information and the site switched service providers seven times to evade takedown notices. We have no further information on the results of this or other complaints, or whether any of the recording industry cases were dealt with by administrative fines or were referred to the Ministry of Public Security for criminal investigation and possible prosecution.

⁵⁵ The Mexican Association of Gift Producers (AMFAR) reported that during 2005 holidays, nearly 80% of traded merchandise was imported from China through illegal means. *AMFAR: 80% of Chinese merchandise, illegal*, Corporate Mexico, January 18, 2006.



have once again returned to plying the export trade, after enormous enforcement efforts in the late 1990s largely eradicated massive pirate production for export. News also spread in 2005 of China's plans to create its own format of HD-DVD which will not be compatible with any existing player, and that will not be bound by current copy protection.⁵⁶ The prospect of an unprotected format created in China harkens back to the advent of the VCD, a Chinese-invented pirate format, and raises questions about the Chinese Government's will to deal with the piracy issue.

Piracy of Books and Journals: U.S. book and journal publishers suffer from piracy in three key forms—unauthorized photocopying on a commercial scale, illegal printing of academic books and commercial bestsellers, and Internet piracy encompassing online academic and professional journals and sites offering book titles for download. Well known publishers, especially university presses, suffer from trademark infringement as well, with university names and seals reproduced on content bearing no relation to the university and sold at mainstream bookstores such as the Wangfujing Bookstore in Beijing.

Publishers are especially concerned to learn that universities throughout China are actually reproducing books for distribution to students without authorization from, or compensation to, right holders. These practices, often performed at university "textbook centers," are undermining the market for foreign and Chinese books alike. These books are often produced prior to commencement of a university term and held at a separate warehouse, although some textbook centers operate on a print-on-demand basis. Prestigious universities, such as Tsinghua University, Fudan University, Wuhan University, South China Normal University and many more, have undertaken these practices. Some of the universities even produce their own covers for the illegal books, bearing the university seal. These practices are so widespread and organized as to require bar codes for scanning of inventory. The NCA has been alerted to this problem, and IIPA urges it to work with the local copyright bureaus and the universities to ensure that only legitimate books are given the imprimatur of Chinese universities' centralized distribution.

Illegal photocopying, of course, is not limited to university campuses and should be brought under control at copyshops outside universities as well. Furthermore, English language teaching programs often use the prospect of high-quality, color materials to lure students to their after-school programs, but then make and distribute unauthorized photocopies of those materials instead of the originals. IIPA urges the Chinese government to work closely with right holders in 2006 during the applicable raiding and monitoring times (typically February/March and September) to remedy this problem.

Illegal printing of books, which is a more sophisticated endeavor than photocopying, continues to plague publishers in China as well. Whether it appears in the form of a high level technical or medical book that looks exactly like the original, or a cheap bestseller sold under a bridge in Beijing, this type of piracy is devastating the market—not only for foreign publishers but also the Chinese companies that have the legitimate reprint or translation rights to these titles. A quick stroll across a pedestrian bridge outside the Beijing International Book Fair venue

⁵⁶ *China to Develop New Format Based on HD-DVD*, October 7, 2005, at <http://www.msnbc.msn.com/id/9618578/> (reporting a *Xinhua* news agency report).



in September 2005 resulted in easy access to titles such as *The DaVinci Code*, the sixth *Harry Potter* book, and many more. Titles such as these are sold by street vendors throughout major cities and in book markets such as the Tianshuiyuan market in Beijing.

As detailed in previous sections, the burgeoning of Internet use in China has resulted in significant digital piracy problems for the publishing sector, most notably with respect to sites offering download of academic titles and misuse by users of licensed online academic journals. University gateways are often left open to non-subscribers, undermining the ever-popular electronic journals market. Furthermore, the industry has recently run across instances of government institutions engaging in unauthorized delivery of online documents, especially academic journals. In one instance, the Institute of Scientific and Technical Information in China (ISTIC) appeared to be engaging in a practice similar to a document delivery service for journals, without any permission from rights owners. IIPA members are also tracking several sites illegally offering scanned copies of books for peer to peer trading or paid download. The publishing industry is working with authorities to take proper measures against these practices and expects full cooperation from the Chinese government.

Business Software End-User Piracy: Unauthorized use of software within enterprises and government offices in China causes the majority of piracy losses faced by the business software industry. The business software industry also loses revenue due to retail hard-disk loading (as part of the sale of computers), and the production in China (generally for export) of high-quality counterfeit software packages. China made a commitment in the JCCT to complete legalization within all government offices, including provincial and local level government offices, by the end of 2005, and while there have been reports of some software purchases by government offices around China, the level of government purchases would indicate this commitment has not been fulfilled. The industry welcomed China's commitment to extend the legalization program to enterprises (including state owned enterprises) in 2006 and urges the government to complete a plan for the implementation of this commitment and to implement the plan fully in 2006.

Broadcast, Cable and Public Performance Piracy: The unauthorized public performance of U.S. motion pictures continues mostly unchecked in hotels, clubs, mini-theaters and even government facilities. Television piracy, particularly at the provincial and local levels, and cable piracy (over 1,500 registered systems which routinely pirate U.S. product) continue to harm U.S. right holders.

Piracy of Entertainment Software Products: The markets for PC games, console games, and games played on handheld devices continued to grow in China in 2005, but these markets are now dwarfed by the market for online gaming. In 2005, there were an estimated 250,000 Internet cafés in China, with only about one percent of these establishments using licensed entertainment software products. Typically, most cafés purchase one legitimate copy, or use a pirated copy and load it on each computer in the café.

The manufacturing and assembly of cartridge-based handheld games also continues to be a massive problem in China, as the country remains the world's primary producer and exporter of infringing *Nintendo* video game products. In 2005, a total of 244,000 counterfeit



Nintendo products, all originating from China, were seized in 15 countries in Asia, North America, Latin America, the Middle East and Europe. These large export seizures are due to the lack of sustained enforcement against the factories engaged in massive counterfeit production as well as a lack of effective customs inspections procedures to interdict the exports before they leave the country.⁵⁷

In 2005, Nintendo of America (NOA), in coordination with local Chinese administrative bodies, conducted 46 administrative actions and seized over 1.2 million counterfeit *Nintendo* video game products and semi-finished components. These enforcement efforts have been focused in Guangdong Province, the center of counterfeit cartridge game production in China. The Chinese administrative authorities (Administration for Industry and Commerce (AIC) and the Technical Supervision Bureau (TSB)) conducted raids against 10 factories, 21 warehouses and 5 retail operations. One administrative action conducted in late 2005 was successfully transferred to the PSB for criminal prosecution. However, after the defendant fled town, the criminal prosecution was indefinitely put on hold. All enforcement action has been driven by complaints initiated by NOA, as the Chinese authorities have not been willing to undertake self-initiated actions against these pirate and counterfeit operations.

As discussed above, entertainment software publishers also face the growing problem of "offline server" piracy in China.

The Criminal Enforcement System Remains Non-Deterrent: Despite China's promise in the JCCT to increase the number of criminal prosecutions for copyright piracy, little has yet been done. The current criminal system in China continues to operate ineffectively and without deterrence.⁵⁸ Moreover, as discussed below in connection with the copyright law and related laws and regulations, there are on-their-face legal issues of what acts constitute crimes, and what proof meets the criminal thresholds (including, *inter alia*, how to measure harm to meet the thresholds).

Further, there is not one Ministry that takes responsibility for criminal copyright enforcement, including the raid, arrest, seizure, and transfer of a case file for prosecution. Retailers, distributors, warehouse owners, and even pirate producers know that administrative raids will rarely if ever be transferred for criminal prosecution, so they operate for the most part in the open without fear of effective enforcement action, much less effective criminal enforcement. Repeat offenders often pay insignificant administrative fines and thus disregard administrative orders to cease their infringing activities. Unless criminal prosecutions are

⁵⁷ Hong Kong has become a key transshipment point for counterfeit *Nintendo* products. In 2005, it is reported that over 85,000 infringing *Nintendo* products were shipped through the HKSAR.

⁵⁸ We focus on the practical issues related to criminal enforcement, but note that as a political matter, a fundamental issue remains that copyright piracy is still viewed by many in China as a problem to be dealt with administratively rather than in the criminal courts. Administrative enforcement of copyright has been under the auspices of the National Copyright Administration of China (NCA), which is neither properly equipped nor staffed with the resources or personnel to address the large-scale piracy problem in China. The failure to have any one agency in charge, which has the wherewithal to do the job of achieving deterrent enforcement, has led to *ad hoc* approaches to enforcement.



brought, piracy will remain pervasive in the country as mere administrative actions have long been proved to be without a deterrent effect on pirates and counterfeiters.

IIPA has repeatedly stressed the absence of criminal prosecutions. While the Chinese government reports such prosecutions, IIPA and its members are aware of only a very few that have involved U.S. or other non-Chinese works.⁵⁹ One of these cases was the infamous *Guthrie* case (involving a large DVD wholesale piracy ring run by a citizen of the United States). While this case did involve piracy of U.S. product, it is dwarfed by comparison with the organized criminal activities conducted by Chinese citizens, who are rarely prosecuted for their crimes.⁶⁰ We do note, however, that the "special campaign" against Internet piracy appears to be targeting some of the websites/services for criminal prosecution. As discussed below, however, it is not yet clear whether and how the new thresholds will be met to enable criminal prosecution of Internet pirates.⁶¹

It is not yet evident that prosecutors or police will undertake significant criminal prosecution directly for copyright piracy. For example, a major criminal warehouse case in Beijing was finally prosecuted as an Article 225 "illegal business operations" case, notwithstanding that the criminal thresholds for copyright infringement had otherwise been carefully met.

Civil Cases Brought, Including Against Internet Pirates: The copyright industries have fared far better in the civil courts in China.⁶² Unfortunately, the average awards do not come close to compensating the right holder for the injury suffered as a result of the infringement. For example, the average damages awarded in the recording industry cases were about RMB3500 (US\$435) per title, which in the majority of the cases does not even cover legal fees and expenses, much less compensate the right holder for its loss. Moreover, awards for legal fees and costs are usually a small fraction of the actual costs incurred. Documentation requirements to prove copyright ownership and status of the plaintiff are overly burdensome, and ascertaining information regarding defendants sufficient to succeed in these actions is

⁵⁹ Known cases involving foreign product include *In re TONG Yaxi* (People's Court of Yuzhong District, Chongqing, August 12, 2005), which involved U.S. motion picture product, and *In re Li WENHU, CHEN, SU, ZHONG*, which involved the Belgian literary works *Tintin* (the author's representatives were reportedly very active in pursuing this case).

⁶⁰ *In re Randolph Hobson GUTHRIE III, Abram Cody THRUSH, WU Dong and WU Shibiao* (Shanghai No. 2 Intermediate Court, April 19, 2005).

⁶¹ In October 2005, the Supreme Court and the Supreme People's Procuratorate issued a clarification to the JIs, specifically stating that transmission over the Internet of sound recordings falls within Article 217 of the Criminal Code and the JIs. IIPA hopes that this change sets the stage for far greater numbers of prosecutions in Internet copyright-related cases, involving sound recordings as well as other works. It is reported that in November 2005, the Guangdong Public Security Bureau raided an Internet café, seizing the equipment and arresting two suspects operating a website which was alleged to have offered thousands of songs for download over the Internet. Investigations are ongoing and it is unclear whether this case will be referred to the People's Procuratorate for criminal prosecution.

⁶² Since 2002, the motion picture industry has brought ten civil cases, four against factories and six against retail outlets in Shanghai. All these cases were concluded successfully. The record industry has recently shifted the focus of its civil cases to Internet piracy, filing 87 civil cases against Internet infringers since 2003. As of January 2006, 61 cases have been concluded, 59 successfully, while another 26 cases remain pending.



difficult, as the domain name or other registration information for these Internet operators is usually inaccurate or incomplete. Additional burdens are imposed by the Chinese court's requirement on who may act as the "legal representative" of a party. Under these provisions, courts have even required the chief executives of major multinational corporations to appear in person to prove, for example, copyright ownership and subsistence.

MARKET ACCESS AND RELATED ISSUES

It has been more than four years since China joined the World Trade Organization, but IIPA is still waiting for China to make good on a number of commitments it made in that agreement to open its market. Failure to meet these commitments significantly harms U.S. right holders who would like to do business in China, and subjects China to potential dispute settlement claims over its failure to meet its present obligations.

Beyond its existing commitments, however, it is time that the Chinese Government recognized the inherent connection between the absence of effective market access for copyright products and rampant copyright piracy. It is bad policy at best, and duplicitous at worst, for the Chinese Government to impose suffocating market access restrictions on the U.S. recording, motion picture, entertainment software, and book publishing industries, thereby depriving its own consumers of access to a legitimate supply of copyright materials. This directly aids the pirates in defying the law – the copyright law, the censorship laws and the tax laws.

Ownership/Investment Restrictions (MFN): The Chinese Government does not allow foreign sound recording producers, motion picture companies (for theatrical and home video, DVD, etc. distribution), or entertainment software publishers to enter the Chinese market except as a partner in a minority-share (up to 49%) joint venture with a Chinese company. In a positive development, ownership restrictions on cinemas have been lifted slightly, providing up to 75% foreign ownership in Beijing, Shanghai, Guangzhou, Chengdu, Xi'an, Wuhan and Nanjing, compared to 49% everywhere else. However, foreign-owned companies may not operate those cinemas in China. In the television sector, wholly or jointly foreign-owned companies are strictly prohibited from investing in the broadcast industry.

Censorship (National Treatment): Chinese censorship restrictions delay or prevent copyright owners from providing legitimate product to the market in a timely fashion. For example, Chinese government censors are required to review any sound recording containing foreign repertoire before its release, while domestically produced Chinese repertoire is not censored (and, of course, pirate product is uncensored). China should terminate this discriminatory practice which violates the basic tenet of national treatment – that foreign goods will be treated on equal footing with domestic goods.

Entertainment software companies face lengthy delays in the censorship (approval) process in China, wiping out the market window for legitimate distribution of an entertainment software product (this window is usually shorter for entertainment software titles than for other works). Each entertainment software title must go through an approval process at the General Administration of Press and Publications (GAPP), which takes several weeks to several months. As has been committed for other industries, and consistent with the JCCT outcome, the



Chinese Government should rid the market of pirated game titles which are still under GAPP review. Another serious concern involves the creation of an apparently new approval process with the Ministry of Culture for online versions of games. Since the business model for entertainment software involves games to be played on all kinds of platforms, including computers, consoles, handheld devices, and the Internet, there is no reason for two reviews.⁶³ The review function should be lodged with only one agency, either the GAPP or the MOC. Video games distributed on physical optical disc media also increasingly have an online component. Two separate content review processes before two different agencies would be burdensome, adding not only additional costs but also further delay in releasing new product into the market. Further, transparency in the review process is sorely needed.

Restrictions on Investigations (National Treatment): Restrictions on the ability of copyright industries' representatives in China to investigate the activities of pirates in China greatly hamper efforts and create a *de facto* restriction on the ability of copyright owners to do business and enforce their rights in China.

Recording Industry: Record companies are prevented from developing talent in China and from getting legitimate product quickly to market. The fact that U.S. record companies cannot "publish" or release a recording without permission of a state owned company, and cannot manufacture, distribute or engage in retailing of their products, artificially segments China's market, making it extraordinarily difficult for legitimate companies to participate effectively. U.S. record companies are skilled at and desirous of developing, creating, producing, distributing and promoting sound recordings worldwide.⁶⁴ The universal experience of nations in which the international record companies do business is that local artists have expanded opportunities to have their music recorded and distributed widely. The in-country presence of U.S. companies also has brought jobs and expertise in a wide variety of areas. China should permit U.S. (and other foreign) sound recording producers to engage in:

- the integrated production, publishing and marketing of sound recordings.

⁶³ IIPA notes as a general trend that inconsistencies in the laws and regulations in China are beginning to appear (and have detrimental market effects) in the handling of copyright material in traditional media versus content on the Internet. The State Council was long ago charged with creating Internet policy, but several agencies have gotten into the fray (e.g., the State Secrecy Bureau's announcement in January 2000 that all websites in China were to be strictly controlled and censored). Ministry of Culture Regulations require that providers of Internet-based content (with any broadly defined "cultural" attributes) receive MOC approval prior to distribution in China. SARFT also claims some censorship role on the Internet. In addition, from a technological standpoint, China maintains firewalls between China and foreign Internet sites to keep foreign media sites out of China, and regularly filters and closes down Chinese sites that are seen as potentially subversive; the IIPA website was unavailable for a long period of time in China (it is unknown whether it is available now). In September 2002, for example, both the Google and Alta Vista search engines were blocked without explanation or acknowledgement by the Chinese Government.

⁶⁴ The work of these companies encompasses a wide range of activities, including developing and investing in state of the art recording, mastering and engineering facilities; identifying and training talented singers, songwriters, composers, and musicians; promoting and advertising acts and recordings; establishing efficient and competitive distribution systems to take products from recording studio to replicator to wholesalers to retailer; and using global arrangements and distribution services to release products in markets outside the local market. U.S. record companies have long sought to bring these skills to China to develop and record Chinese artists for the Chinese market and for export.



- replicating, distributing, and retailing sound recordings (at present, these activities must be performed by other companies, which segments industry activity and drives up costs; even Chinese sound recording producers may not engage in these activities, meaning all musicians, including Chinese, who record in China operate at a competitive disadvantage with those recording music outside China).
- production, publication and marketing their own recordings in China and direct importation of finished products (at present, a U.S. company must (1) license a Chinese company to produce the recordings in China or (2) import finished sound recording carriers (CDs) through the China National Publications Import and Export Control (CNPIEC)).

China should also permit foreign-owned record companies to release sound recordings in China.

Motion Picture Industry: There has been no change to the current severe restrictions on market access for motion pictures. These include the following:

- **Onerous and Indefensible Import Quota for Theatrical Release of Films:** Under the terms of China's WTO commitment, China agreed to allow 20 revenue sharing films (theatrical release) into the country each year. However, the Chinese have stated that 20 is a "maximum," not a "minimum," an interpretation of its commitment which is not justified and should be corrected. Censorship and the monopoly import structure (described below) are the tools by which this quota is imposed and enforced. Demonstrably unfair contractual conditions still prevail for theatrical-release motion pictures in China, ensuring that the film distributor/studio gets only a small proportion of the box office compared to what they would get if the market were opened.
- **Cutting the Screen Quota for Foreign Films:** SARFT regulations require that foreign films occupy less than one third of the total screen time in cinemas. Even where foreign blockbusters are allowed into China under the film quota system, the screen quota then mandates that the distributor restrict the number of prints available to cinemas.
- **Monopoly on Film Imports and Film Distribution:** China Film continues to be one of the entities holding a state-enforced monopoly on the import of foreign films. China Film held the sole monopoly on the distribution of foreign films until "Huaxia Distribution" was authorized by SARFT to be a second distributor of imported films in August 2002.⁶⁵ Like China Film, Huaxia is beholden to SARFT and its operations are virtually transparent to China Film, thwarting any real competition between the two. Foreign studios or other distributors cannot directly distribute revenue-sharing foreign films.
- **Restricted Market Access for Foreign Satellite Signals:** Foreign satellite channels may only be shown in three-star hotels and above and in foreign institutions. Moreover, foreign satellite channels beaming into China are required to uplink from a government-owned satellite for a fee of US\$100,000, placing a significant and unnecessary financial burden on satellite channel providers. Further, foreign satellite channels are not allowed carriage on local cable networks without government approval or landing permits. Offending news items on sensitive subjects in China are still routinely blacked out by officials who monitor all

⁶⁵ Huaxia is a stock corporation with investment from over 20 shareholders, the largest of which is SARFT, with over 20%, then China Film, Shanghai Film Group and Changchun Film Group, each with about 10%.



broadcasts over the national satellite system. Only a handful of foreign channels have been granted approval, and carriage is currently limited to Guangdong province.

- **Broadcast Quotas, Content Restrictions, and Restrictive License Practices for Satellite Channels:** SARFT's "Regulations on the Import and Broadcasting of Foreign TV Programming" effective October 23, 2004, sets severe quotas on the broadcast of foreign content (e.g., no more than 25% of all content broadcast can be foreign films or television dramas, with a 0% allowance during prime time).⁶⁶ The China TV Program Agency under CCTV must approve all importation of foreign programming under the guidance of SARFT. The Chinese have also issued regulations restricting who can invest and what kinds of programs can be produced in China, again with the aim of severely restricting foreigners' ability to operate in China, and restricting the kinds of content to be permitted (of course, this belies the fact that pirate content comes in unfettered, unregulated, and uncensored).⁶⁷
- **Black-Out Periods:** The Chinese government has decreed "black-out periods" (during which no new revenue sharing blockbuster foreign films may be released) in an effort to restrict competition with Chinese films being released in the same period. This ban artificially drives down foreign right holders' theatrical revenues and contributes to increased piracy, as pirates meet immediate consumer demand for major foreign titles by offering illegal downloads through the Internet, pirate optical discs, and pirate video-on-demand channels.
- **Local Print Production Requirement:** China Film continues to require that film prints be made in local laboratories, reducing right holders' ability to control the quality of a film copy and potentially resulting in increased costs.
- **Import Duties Should be Based on Value of Physical Media:** Import duties on theatrical and home video products may be assessed on the potential royalty generation of an imported film, a method of assessment which is excessive and inconsistent with international practice of assessing these duties on the value of the underlying imported physical media.

Book Publishers: Publishers must be, but are not, afforded full trading rights (the right to freely import directly into China), and must be permitted to engage (with wholly owned companies) in wholesale and retail distribution activities. There was some question as to whether China fulfilled some of these commitments with its 2004 Foreign Trade Law, which went into effect on July 1, 2004. It now appears that this law did little to rectify the problem. Regulations subsequent to the law, promulgated in August 2005, have not been released to the public, contributing to the ongoing transparency problem in China. Statements from the Chinese government about these regulations, however, indicate that they tightened rules on private

⁶⁶ Broadcast of foreign film and television dramas may not comprise more than 25% of total air time each day and 0% during prime time on any channel other than pay television, without SARFT approval. Other foreign programming (news, documentaries, talk shows, travel shows, etc.) is restricted to no more than 15% of total air time each day. Foreign animation programming may not exceed 40% of total animation programming delivered by each station; and to further complicate matters, only producers of domestic animation programming can import foreign animation programming and no more than an equal share of what they produce.

⁶⁷ The "Interim Management Regulations on Sino-Foreign Joint Ventures and Sino-Foreign Cooperative Television Program Production Enterprises," effective November 28, 2004, sets out the 49% minority joint-venture restriction for "production ventures"; investment requirements of foreigners; licensure requirements; requirements that foreign partners must be "specialized radio or TV ventures"; restrictions on access to non-media investors; and perhaps most important from a content perspective, requirements for use of "Chinese themes" in two-thirds of the programming.



ownership of publishing functions, if anything. U.S. publishing companies have been told that they may not import other than through licensed import agencies and that they may not hold their own stock for distribution in China. It appears that foreign publishing companies are allowed to engage in distribution of Chinese-produced materials, but this does most foreign publishing companies little good, considering they are prohibited from producing materials in China. Core publishing activities such as editorial and manufacturing work, printing, and obtaining International Standard Book Numbers (ISBNs) remain off limits to foreign companies. Restrictions on these activities result in greater expense to publishers and consumers alike, and discourage development of materials prepared specifically for the Chinese market. These restrictions also create delays in distribution of legitimate product in the Chinese market, opening the door for pirate supply. Finally, restrictions and high fees related to access to foreign servers result in high costs to publishers of electronic materials (such as academic and professional journals) in making their products available in China, resulting in fewer, lower quality options available to Chinese scholars and students.

TRAINING AND PUBLIC AWARENESS

MPA, IFPI and BSA have undertaken hundreds of training and awareness programs throughout China in 2005. The trainings have involved police, prosecutors, judges, customs officials and administrative agency enforcement personnel. Training and awareness has always been a high priority for the copyright industries in China.

COPYRIGHT LAW AND RELATED ISSUES

Previous years' reports have gone through the legislative landscape in China in detail. The following is intended to provide a summary of latest developments only.

Draft Transfer Regulations: On June 29, 2005, the Supreme People's Procuratorate along with the National Office for Rectification and Standardization of the Market Economic Order, Ministry of Public Security, and the Ministry of Supervision in accordance with the State Council's Regulations on the Transfer of Suspected Criminal Cases by Administrative Law Enforcement Organs, issued draft "Regulations on the Timely Transfer of Suspected Criminal Cases in the Enforcement of Administrative Law." It is hoped that final issuance of these regulations will in fact lead to more and speedier criminal referrals. IIPA commented on these draft regulations and noted, *inter alia*: 1) it is essential that the regulations allow for "on the spot" criminal referrals where there is a "reasonable suspicion" that the infringer has performed acts which, upon further investigation, would meet the criminal thresholds (not when the administrative body determines the threshold has been met, as the draft currently indicates);⁶⁸ 2) because the most critical decision in China's enforcement system is whether the "thresholds" have, or have not, been met, the regulations should include a repetition of the various elements of the 2004 JIs so that administrative organs, the PSB and the SPP, have one single term of

⁶⁸ Since the administrative organs do not have the kind of investigative authority that resides in the PSB and the SPP, or the ability to detain suspects or to secure information effectively from suspected pirates that would provide evidence that would help prove that the thresholds have been met, IIPA believes the "test" for when the PSB or SPP gets involved in a case initially commenced by an administrative organ should not be so strict.



reference.⁶⁹ The effectiveness of these regulations will be judged by whether they lead to a greater number of prosecutions of criminal copyright cases, and whether foreign right holders can expect the Chinese Government to refer significant numbers of criminal cases in the future.

Issuance of New “Regulations for Protection of Copyrights on Information Networks” Is Needed to Confirm Protection of Digital Rights, and Foster Stronger Cooperation by ISPs in the Fight Against Internet Piracy: Two sets of Draft Regulations for Protection of Copyrights on Information Networks, intended to implement Article 58 of the Copyright Law of the People's Republic of China (2001), were issued, first on August 1, 2005, and then again, after revisions following comments, including by IIPA, on September 8, 2005.⁷⁰ Unfortunately, the revised draft was weaker in a number of areas. Overall, IIPA's chief concerns with the September 8 draft include the following (among other concerns identified):

- **Coverage of Temporary Copies:** The draft regulations should re-insert protection for reproductions, including temporary reproductions (the definition was deleted in the September 8 draft).
- **Communication to the Public Must Include Full “Making Available” Right (Not Just Right of “Upload”):** The definition of “communication to the public” should extend to all communications “whether by wire or wireless means, including the making available to the public of the work/sound recording in such a way that members of the public may access the work/sound recording from a place and at a time individually chosen by them.” While the Article 3 description of “communication to the public” appears broad, the next clause, read strictly, could limit the right to the act of “uploading,” which would be insufficient to meet the WCT and WPPT standards.
- **Technological Protection Measures:** The treatment of technological measures does not measure up to the standards required by the WCT and WPPT. Devices and services are not covered (as they were in the prior draft); copy controls are not clearly covered; exceptions to the prohibition against circumvention remain overbroad; the prohibition against right holders using what the draft terms so-called “inappropriate” technological measures must be deleted, as should associated requirements to disclose TPMs (and penalties related to both).
- **Service Provider Liability:** Provisions on the liability of service providers and limitations on such liability are improved from the August draft, since the limitation on remedies (compensation) will preserve the possibility of a right holder seeking injunctive relief against a service provider that does not take down infringing content. It is important that 1) the ISP qualify for the safe harbor only if it does not know of infringements (provided in the current draft) or if it “is not aware of facts from which infringement is apparent” (not in the current draft); 2) the ISP “expeditiously” takes down material once becoming aware of “such facts” (the time period in the draft is five days, which is too lengthy); 3) the notification can be

⁶⁹ The Regulations allow for the Procuratorate or the local police to become involved in a criminal investigation, but many important terms which determine whether the police or Procuratorate get involved, such as “complicated” and “large amount of money” (Article 10), “very significant,” “complicated,” “difficult” (Article 11), and “very significant and have great impact” (Article 12), are vague and left undefined.

⁷⁰ IIPA understands that it is intended that these regulations when finally promulgated will supersede the April 30, 2005 NCAC and Ministry of Information Industry (MII) “Administrative Measures on Protecting Copyright on Internet.” Those Measures contain various rules as to notices to ISPs and takedown of infringing materials from the Internet. While those Measures contain some problems, and remain in force as of this writing, we focus in this report on the draft regulations since they will apparently supersede the Measures.



made by a right holder representative (the draft says "the right holder"); 4) in lieu of the actual URL, information sufficient to locate the infringing site should be adequate to make a notice valid; 5) a notice should be valid if it "substantially" complies with the requirements; and 6) Article 16 allows a right holder to request the ISP to identify the user.

The Criminal Law Should be Amended to Cover All "Commercial Scale" Piracy: Articles 217 and 218, the criminal piracy articles of the Criminal Law of the People's Republic of China (1997), fail to cover all possible commercial scale piracy, and as such, these provisions violate TRIPS Article 61. In addition, China is one of the only countries in the world that requires proof that the act in question was undertaken with the "purpose of reaping profits," and is the only country we know of that has a threshold ("gains a fairly large amount" or "when the amount of the illicit income is huge") for criminal liability calculated based on pirate profits or income.⁷¹ China should remove the "purpose of reaping profits" standard since commercial scale piracy can be, and in the digital age often is, engaged in without any purpose of reaping profit (e.g., on a P2P Internet site where no money is exchanged). The criminal provisions also need an update to take into account the WCT and WPPT (WIPO "Internet" Treaties), which China has promised to adhere to in 2006. Thus, we propose that Article 217 be amended to achieve the following, among other things: (1) expressly criminalize end-user piracy; (2) add the TRIPS-required reference to all the exclusive rights now provided in the law (and include the WIPO treaties rights and importation); (3) criminalize violations of the anti-circumvention and rights management information provisions; (4) remove "purpose of reaping profits" to criminalize offenses that are without profit motive but that have a "commercial scale" impact on right holders; (5) eliminate distinctions between crimes of entities and individuals; and (6) increase the level of penalties overall. China must also make good on its promise to criminalize the importation and exportation of pirate product (under the JIs such acts are actionable under "accomplice" liability, but the penalties available are much lower and generally non-deterrent).⁷² We also note that the JI provisions on repeat offenders, while included in the 1998 JIs, were not included in the 2004 JIs; we seek confirmation that the recidivist provision in the 1998 JIs remains intact, since it is not inconsistent with the 2004 JIs.⁷³

Criminal Thresholds Should be Lowered or Abolished Entirely: The 2004 Supreme People's Court JIs still leave thresholds too high. The 2004 JIs made only minimal decreases in the monetary thresholds and leave in place calculation of "gain" or "illicit income" at pirate prices. Further, to date copyright owners have not found that the copy thresholds (1,000, 3000, and

⁷¹ As noted below, the new JI set forth what "other serious circumstances" and "other particularly serious circumstances" are, but nonetheless, as the alternative thresholds such as the per copy thresholds may be difficult to meet even where commercial scale piracy exists, China should instead choose to modernize its criminal provisions by removal of these vague standards or by significantly lowering the thresholds.

⁷² In the JCCT, the Chinese Government committed that the Chinese Ministry of Public Security and the General Administration of Customs would issue regulations "to ensure the timely transfer of cases [involving pirate exports] for criminal investigation." The JCCT outcomes indicate that the "goal of the regulations is to reduce exports of infringing goods by increasing criminal prosecution." A draft has not emerged although IIPA understands that one is due in mid-2006.

⁷³ According to Article 17 of the 2004 JI, "[i]n case of any discrepancy between the present Interpretations and any of those issued previously concerning the crimes of intellectual property infringements, the previous ones shall become inapplicable as of the date when the present Interpretations come into effect."



5,000) have proven helpful in generating new criminal prosecutions, although copy thresholds could be helpful if lowered significantly (in 2004, IIPA had proposed 50 copies of software or books and 100 copies of recorded music or motion pictures for criminal liability, and twice this number for more serious offenses; the Supreme People's Court adopted a number 30 to 60 times higher than what IIPA proposed). A copy threshold is not even available in Article 218 "retail" cases, so that only the monetary thresholds apply in those cases (which are more difficult to meet particularly since they are measured at pirate prices). A new challenge is how to meet the threshold in the case of Internet infringement. The severity of Internet piracy clearly calls for adjustments to the thresholds in the JIs so that Internet piracy, when on a commercial scale, is actionable even if pirate profit is not proved.

China Should Adopt an Anti-Camcording Criminal Provision: A vast number of movies are stolen right off the screen by professional camcorder pirates, who use video cameras to illicitly copy a movie during exhibition in a movie theatre – usually very early in its theatrical release or even prior to the film's release (e.g., at a promotional screening). These copies are then distributed to bootleg "dealers" throughout the world and over the Internet. China should take whatever legislative steps are necessary to criminalize camcording of motion pictures.