



September 20, 2007

By E-MAIL to fr0713@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, 72 Fed. Reg. 40905 (July 25,
2007)

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 25, 2007 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 (Pub. 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 27, 2007 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 12, 2007,¹ as part of IIPA's filing in the annual Special 301 process.

¹ As amended on February 27, 2007.



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).²

On January 30, 2007, the IIPA released an economic report entitled *Copyright Industries in the U.S. Economy: The 2006 Report*, the eleventh study written by Stephen Siwek of Economists Inc. This report details the economic impact and contributions of U.S. copyright industries to U.S. Gross Domestic Product, employment, and trade. The latest data show that the "core" U.S. copyright industries³ accounted for an estimated \$819.06 billion or 6.56% of the U.S. gross domestic product (GDP) in 2005. These "core" industries were responsible for 12.96% of the growth achieved in 2005 for the U.S. economy as a whole (this means that the growth contributed by these core industries (12.96%) was almost double their current dollar share of GDP (6.56%)). In addition, the "core" copyright industries employed 5.38 million workers in 2005 (4.03% of U.S. workers) in 2005. The report, for the first time, provides data on the estimated average annual compensation for a worker in the core copyright industries: \$69,839 in 2005, which represents a 40% premium over the compensation paid the average U.S. worker. Finally, estimated 2005 foreign sales and exports of the core copyright industries increased to at least \$110.8 billion, leading other major industry sectors. Those sectors include: chemicals and related products (not including medicinal and pharmaceutical products); motor vehicles, parts and accessories; aircraft and associated equipment; food and live animals; and medicinal and pharmaceutical products.

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.

² 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, at www.iipa.com.

³ The "total" copyright industries include the "core" industries plus those that, under conservative assumptions, distribute such products or other products that depend wholly or principally on copyrighted materials. The "core" copyright industries are those that create copyrighted materials as their primary product. *The 2006 Report* is posted on the IIPA website at <http://www.iipa.com>.



That MOU obliged China to protect copyright in line with international standards in place at the time.

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 some of the most onerous market access barriers -- due both to very high piracy rates and a myriad of stringent market access restrictions -- of any major sector of the U.S. economy. Despite 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 85%-90% of the market in virtually all copyright sectors and U.S. 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 losses to these industries in China exceeded **\$2.4 billion** in 2006.⁵

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.

⁵ This loss number does not include losses due to piracy of motion pictures or entertainment software for which 2006 data was unavailable. See <http://www.iipa.com/pdf/IIPA2007TableofEstimatedTradeLossesandPiracyLevelsfor2006ASIA060607.pdf>



PEOPLE'S REPUBLIC OF CHINA
Estimated Trade Losses Due to Copyright Piracy
(in millions of U.S. dollars)
and Levels of Piracy: 2002-2006⁶ (Updated June 2007)

INDUSTRY	2006		2005		2004		2003		2002	
	Loss	Level								
Motion Pictures ⁷	NA	NA	244.0	93%	280.0	95%	178.0	95%	168.0	91%
Records & Music ⁸	206.0	85%	204.0	85%	202.9	85%	286.0	90%	48.0	90%
Business Software ⁹	2172.0	82%	1554.0	86%	1488.0	90%	1787.0	92%	1637.3	92%
Entertainment Software ¹⁰	NA	NA	589.9	92%	510.0	90%	568.2	96%	NA	96%
Books	52.0	NA	52.0	NA	50.0	NA	40.0	NA	40.0	NA
TOTALS	2430.0		2643.9		2530.9		2859.2		1893.3	

As the result of market access barriers and rampant piracy, the United States is being 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 extraordinary levels of 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 high 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 “safe harbor” within which pirates can operate with little risk to their illegal business other than small, largely meaningless, administrative fines or short-term store closures. These thresholds render China in clear violation of its WTO TRIPS obligations to criminalize acts of “copyright piracy *on a*

⁶ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2007 Special 301 submission at www.iipa.com/pdf/2007spec301methodology.pdf. For information on the history of China under Special 301 review, see Appendix D at (<http://www.iipa.com/pdf/2007SPEC301USTRHISTORY.pdf>) and Appendix E at (<http://www.iipa.com/pdf/2007SPEC301HISTORICALSUMMARY.pdf>) of this submission.

⁷ MPAA's trade loss estimates and piracy levels for 2006 are not yet available. However, such numbers will become available later in the year and, as for 2005, will be 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 the 2006 loss numbers and piracy levels become available, they will be posted on the IIPA website, <http://www.iipa.com>.

⁸ 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.

⁹ BSA's 2006 statistics are preliminary. They represent the U.S. publishers' share of software piracy losses in China, 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. BSA's 2005 piracy statistics were preliminary at the time of IIPA's February 13, 2006 Special 301 filing; the 2005 data was revised and posted on the IIPA website in September 2006 (see <http://www.iipa.com/statistics.html>), and the 2005 revisions (if any) are reflected above.

¹⁰ 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.



commercial scale.” Moreover, Chinese authorities almost never initiate criminal proceedings even when the thresholds are exceeded.

Responding to pressure from trading partners, China lowered the criminal liability thresholds in 2004, suggesting they were intending to be responsive to China's April 2004 JCCT commitments “to significantly reduce IPR infringements.” Apparently realizing that the thresholds still remained too high after 2004, some of the thresholds were again reduced by half on April 4, 2007, just before the U.S. government, on April 10, commenced WTO consultations on the threshold issue. While this information is virtually impossible to come by, in the almost six years that China has been a WTO member, IIPA is aware of no more than six criminal cases under Articles 217 and 218 of the Criminal Law having been concluded involving U.S. copyrights and only about five to ten more criminal cases involving copyrights of other WTO members. Given the magnitude of the piracy problem, no conceivable interpretation of China's TRIPS obligations can render this record as TRIPS-compliant. Because of the continued high thresholds in the Criminal Law and a lack of prosecutions in-practice, it is clear that foreign right holders do not enjoy a WTO-compatible criminal remedy in China.

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,” in violation of Articles 41 and 61 of the TRIPS agreement.

Finally, in its WTO TRIPS case initiated earlier this year, the U.S. government also identified as a TRIPS violation that Article 4 of the Chinese Copyright law, which provides that works which are prohibited from being distributed in China shall not be protected under the Copyright Law of the PRC.

With respect to market access, China also has failed to implement its clear WTO commitments in several ways. A number of WTO-incompatible measures have been identified in the U.S. government's recent requests for consultations to the WTO: (a) claims involving the failure to afford trading rights (the right to freely import or export without going through a government monopoly) to imported films for theatrical release, audiovisual home entertainment product, sound recordings and book and journal publications; (b) measures that restrict market access for, or discriminate against, foreign suppliers of audiovisual services (including distribution services) for audiovisual home entertainment product and that discriminate against foreign suppliers of distribution services for publications; (c) measures that provide less favorable distribution opportunities for foreign films for theatrical release than for domestic films; and (d) measures that provide less favorable opportunities for foreign suppliers of sound recording distribution services and for the distribution of foreign sound recordings than are provided to like service suppliers or like products. Beyond those barriers which are the subject of the WTO case, there are other significant barriers affecting the filmed entertainment, music and recording, the book and journal publishing industry and the entertainment software industry. Many additional barriers, which were unfortunately not addressed under China's WTO accession terms, continue to produce nearly insurmountable hurdles to legitimate market entry for U.S. and



foreign right holders, thus contributing to and exacerbating the effects of the 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 six years after China's WTO accession, have resulted in a number of additional Chinese commitments, including the commitment to "significantly reduce IPR infringements." However, more than three years after the Chinese authorities made this commitment, piracy rates are only marginally lower for some industries and the same or worse for others.

B. OBSERVATIONS ON THE JCCT PROCESS – 2004-2007

Before discussing the WTO issues, IIPA wishes to comment on the bilateral negotiating process between the U.S. and China. 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 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 improved 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, and again in 2007, as mentioned.

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 its comments¹¹ 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 amended (December 2004) Supreme People's Court's "Judicial Interpretations" ("JIs") left unanswered

¹¹ 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.



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 late 2004/early 2005. 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, 2005.¹² 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."¹³ BSA noted its approval¹⁴ 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.¹⁵ 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 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

¹² 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.

¹³ 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).

¹⁴ 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>.

¹⁵ 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.



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 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 of the 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 the commitment that government agencies would 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. However, Chinese authorities did not agree to software industry calls for effective software asset management systems inside government ministries in the JCCT process, and this 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 fines or criminal punishment ultimately meted out in such cases.

This 2006 JCCT meeting, from a copyright industries' viewpoint, was primarily devoted to ascertaining the level of implementation of prior commitments, with the exception of the commitment to load legal operating system software on all computers made in China. There were immediate gains from the implementation of this commitment and sales have increased for U.S. software companies. BSA reported a 65% compliance rate by November 2006. On government legalization, a draft implementation plan was issued but there are no reports of it being finalized and an effective software asset management system has yet to be put into place. Criminal cases against optical disc (OD) plants were also discussed, but IIPA still has no report of any criminal case brought against any of the 14 OD factories raided in 2006 and there has been no progress on cooperation between the Chinese government and the International Federation of Phonographic Industries (IFPI) in the area of OD forensics. The discussion on ridding the consumer markets of pirate goods resulted in the 2006 "100 day campaign" and while raiding of retail shops was intense, a 2007 survey conducted by the motion picture and recording industries after the campaign showed little, if any, progress in terms of increased legitimate sales in the marketplace.

At the end of 2006 and into 2007, there were reports of criminal cases having been concluded involving pirate servers for popular Korean videogames and the PSB reported that up to 48 Internet piracy criminal cases were pending. We have been unable to ascertain to date whether U.S. videogames were involved or whether any of these cases has been concluded.



Notwithstanding the possible up-tick in Internet cases, as noted, we have been able to identify only six criminal cases since China joined the WTO involving U.S. works and perhaps five to ten more involving the works of other WTO members. Given the severity of the piracy problems in China, the bringing of on average roughly one criminal case per year involving copyright piracy of U.S. works simply cannot be deemed to be in compliance with China's TRIPS enforcement commitments.

The growing problem of Internet piracy, including in Internet cafés, has yet to be dealt with comprehensively in the JCCT process and IIPA hopes that this topic will be included on the JCCT agenda. While there have been many takedowns by ISPs of pirate sites, following the adoption in July 2006 of new Internet Regulations, compliance rates are still unacceptable and the problem has grown worse. The National Copyright Administration of China (NCAC) has taken administrative actions against pirate websites but we have not yet heard of it fining an ISP that has refused or delayed takedowns. There have also been other problems involving the Internet which are mentioned below in the discussion of market access barriers.

The publishing industry reports some uneven progress in securing administrative enforcement against "textbook centers" run on the campuses of many of China's major universities. The industry's efforts to secure these actions are detailed in IIPA's 2007 Special 301 report. However, textbook piracy remains one of the several large problems faced by the industry in China, including at many of China's universities. Reports of seizures of pirate books abound in the Chinese press. It is impossible, of course, to know whether U.S. works are involved in any of these reported actions.

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. In addition, the Chinese Government has not only 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. The promise made by China over three years ago in the April 2004 JCCT¹⁶ 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.

¹⁶ 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>.



C. CHINA'S COMPLIANCE WITH ITS WTO TRIPS COMMITMENTS

For the sixth year in a row, IIPA must report, unfortunately, little positive development regarding China's efforts to develop an effective and deterrent criminal copyright enforcement system, as required under its WTO TRIPS Agreement obligations. Our conclusion this year – the same as in the five prior years (2002,¹⁷ 2003,¹⁸ 2004,¹⁹ 2005²⁰ and 2006²¹ – is that the same two primary problems – rampant copyright piracy²² and stifling market access barriers (for most industries) – have kept China's market largely closed and have prevented copyright owners from benefiting from China's accession to the WTO.

The IIPA coalition, however, takes no position regarding the current WTO cases on intellectual property and market access which the U.S. government is preparing against China. However, several member associations of the IIPA are working with the U.S. government to support these WTO cases, and have combined to form another coalition known as the China Copyright Alliance (CCA), which includes the Association of American Publishers (AAP), the International Film & Television Alliance (IFTA), the International Federation of the Phonographic Industry (IFPI), the Motion Picture Association of America (MPAA) and the Recording Industry Association of America (RIAA). along with the Art Copyright Coalition (ACC).

¹⁷ 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.

¹⁸ 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." 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.

¹⁹ 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.

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

²¹ See <http://www.iipa.com/pdf/IIPA%20CHINA%20TPSC%20WTO%20Compliance%20Written%20Comments%20FINAL%2009212006.pdf>.

²² 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 2006 remained in the 85-95% range for most of the industries. The industries collectively estimated \$2.4 billion in estimated trade losses due to piracy in China in 2006, not including loss data from the motion picture and entertainment software industry which was unavailable for the 2007 Special 301 submission.



In IIPA's comments and testimony to the TPSC last year, we noted a number of areas where China fails to meet minimum TRIPS obligations. None of these failures have been remedied and on April 10, 2007, the U.S. government requested consultations in the WTO under its dispute settlement mechanism on a few of these TRIPS incompatibilities. The U.S. government also requested consultations on a range of market access issues as well which affect the motion picture, recording and publishing industries.

Last year in this proceeding, IIPA identified certain TRIPS deficiencies which are not part of the U.S. government's WTO case:

- 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 constitute a deterrent to further infringements." There is no question but that the Chinese system does not provide remedies against copyright infringement that "constitute a deterrent to further infringements."
- Furthermore, with the small number of criminal cases pending or concluded, particularly for a country of China's size and levels of piracy, it cannot be said that China applies criminal remedies against "copyright piracy on a commercial scale" as required by TRIPS Article 61. Even major pirates in China, generating millions of dollars in illicit profit, do not feel deterred by the small administrative fines imposed on them when they are discovered. The absence of actual criminal cases with deterrent penalties puts China in violation of its obligations under TRIPS Article 61.
- 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" sought to change this result, though doing so without legislative change leaves coverage incomplete in our view, since it criminalizes only the companies that engage in import, and then, only as accomplices), bootlegging of performances, rental rights, and other rights. While these Criminal Law Articles are deficient on their face or "as such," there seems to be no political will in the National People's Congress to introduce amendments to correct this violation of TRIPS Article 61.

In the U.S. government's Request for Consultations of April 10, 2007, the U.S. cited a number of Chinese measures which it believes constitute violations of the TRIPS Agreement. These are "as such" claims that challenge these measures "on their face." Consultations were held on June 7-8, 2007, and on August 13, 2007, the U.S. government requested the establishment of a dispute settlement panel. At the August 31, 2007 meeting of the WTO's



Dispute Settlement Body (DSB), the Chinese government blocked the establishment of a panel, as they have the right to do. However, at the September 25, 2007 DSB meeting, the U.S. is likely to once again request a panel, and the Chinese government will not be able to block the panel's formation which will commence on that date.

The panel, when formed, will consider whether Chinese law, regulations and other measures violate the TRIPS Agreement in the following areas:

- The first request challenges the quantitative “thresholds” in China’s criminal law²³ that must be met in order to commence a criminal prosecution and for the acts in question to constitute a criminal offense. These thresholds insulate a vast array of pirate activity from criminal prosecution, conviction and penalties that clearly constitute “copyright piracy on a commercial scale” under TRIPS Article 61. These high thresholds also make unavailable remedies that constitute a deterrent to further infringements under TRIPS Articles 41 and 61, and finally, China fails to ensure that enforcement procedures are available under its law so as to permit effective action against any act of willful copyright piracy on a commercial scale under TRIPS Articles 41 and 61.²⁴
- The second copyright-related request challenges Article 4 of China’s copyright law which denies copyright protection to any work (and, if applicable to sound recordings and performances) that has not been authorized for publication or distribution in China. This provision of the law violates the Berne Convention, including its no-formality rule (the Berne Convention is incorporated in the TRIPS Agreement) and TRIPS Article 14 as applied to sound recordings and performances and the Berne and TRIPS national treatment provisions (because China’s distribution and publication review procedures result in local copyrighted material receiving more favorable treatment than foreign-origin copyrighted material).
- The third request deals with whether Article 217 of China’s criminal law criminalizes reproduction and distribution or reproduction or distribution. Treating these as separate crimes is a TRIPS requirement.²⁵

²³ Articles 217 and 218 of China’s criminal law, as interpreted by the Supreme People’s Court and the Supreme People’s Procuratorate in their December 2004 Judicial Interpretation (JI) and their April 2007 Judicial Interpretation.

²⁴ The request also encompasses claims regarding the high thresholds applicable to trademark counterfeiting under Articles 213-216 of China’s criminal law and JIs

²⁵ On August 13, 2007, the U.S. government requested that the first two requests be considered by a panel. The “reproduction/distribution” issue was considered clarified by the Chinese during the consultations and in the 2007 JI. A fourth request deals with measures in Chinese law that create a TRIPS-incompatible hierarchy for how to deal with seized counterfeited product. For example, the Chinese measures would allow counterfeit product to be returned to the channels of commerce, and not destroyed, if the infringing feature can be removed (such as a label on apparel).



**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.

In its consultation request made on April 10, 2007 and in its supplemental request made on August 17, 2007, the U.S. government sought consultations with the Chinese government in order to dismantle many of the WTO violations that continue to hinder effective market access for the motion picture, recording and publishing industries.

The market access measures that were the U.S. government alleges to be WTO-incompatible include:

1. Claims involving the failure to afford trading rights (the right to freely import without going through a government monopoly) to imported films for theatrical release, audiovisual home entertainment product, sound recordings and book and journal publications.
2. Measures that restrict market access for, or discriminate against, foreign suppliers of audiovisual services (including distribution services) for audiovisual home entertainment product and that discriminate against foreign suppliers of distribution services for publications.
3. Measures that provide less favorable distribution opportunities for foreign films for theatrical release than for domestic films.
4. Measures that provide less favorable opportunities for foreign suppliers of sound recording distribution services and for the distribution of foreign sound recordings than are provided to like service suppliers or like products.

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. Unfortunately, China has failed to meet all of its WTO obligations in the market access area.

But beyond the market access restrictions that are cited by the U.S. government in the WTO case, there are other market access barriers that may or may not be direct WTO violations, yet nevertheless serve to prevent the copyright-based companies from realizing the full potential of the Chinese market. Some of these are detailed below.



The Book Publishing Industry: Book publishers continue to face severe restrictions on activities of paramount importance to U.S. publishers. Below are some of the key market access improvements sought by the publishing industry:

1. Allow foreign companies to acquire local book and serial numbers for their publications
2. Allow printing (currently "restricted") by foreign companies for the local market, including allowing matter printed in export processing zones to be imported directly from those zones, rather than requiring it to physically leave the country

The Filmed Entertainment Industry: 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 on a revenue-sharing basis, 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 in the world. High import duties and restrictions on licensing in home video formats also negatively affect the industry, to the advantage of Chinese companies and, of course, pirates. The Chinese government restricts foreign satellite programming on local cable channels, in addition to the regular censorship requirements.

In summary, below are some of the key market access improvements sought by the motion picture industry:

1. Repeal the 20 foreign films/revenue sharing quota.
2. Liberalize restrictive market access for satellite signals, broadcast quotas, content restrictions.
3. Halt protectionist blackout periods.
4. Speed up and make transparent the censorship process, especially for home entertainment products.
5. Remove local print and home video production restrictions.
6. Repeal all import duties NOT based on value of physical media.

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 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, and which enable them to realize essential economies of scale needed to produce efficiently and provide legitimate product in the Chinese market. China's WTO commitments oblige it to open wholesale and retail distribution to foreign (record) companies with majority joint ventures with Chinese firms, but to date the Chinese have only permitted foreign companies to enter via minority contractual joint ventures,



not majority foreign-owned or wholly foreign-owned entities.²⁶ Other activities, such as the signing of recording artists, artist management, and the production, publication, and promotion 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,²⁷ 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 rest of 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.

In summary, below are some of the key market access improvements sought by the recording industry:

1. Remove all restrictions on the ability of foreign record companies to sign local artists, release, produce, distribute etc.
2. Expedite and make transparent the censorship process.

The 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 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.

²⁶ 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.

²⁷ 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).



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 videogame companies in preparing games for the market.

In summary, below are some of the key market access improvements sought by the entertainment software industry:

1. Expedite and simplify the content review process and centralize it in one agency that has the jurisdiction for reviewing entertainment software products with an online component.
2. Repeal the ban on sales of game consoles in China (most of which are made in China!)

The Business Software Industry: BSA welcomed the 2005 JCCT “outcomes” which resulted in the Chinese government reevaluating its government procurement plans.²⁸

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 in the 2006 JCCT, 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 2007 and 2008.

In summary, below are some of the key market access improvements sought by the business software industry:

1. The U.S. government should use the JCCT as an opportunity to lay out its expectations for China's GPA accession offer (due by the end of 2007 under a previous JCCT commitment).
2. The U.S. government should signal that an acceptable GPA offer should cover a commercially-significant proportion of tenders in the software/IT sector and should not be burdened by any lengthy transition periods.

The Music Publishing Industry: Below are some of the key market access improvements sought by the music publishing industry:

1. Establish mechanisms to ensure that all performing right and other royalties due for U.S. musical works are: (a) enforced retroactively for a minimum of 10 years,

²⁸ 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.



and (b) payments to the MCSC, or to rights holders directly, are actually made by music users, including government broadcasting stations.

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. Some of these issues are part of the WTO case, particularly where the censorship process unfairly benefits local companies in violation of China's national treatment obligations.

E. CONCLUSION

Nearly six years have passed since China's accession to the WTO. 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 appears to be political will in some quarters of the Chinese government to accomplish this change, there appears as well to 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 work with USTR and other U.S. government agencies to bring about major improvements in copyright protection and enforcement worldwide.

Respectfully submitted,

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International Intellectual Property Alliance

Attached: Appendix A, copy of IIPA's 2007 Special 301 Report on China
at <http://www.iipa.com/rbc/2007/2007SPEC301PRCrev.pdf>

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2007 SPECIAL 301 REPORT

PEOPLE'S REPUBLIC OF CHINA (PRC)

Special 301 Recommendation: IIPA recommends that USTR maintain China on the Priority Watch List.

EXECUTIVE SUMMARY

PRIORITY ACTIONS TO BE TAKEN IN 2007

- **China Must Bring a Significant Number of Criminal Prosecutions for Copyright Piracy of U.S. Works:** China has been extremely reluctant to bring criminal cases for copyright piracy, and its failure to do so has left in place a non-deterrent enforcement system that has proven to be incapable of delivering on China's 2004 JCCT commitment (nor its TRIPS obligations) to "significantly reduce IPR infringements" in the near term. Bringing criminal cases against "commercial scale" piracy has also been thwarted by overly high and complex criminal thresholds and the failure of the administrative authorities to refer an appropriate number of cases to the criminal authorities for prosecution. The Public Security Bureau (PSB) and the Supreme People's Procuratorate (SPP) must investigate potential criminal infringements upon "reasonable suspicion" that a crime has been committed – as done in the rest of the world – and not require "proof" that the thresholds have been met or that a crime has been committed as a basis for even initiating an investigation. In particular, criminal cases must be brought in the following areas:
 - **China Must Prosecute Software End-User Piracy:** China continues to insist that use of unauthorized software in a commercial business environment is not a crime. The Criminal Law need not be interpreted so narrowly and the SPC should clarify that such unauthorized uses involve unauthorized reproduction or distribution in violation of Article 217 of the Criminal Law and that prosecutions should proceed when such acts are "on a commercial scale."
 - **China Must Significantly Increase the Prosecution of Infringements on the Internet:** Internet piracy is growing and must be significantly reduced, not only by administrative enforcement by the National Copyright Administration of China (NCAC), but through the prosecution of infringements that at least (under TRIPS, the "commercial scale" standard) meet the criminal thresholds in the 2004 Judicial Interpretations (2004 JIs) of the Supreme People's Court (SPC). China fails to initiate prosecutions despite the fact that a large number of these infringements meet China's copy or other thresholds in the 2004 JIs and, while there have been a few prosecutions this year involving videogame Internet piracy, prosecutions must be significantly expanded to cover Internet infringements of music, movies, literary works and all computer software.
 - **China Must Bring Many More Prosecutions Against OD Plant Owners Engaging in Unauthorized Production and Export of Pirate ODs:** Despite asserted

administrative inspections (which in any case lack deterrence), OD piracy by China's factories continues unabated. The Chinese government should take effective and well-publicized action against factories pirating U.S. product to convey a strong message to Chinese society and to pirate producers that illegal production will not be tolerated. Temporarily closing plants without any further action, as China did in March 2006, will not deter China's pirates; they will re-open or move to new locations. The authorities must seize and destroy the offending equipment and prosecute those responsible. Investigations must be commenced based on "reasonable suspicion" that a crime has been committed and prosecutions, convictions and deterrent penalties should ensue. China should also cooperate with right holders to ensure proper forensic examination of discs found in the marketplace, and should criminally prosecute those plants found to be producing pirate materials.

- **China must Significantly Increase the Manpower and Financial Resources Available to the NCAC in Beijing and to Local Copyright Bureaus to Improve Administrative Copyright Enforcement Against Hard Goods Piracy and Piracy on the Internet:** Industry reports and surveys indicate that the 2006 government campaign against piracy, though involving thousands of raids and seizures, had only a minimal and temporary impact in the marketplace. NCAC's and the local copyright bureaus' resources are inadequate to deal with piracy in China and administrative enforcement must not be left solely to inspections by other agencies (such as the Ministry of Culture) for licensing violations.
- **Resources at the NCAC Headquarters in Beijing Should be Significantly Enhanced, Particularly to Combat Internet Infringements:** While NCAC opened and concluded a number of investigations against Internet infringements in 2006, more training and resources are sorely needed, and deterrent administrative penalties must be imposed against website owners and P2P uploaders, and particularly against Internet Service Providers (ISPs) who fail to comply with takedown requests from right holders.
- **Local Copyright Bureaus Throughout the Rest of China are also Woefully Understaffed, Insufficiently Trained (Particularly to Fight Online Piracy) and Require Much Greater Coordination with NCAC Headquarters in Beijing:** Some of these offices have no more than 5 employees and must depend on other agencies to enforce their own administrative regulations. Local Copyright Bureau staffs must be augmented to enforce the copyright law effectively.
- **Enhance Pre-Release Administrative Enforcement for Motion Pictures and Sound Recordings, 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 that are found in the marketplace are deemed pirated and subject to enhanced enforcement." This should apply to all other subject matter including sound recordings as increasingly such pre-releases have been found to be distributed online from servers located in China, even before worldwide legitimate release. MPA reports moderate success in reducing pre-release piracy but it needs to receive even more focused attention and extended to other products.
- **Clarify China's New Internet Regulations to Ensure their Effectiveness and Enable Aggressive Administrative and Criminal Enforcement:** The promulgation of the Internet regulations was a positive step. However, Chinese authorities should clarify how they will be implemented and then implement them aggressively. China should clarify that the deep

linking to infringing files, as well as the maintenance of directories of infringing materials, is prohibited. It should clarify that services that permit conversion of infringing files (e.g. MP3's to ring tones, or ring back tones) are banned. It should clarify publicly with all ISPs that right holder notices of infringement may be served on ISPs by email and extend notices to telephone communication in cases of pre-release materials or in other exigent circumstances. It should publicly clarify that "expeditious" in the Regulations means that ISPs must remove infringing content, or block access to it, in no case more than 24 hours after receiving notice. It should clarify that ISPs must restrict access to their systems in cases of repeat infringers. Finally, it is critically necessary that MII and NCAC maintain an accurate database of the many ISPs in China to ensure that notices can be timely filed.

- **Ensure Use of Legal Software by Government and SOEs:** China promised in the 2006 JCCT to begin the process of legalization of software in private and state-owned enterprises in 2006, and to implement its legalization plan in 2007. China must redeem this commitment. Despite statements by the government that software legalization at the national, provincial and local government level has been completed, the government of China must recognize that legalization is an on-going process with no fixed end-point. While industry sales have increased as a result of the government legalization program, the program is not complete. Working with industry, software asset management programs must be established at each Ministry and governmental level.
- **Legitimize Book Distribution Practices on University Campuses:** The General Administration of Press and Publications (GAPP) and the NCAC, in cooperation with the Ministry of Education (MOE), local copyright bureaus and right holders, have made great strides in addressing the problem of illegal copying by university textbook centers during 2006. These agencies should work together to ensure proper implementation of their August, September and November notices about such copying, and enforcement actions should continue against universities that fail to fully implement the notices.
- **Join the WCT and WPPT and Adopt Regulations Completing the Task of Updating the Legal Regime to Comply with the Internet Treaties:** Legislation authorizing the Chinese government to deposit their instruments of accession in Geneva and to join the Internet treaties was passed in December 2006. Deposit should be made as soon as possible.
- **Amend the Criminal Law to Bring It into Compliance with TRIPS:** China must criminalize all copyright piracy "on a commercial scale," including piracy involving acts not currently cognizable under China's Criminal Law. The "for-profit" criterion for establishing a criminal offense should also be eliminated. An amended law should eliminate all thresholds or, at a minimum, ensure that they are low enough to criminalize all "copyright piracy on a commercial scale" as required by the TRIPS Agreement. China is the only country in the world that calculates a threshold for bringing criminal cases based on pirate profits and business volume at pirate prices; these criteria should be eliminated.
- **Allow Investigations by Foreign Right Holder Associations and Eliminate Burdensome Evidentiary Requirements:** Foreign right holders cannot reasonably be expected to fully avail themselves of the Chinese legal system unless they can investigate suspected infringements. Regulations limiting activities (and number of employees) of the trade associations representing U.S. and other foreign right holders should be, and can be, easily amended to permit them to fully cooperate with the government in fighting piracy. Evidence rules (including for establishing subsistence and ownership of copyright) for

administrative and criminal actions must be reformed and made more transparent and logical.

- **Bring Significant New Transparency to the Enforcement Process through NCAC Reporting on Cases Involving Foreign Works and the SPC Extending their Reporting from Civil to Criminal Cases at All Levels:** NCAC and local copyright bureaus need to share with right holders information on administrative copyright cases, a request by right holders which has to date been refused. The SPC now regularly reports the results of civil cases on their website. This reporting should be extended to criminal cases as well.
- **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 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 and distribution rights), the Chinese government, if it wishes to address rampant piracy in the country and foster the growth of creative industries in China, must significantly liberalize market access for all copyright industries, looking beyond the bare minima of WTO toward a fairer and more open market for all. Such reforms would include vastly increasing transparency, eliminating the film quota, permitting full publishing and distribution activities within China and eliminating delays in reviewing content under its censorship regime, including for all products which require censorship approval, to ensure that legitimate products get to the market before pirate products. Censorship processes that merely slow the ability of legitimate enterprises to distribute products—whether in the physical market or through digital transmissions, but which are ignored by piratical or unauthorized enterprises, do not advance China's social and/or cultural concerns, and greatly prejudice the interests of U.S. right holders by providing further market advantages to pirate operations.

For more details on China's Special 301 history, see IIPA's "History" Appendix to this filing at <http://www.iipa.com/pdf/2007SPEC301HISTORICALSUMMARY.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: 2002-2006²⁹

INDUSTRY	2006		2005		2004		2003		2002	
	Loss	Level								
Motion Pictures ³⁰	NA	NA	244.0	93%	280.0	95%	178.0	95%	168.0	91%
Records & Music ³¹	206.0	85%	204.0	85%	202.9	85%	286.0	90%	48.0	90%
Business Software ³²	1949.0	82%	1554.0	86%	1488.0	90%	1787.0	92%	1637.3	92%
Entertainment Software ³³	NA	NA	589.9	92%	510.0	90%	568.2	96%	NA	96%
Books	52.0	NA	52.0	NA	50.0	NA	40.0	NA	40.0	NA
TOTALS	2207.0		2643.9		2530.9		2859.2		1893.3	

PIRACY AND ENFORCEMENT UPDATES IN CHINA

Piracy of “Hard Goods” Continues at the 85%-95% Level Despite China’s Anti-Piracy Campaign in the Second Half of 2006. China announced the commencement on July 15, 2006 of a “100 Day Campaign” directed primarily at retail piracy. Statistics on raids and seizures were released almost weekly and at the end of the campaign, the government trumpeted its success and the vast number of raids and seizures conducted.³⁴ Reports and surveys received both during and after the campaign from industry sources, however, noted this

²⁹ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA’s 2007 Special 301 submission at www.iipa.com/pdf/2007spec301methodology.pdf. For information on the history of China under Special 301 review, see Appendix D at (<http://www.iipa.com/pdf/2007SPEC301USTRHISTORY.pdf>) and Appendix E at (<http://www.iipa.com/pdf/2007SPEC301HISTORICALSUMMARY.pdf>) of this submission.

³⁰ MPAA’s trade loss estimates and piracy levels for 2006 are not yet available. However, such numbers will become available later in the year and, as for 2005, will be 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 the 2006 loss numbers and piracy levels become available, they will be posted on the IIPA website, <http://www.iipa.com>.

³¹ 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.

³² BSA’s 2006 statistics are preliminary. They represent the U.S. publishers’ share of software piracy losses in China, 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. BSA’s 2005 piracy statistics were preliminary at the time of IIPA’s February 13, 2006 Special 301 filing; the 2005 data was revised and posted on the IIPA website in September 2006 (see <http://www.iipa.com/statistics.html>), and the 2005 revisions (if any) are reflected above.

³³ 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.

³⁴ What purported to be final statistics were reported widely in the Chinese press: “Since [the beginning of the campaign], China has destroyed nearly 13 million pirated CDs, DVDs and computer software products. Over the past two months, police and copyright officials have investigated more than 537,000 publication markets, shops, street vendors and distribution companies, and closed down 8,907 shops and street vendors, 481 publishing companies and 942 illegal websites.” Xinhua, China Daily, September 29, 2006. In its 2006 submission IIPA reported on China’s 15-month national anti-piracy campaign involving thousand of raids and the seizure of millions of units of pirate product. IIPA members also reported then that there was “no meaningful decrease in the widespread availability of pirate products” (<http://www.iipa.com/rbc/2006/2006SPEC301PRC.pdf>). In an IIPA meeting with GAPP/NAPP/NCAC in November 2006, Mr. Li Baozhong gave the statistics for the 100 day campaign from his information: 10,000 cases, 7,634 of which involved copyright infringement (the rest were presumably pornography but this was not clarified). A total of 270 cases were referred to the PSB and 63 of these cases were concluded involving 140 defendants. We were given no further information on these cases, what penalties were imposed, whether U.S. works were involved etc.

vast raiding activity but concluded, as in many previous campaigns of this nature, that pirate product remained available throughout the campaign in virtually the same quantities as before the campaign commenced. In some cases, however, pirate product became less visible in retail establishments and was made available clandestinely from catalogues and stocks hidden at the rear of stores or down back alleyways.

What this story, and those following previous campaigns over many years, illustrates is that the otherwise commendable use of massive enforcement resources to go after piracy lacks the effective deterrence that China must create if it wishes to have a significant deterrent impact in the marketplace. As IIPA has pointed out on innumerable occasions, China's administrative enforcement machinery and penalty structure does not deter piracy in any significant way.

In addition, at the manufacturing and wholesale levels, industry continues to report large-scale pirate production by Chinese OD factories. Exports sourced from these factories continue to be seized around the world. The quality of the pirate product being produced and exported in large quantities by Chinese OD plants is some of the best being found by authorities in other countries. The continued lack of criminal prosecutions and the lack of deterrence in administrative enforcement in China ensures that piracy rates of physical copyright products continues to be among the highest in the world, at 85-95% depending on the industry sector and product format (e.g., an estimated 95% of DVDs in China are pirate).

In June 2006, a campaign against hard disk loading of business software was launched to follow up on the earlier announcement by the government requiring manufacturers of computers (and imported computers) to be sold only with legitimate operating systems. This latter notice was jointly issued in March by the Ministry of Commerce (MOFCOM), the Ministry of Information Industries (MII) and NCAC. This complemented the 100-day campaign announced in July 2006 and the Internet piracy campaign (see below) announced in September 2006. BSA has commended the few actions on hard disk loading taken in a number of major cities, but action must be significantly enhanced for piracy levels in this area to be reduced.

Internet Piracy Continues to Grow and Has Become a Major Threat to the Digital Marketplace: Internet piracy is progressively worsening as the number of Internet users and broadband penetration increase in China.³⁵ China has become 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.³⁶ Official Chinese figures reported in the press indicate that there are about 843,000 websites now operating in China. Hundreds of these websites emanating from China now offer streams, downloads or links to unauthorized files of copyright materials (music, films, software, books and journals). The motion picture industry reports, for example, that all of the major P2P sites streaming broadcast programs (either entire channels or newly created channels composed of U.S. broadcast content) operate out of China. The recording industry reports that seven or more "MP3 search engines" offer "deep links to thousands of infringing song files. The largest of these is Baidu, which was sued by the international record companies for its deep linking activities. Unfortunately, the Beijing

³⁵ China saw continued rapid expansion in 2006 in terms of the number Internet users and number of broadband lines. "The number of Internet users in China grew to 137 million at the end of 2006. China's netizens grew by 26 million, or 23.4%, and currently reach 10.5% of the total population, [China Internet Network Information Center](http://www.chinainternetnetworkinformationcenter.com/) reported. In China, 17 million people use their cell phones to go online, and 104 million have broadband Internet access. http://www.itfacts.biz/index.php?id=C0_2_1.

³⁶ *Id.* It has been reported that the number of broadband subscribers in China will surpass the number in the U.S. by the end of 2006, giving it the largest number of broadband subscribers in the world. <http://www.websiteoptimization.com/bw/0601/>.

Intermediate Court sided with Baidu in a decision with massive adverse implications. The case is being appealed, as the court entirely misconstrued the nature of Baidu's activities and deep involvement with infringing activity.³⁷ The international recording industry filed a similar civil suit in early 2007 against Yahoo China for copyright infringement. There are also at least eight Chinese based P2P services engaging in widespread illegal file sharing activities. The most widely known are Kuro (now shut down), Mupar and Kugoo. Most of these are advertising-driven sites (though some are subscription based), given the lack of development in China of credit card or similar payment mechanisms. Many eMule/eDonkey servers and Bit Torrent sites are based in China. Further, there are growing numbers of video locker sites in China, like Tudou, which are also advertising-driven sites providing infringing streaming of music videos.

In a welcome development, the licensee (Shandha) of the Korean entertainment software developer of the "Legend of Mir" videogame was successful in obtaining at least two criminal convictions against pirate servers dealing in the game. The division of the PSB that deals with Internet offenses has reported that there are now pending or concluded 48 Internet criminal cases. IIPA has been unable to find out anything further about these cases but they are a most welcome development, particularly if they result in publicized convictions with deterrent penalties.

With the adoption of the Internet Regulations in July 2006, the legal infrastructure for effective protection of content on the Internet in principle was significantly enhanced. In September 2006, the NCAC issued a notice of special actions to be taken against pirate sites, with the campaign lasting until January 2007. According to an NCAC news release on Feb 8, 2007, NCAC shut down 205 illegal websites, confiscated 71 illegal servers and transferred six cases to the courts for prosecution; one of those cases reportedly led to a conviction. NCAC investigated 436 cases, and ordered 161 offenders to stop their infringement. The authorities reportedly imposed total fines of RMB705,000 (US\$90,980). Both NCAC and the Internet division of the PSB reported to IIPA and its members in November 2006 on the difficulty of getting IP addresses and identifying right holders. We informed both offices that the associations stood ready to assist in this endeavor and that cooperation between enforcement authorities and right holder organizations was severely hampered by outmoded rules, and reforms would need to be made before Chinese enforcement could begin to resemble that in other countries, where such cooperation was a regular feature.

Certain key reforms would assist greatly in this area. First, it should be publicly clarified that email notices are permitted under the new Internet regulations and that takedowns following notice must be within 24 hours.³⁸ Second, ISPs that fail to immediately takedown sites following compliant notices from right holders are infringers and have violated the Internet regulations and the Copyright Law (by losing the "safe harbor" established under the regulations). As such, they should be subject to the same administrative fines as any other infringer. Until these fines are imposed and announced publicly, it will remain extremely difficult for NCAC and the local copyright bureaus to deter Internet piracy, given the difficulties to identifying and bringing administrative actions against the website or the like. Third, the agency must clarify the

³⁷ In a meeting between IIPA and the State Council Legislative Affairs Office (SCLAO) in November 2006, the official responsible for drafting the *Regulations on the Protection of the Right of Communication through Information Networks* ("Internet Regulations") which became effective on July 1, 2006 stated that under Article 23 of those regulations, ISPs were liable for their linking activities.

³⁸ NCAC officials stated in a November meeting with IIPA that takedowns should occur in no more than 48 hours. Unfortunately, this appears NOT to have been communicated officially to the ISP community in China, which continues to fail to comply with notices.

evidentiary requirements necessary to provide a compliant notice and to ensure that an administrative fine can be imposed. Fourth, with respect to the obligation of the NCAC to transfer cases involving criminal infringement to the PSB and SPP, it must be clarified exactly how the thresholds established in the 2004 JIs apply in the Internet environment and such clarifications should be widely circulated throughout all the agencies responsible for enforcement. NCAC must reach out to industry to create an effective notice and takedown and administrative enforcement system to combat Internet piracy. Finally, given that there are more than 1000 local ISPs throughout China, another reform that is critically necessary is for the MII and NCAC to provide stringent rules for ISPs to maintain accurate, up to date contact information, residing on the MII and NCAC website, so that notices may be timely served to the right entity. This is not the case today and such a list is urgently needed.

The recording industry filed complaints with NCAC for administrative action in 2006 against 44 internet sites. 29 of these sites have been taken down. One complaint was filed with the Beijing Copyright Bureau against a deep-linking site. Six complaints were filed with the National Anti-Piracy and Pornography Working Committee.

The motion picture industry sent seven take-down notices to ISPs between September and December 2006. Four sites complied after the MPA raised it with NCAC, however, as of February 9, two sites were reactivated, demonstrating clearly that deterrence is lacking.

Below are statistics provided by the record industry on Internet infringement actions in China in 2006.

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	61%
2006	1495	1205	58% ³⁹

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 Must Take Effective Criminal Action Against Optical Media Plants Engaged in Piratical Activities, Particularly Mass Production for Export: We believe there are approximately 92 optical disc plants in China, with 1,482 total lines bringing total disc capacity based on IIPA's conservative methodology to a staggering 5.187 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. A considerable amount of very high quality pirate Chinese OD production continues to be exported. In 2006, infringing product from China was found in nearly every major market in the world, including (but not limited to): Germany, Italy, Australia, Norway,

³⁹ Although a number of sites were taken down by ISPs/ICPs after receiving a takedown notice, some of the sites very quickly reappear on the same ISP/ICP offering different repertoire.

Belgium, Canada, Mexico,⁴⁰ the United States, Russia, the United Kingdom, the Netherlands, Israel, Paraguay, Lithuania, Singapore, Taiwan, the Philippines, Indonesia, Vietnam, Hong Kong, Malaysia, Thailand, Chile, New Zealand and South Africa.

The recording and motion picture industries have been urging that the Chinese government cooperate effectively with their industries to identify forensically infringing CDs and DVDs produced by Chinese OD factories. They have proposed specifically that Chinese authorities collect and maintain “exemplars,” (e.g. samples), from each production line and make them available to these two industries for use in forensic analysis of pirated product as is done by many governments around the world. In exchange, these industries would also, at the request of the Chinese government, use their international exemplar database to help the Chinese government determine the source of infringing product that the Chinese government has reason to believe was manufactured outside of China. This should facilitate greater regional and/or global cooperation in the fight against piracy. Regrettably, the Chinese government continues to refuse to collaborate with right holders in this manner.

In March 2006, after much discussion with the U.S. government about these issues, China announced administrative actions against 14 optical disc plants. It was then learned that 6 of these plants were reportedly closed (although it remains unclear whether such closures were permanent) and that the licenses of 8 of the plants were “temporarily” suspended. Finally, it was reported that only one or two of the fourteen plants were under “criminal investigation” despite pirate production levels at many or most of these plants that we believe far exceed even China’s high thresholds for criminal prosecution. Little further information was provided. Since then, industry has brought evidence of piracy to the PSB in cases involving 17 OD plants and formally requested criminal prosecutions against them. Industry has also asked the PSB to bring criminal actions against three other plants among the original 14 identified by the Chinese government, for a total of 20 requested criminal cases. Results to date have been discouraging; no criminal cases have been commenced (though in some the PSB is still considering the matter). A few of the cases have been rejected outright by the PSB. These rejections were either because the PSB believed the case should have been brought initially to the administrative authorities, or because it believed that the evidence presented, which clearly raised a strong, virtually irrefutable, inference that piracy meeting the thresholds was occurring, did not “prove” that the thresholds were met. In the first case, Chinese law expressly permits citizens/right holders to bring criminal cases directly to the PSB⁴¹ and in the second case, China stands alone in the world in apparently requiring more than “reasonable suspicion” that a crime in being committed before commencing an investigation. Unless China shows an open willingness to bring criminal cases against major pirates in their country, there is little hope that levels of piracy can be significantly reduced, despite repeated Chinese government promises.

⁴⁰ 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.

⁴¹ Taking cases through the administrative machinery slows the case down, risks that evidence will not be preserved and under applicable criminal rules is not necessary. Indeed the PSB is obligated to take cases directly where criminal conduct is demonstrated. See Article 84 of the *Criminal Procedure Law of the People's Republic of China* (adopted at the Second Session of the Fifth National People's Congress on July 1, 1979, and revised in accordance with the *Decision on Amendments of the Criminal Procedure Law of the People's Republic of China*, adopted at the Fourth Session of the Eighth National People's Congress on March 17, 1996). See also, Article 18 of the *Rules of Public Security Authority on the Procedure of Handling Criminal Cases* (promulgated by the Ministry of Public Security under Decree No.35 on May 14, 1998).

As bad as it is, the problem of pirate OD production for the domestic Chinese market and for export will multiply exponentially if China goes forward with its plans, announced in 2005, to create its own format of HD-DVD which will not be compatible with any existing DVD player, and that will not be bound by current copy protection.⁴² The prospect of an unprotected format created in China harkens back to the advent of the VCD, a Chinese-invented pirate format, and would raise serious questions about the Chinese government's will to deal with the piracy issue.

China Must Implement Deterrent Measures in Fighting Piracy of Books and Journals: U.S. book and journal publishers suffer from piracy in three key forms—unauthorized commercial-scale photocopying, illegal printing of academic books and commercial bestsellers, and Internet piracy encompassing online academic and professional journals and sites offering scanned books 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 throughout China.

Throughout 2006, publishers worked with GAPP, NCAC and most recently MOE to deal with rampant piracy in “textbook centers” on university campuses. During the second half of 2006, these three agencies took unprecedented action on this issue, engaging in a series of enforcement actions against textbook copying activity in Hubei, Beijing, Shanghai and Guangdong. These actions, taken in response to industry complaints, involved administrative investigations at key universities in these cities and provinces, in most cases resulting in Punishment Decisions, including administrative fines. IIPA applauds this action and hopes to see it continue during the high copying periods in March and September of 2007.

One industry complaint, against Tongji Medical College of Huazhong University in Hubei Province, was acted on within 24 hours of the complaint, resulting in seizure of thousands of pirate books! In this case, authorities imposed the maximum fine of RMB100,000 (US\$12,900) as part of the Punishment Decision. Other cases have not made such a strong statement, and industry is concerned that the government investigations were conducted at the wrong time⁴³ or that fines (perhaps as a result) were too low to be deterrent.⁴⁴

A welcome development, complementing the enforcement undertaken by GAPP and NCAC, is the involvement of MOE in sending messages to universities about this sort of copying. In August, September and November 2006, GAPP, NCAC and MOE joined forces in issuing notices to regional education bureaus and regional copyright bureaus that copying of books at universities was not to be tolerated.⁴⁵ These notices instructed universities that, among other things, they were to ensure that the textbook centers were free of infringing activity by December 31, 2006. Industry has received some reports that this message is being conveyed to certain universities. IIPA considers it imperative that these notices are properly conveyed to the

⁴² *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).

⁴³ The pertinent periods for enforcement against university textbook centers—or any type of copying of academic materials—surround the start of university terms. These most often begin in September and March. Several of the government investigations in response to right holder complaints were conducted outside of these time periods. For example, the first investigations took place in June and July, when universities were out of session. Low seizures and low fines are bound to result. Right holder groups requested in these cases that authorities return to the campus during the September high season, but these requests were summarily declined.

⁴⁴ In fact, in some cases fines were waived due to “low stock.” This again illustrates the importance of proper investigation during the seasons when infringing activity is likely to be taking place.

⁴⁵ Some of these notices were issued by one or two of the agencies in partnership, rather than all three.

appropriate university authorities and fully implemented. MOE, GAPP and NCAC should work together to formulate and undertake a strategy to ensure proper implementation and follow-through.⁴⁶

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.

Illegal printing of books continues to plague publishers in China as well. Local publishers report high levels of print piracy of their own academic materials. High level foreign technical or medical books marketed to professionals and bestsellers tend to be vulnerable to this type of piracy, severely undermining the legitimate market for foreign and Chinese publishers alike. In some cases these books are sold in bookstores, and also by street vendors and large book markets throughout China.

As noted earlier, Internet piracy also affects the publishing sector, most notably with respect to sites offering free or pay downloads of academic and trade titles, and abuse by users of licensed online academic journals. University gateways are too often left open to non-subscribers, allowing for-profit companies to download and resell journals, severely undermining the electronic journals market. Publishing industry groups have recently brought two complaints to NCAC about this problem. NCAC should continue work, along with the MII and local and regional copyright bureaus, to ensure immediate and effective action against such sites.⁴⁷

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.⁴⁸ China made a commitment in the JCCT to complete legalization within all government agencies, 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 indicates that this commitment has not been fulfilled. In the 2005 JCCT and again in 2006, China committed to the legalization program for state-owned enterprises and to discuss software asset management. An implementation plan has been issued (but detailed plans have apparently not yet been formulated) and, unfortunately, the responsibility for compliance and oversight seems to lie on each agency and not on any central authority to enforce the commitment. Software asset management is still under discussion and much progress must still be made. The commitment is to complete this program in 2007.

⁴⁶ Universities in areas targeted for enforcement in 2006 seem to be aware that the authorities are paying more attention to these issues. Several university employees have made comments alluding to “copyright problems” or the “need to be careful.” While implementing the notices and continuing their enforcement activities, GAPP, NCAC and MOE should also be on the lookout for changing modes of operation, as these activities often go underground when enforcement becomes more frequent.

⁴⁷ AAP reports that its complaint against www.fixdown.com and related sites, received good attention from NCAC and the Guangdong copyright authorities, and the site was taken down soon after it was listed as one of China’s “Top 50” Internet priorities. AAP will continue to monitor the status of this site. AAP urges that similarly expedient action be taken with regard to its other complaints.

⁴⁸ The business software industry also loses revenue due to retail hard-disk loading (discussed earlier), and the production in China (generally for export) of high-quality counterfeit software packages.

Among the most notable and far reaching commitment emanating from the 2006 JCCT was the commitment, discussed earlier as well, to prohibit sale of computers both manufactured in China and imported without legal operating systems. NCAC placed the compliance rate on this commitment at 65% in November.

NCAC is woefully understaffed and while it has run a few end-user raids, this entire area of much needed enforcement is not being given sufficient attention given the magnitude of the problem. BSA filed 39 end user actions with NCAC and local copyright bureaus in 2006, all of which were acted on, a major positive enforcement development for the industry. This resulted in 16 settlements with targets (with others under negotiation, with only two cases resulting in administrative fines. However, much more needs to be done; NCAC must secure more manpower and resources, must issue many more deterrent administrative fines, and must confiscate equipment in many more cases.

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. and Chinese film industry.

Piracy of Entertainment Software Products: The level of piracy in the market for physical product (PC games and games played on handheld devices) remains high.⁴⁹ However, the Internet gaming market has shown immense growth and entertainment software publishers are seeing significant development in the online games market.⁵⁰ Notwithstanding a developing online games sector, there has been an increase in Internet piracy, including downloading and corresponding burning activity (which is reportedly happening at the thousands of Internet cafés in the country).

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. Large export seizures in other countries 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.⁵¹ In 2006, over 75,000 counterfeit *Nintendo* products, all originating from China were seized in 13 countries around world. However, Chinese Customs

⁴⁹ This includes sale of packaged games where piracy levels are high and legitimate sales are miniscule, as well as use of games in Internet cafes where owners often buy one copy and load it on all their computers or consoles. There are over 250,000 such cafes, and it is suspected that the losses from this piracy are enormous, though efforts by some entertainment software publishers to license such cafés are reportedly progressing well. Fortunately, the popularity of online games has at least delivered some promising returns for entertainment software publishers.

⁵⁰ The industry's use of technological protection measures has been relatively successful and is believed to have aided in promoting the development of this sector of the video game industry. There have, however, been recent reports of circumvention of these measures but courts have so far appeared sympathetic to this problem. *See In re Mr. ZHANG* (张某, *Mr. HAN* (韩某, *Mr. LIU* (刘某, *Mr. QI* (齐某) & *Mr. HE* (何某) (January 30, 2007, People's Court of Nanshan District, Shenzhen, Guangdong Province). This case involved the circumvention of TPMs on an online Korean videogame (which was discussed by the court) and the unauthorized reproduction of the game. Unfortunately, as discussed below, circumvention of TPMs, as a separate act, does not yet carry criminal liability in China, as required by the WIPO Internet Treaties which China is about to join.

⁵¹ Hong Kong continues to be a key transshipment point for counterfeit *Nintendo* products. In 2006, over 34,000 infringing *Nintendo* products were shipped through the HKSAR.

authorities failed to stop even one shipment of such pirated or counterfeit goods from leaving its territory.

Chinese enforcement authorities continue to fail to initiate criminal prosecutions against infringers. During 2006, 24 raids were conducted against factories, warehouses or workshops in Guangdong Province, resulting in the seizure of over 800,000 infringing Nintendo products. Many of these actions involved willful commercial-scale infringement, yet not a single action was initiated or prosecuted by the Chinese criminal enforcement authorities. Another troubling enforcement obstacle that has recently arisen is a new requirement (imposed by the administrative authorities in Shenzhen and Guangzhou) that obliges the complainant to submit samples of the counterfeit goods along with sales receipts. Many counterfeiters operate illegally without a business license and thus are quite unlikely to furnish invoices or sales receipts at the time of the sale of counterfeit products. This new requirement would make it a great deal more difficult to initiate actions.

China must Significantly Increase Criminal Prosecutions for Copyright Piracy to Create Deterrence in its Enforcement System: While there have been an increasing number of statements from Chinese leaders in the last year that criminal enforcement is a necessary component of its enforcement system, the reality remains that copyright piracy is still viewed by most government policy-makers as a problem to be dealt with through administrative rather than criminal means.⁵² China has not met its promises in the JCCT to increase the number of criminal prosecutions for copyright piracy. IIPA has sought to determine, through statistics issued in China and through its own investigations, the number of criminal cases brought under those provisions of China's criminal law that deal with piracy offenses. China does not separately break out criminal cases involving copyright. IIPA and its members remain aware of only six criminal cases involving U.S. works brought by China since it joined the WTO in 2001 (three in 2006 and three in 2005) and a few more cases involving the works of other WTO members.⁵³

Without significant increases in criminal prosecutions resulting in deterrent penalties and a willingness (a) to devote the resources to such prosecutions; (b) to seek assistance from right holders with respect to training etc., and (c) to announce publicly throughout China that criminal prosecutions for piracy will be a primary feature of its enforcement system, we do not believe

⁵² On January 11, 2007, the SPC released to all lower courts in China, the "*Opinions on Strengthening All Respective Work on Intellectual Property Trials to Provide Judicial Safeguard for Building An Innovation-oriented State.*" Just one of the 26 sections of this document dealt with criminal enforcement and urged the lower courts to treat criminal piracy as an important crime. It is as yet unclear what effect this will have on lower criminal courts and on the enforcement authorities in prosecuting and concluding significantly more criminal cases.

⁵³ IIPA has been able to identify 51 cases since 2001 which it believes were brought under the piracy provisions of the Criminal Law, namely Articles 217 and 218. The vast majority of these involve only Chinese works, or we are unable to ascertain if foreign works were involved. China does bring criminal cases for "illegal business operations" under Article 225 of the Criminal Law and these cases can involve acts of piracy and most often prosecutions for manufacturing or dealing in pornography. Known Article 217-218 cases involving U.S. product include *In re SHEN Jiuchun* (沈久春) (December 20, 2006, People's Court of Shijingshan District, Beijing) (pirated Chinese version of book on Jiang Zemin); *In re CHEN Fuqiang* (陈富强), *WU Jun* (吴军) and *WU Xiaojun* (吴小军) (date decided unknown, possibly December 2006, People's Court of Beichen District, Tianjin) (MS SQL 2000); *In re HUANG Yilong* (黄毅龙) & *CHEN Zengcai* (陈赠才) (September 17, 2006, People's Court of Huli District, Xiamen) (online U.S. music and sound recordings) *In re TONG Yaxi* (People's Court of Yuzhong District, Chongqing, August 12, 2005), (U.S. motion picture product); *In re Randolph Hobson GUTHRIE III, Abram Cody THRUSH, WU Dong and WU Shibiao* (Shanghai No. 2 Intermediate Court, April 19, 2005)(U.S. motion pictures on DVD); and *In re CHEN Fuqiang* (陈富强) (date decided unknown but probably early 2005; People's Court of Haidian District, Beijing)(U.S. software).

that China can make a meaningful dent in piracy levels. Other countries/territories that have to significantly reduced piracy levels have done so only through the aggressive use of deterrent criminal prosecutions.⁵⁴ China must learn this lesson.

In March 2006, China amended its rules on transferring administrative cases to the criminal courts for prosecution.⁵⁵ While the enforcement authorities regularly announce that a few administrative cases were referred to the PSB, industry is not able to ascertain what happens to these cases after being transferred and whether they are ever fully investigated or prosecuted. The entire system is non-transparent. The Chinese government must open up its system and provide right holders with meaningful information.

Civil Cases Brought, Including Against Internet Pirates: The copyright industries have fared better in the civil courts in China.⁵⁶ Unfortunately, the average awards do not come close to compensating the right holder for the injury suffered as a result of the infringement, though improvements are slowly being made. For example, the average damages awarded in the recording industry's cases were about RMB3,500 (US\$452) per title, which usually does not even cover legal fees and expenses, much less compensate the right holder for its loss. This paltry sum has fallen further to an average of about RMB2,000 (US\$258) per title in 2006. Documentation requirements to prove copyright ownership and status of the plaintiff are overly burdensome in China, and, in the Internet environment, ascertaining information regarding defendants sufficient to succeed in these actions is 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 on occasion even required the chief executives of major multinational corporations to appear in person to prove, for example, copyright ownership and subsistence. The civil system should be reformed to provide clear evidentiary and procedural rules and (a) to provide for statutory damages and reasonable compensation for legal fees and expenses, (b) to introduce a presumption of subsistence and ownership of copyright, and (c) to allow organizations that are authorized by right holders to conduct anti-piracy cases on their behalf to sue in their own name. As a result of all these difficulties, the recording industry decided not to file any civil cases in 2006.

MARKET ACCESS AND RELATED ISSUES

IIPA has consistently stressed the direct, symbiotic relationship between the fight against piracy and the need for liberalized market access to supply legitimate product to Chinese

⁵⁴ South Korea, Singapore, Taiwan and Hong Kong are examples where criminal enforcement has been able to significantly reduce piracy levels.

⁵⁵ *Opinions on the Timely Transfer of Suspected Criminal Cases Encountered in the Course of Administrative Law Enforcement* (Issued by the Supreme People's Procuratorate, the National Office of Rectification and Standardization of Market Economic Order, the Ministry of Public Security and the Ministry of Supervision, March 2, 2006.) ("Criminal Transfer Regulations")

⁵⁶ During 2002 and 2003, the motion picture industry 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 at least 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. In 2006, the motion picture industry filed six civil cases, one against a Nasdaq-listed internet website and five against retail outlets. Two retail and the internet website cases received favourable judgements, while three cases against the retail outlets remain pending. In 2006, the Beijing Intermediate Court ruled against the recording industry in its civil cases against Baidu, which cases has been appealed to the Beijing High Court In 2007. The record industry has filed 11 cases against Yahoo China for its deep linking service.

consumers. It has been more than five years since China joined the World Trade Organization, and the copyright industries are still waiting for China to comply with a number of commitments it made in that agreement to open its market. China's failure to meet these commitments significantly harms U.S. right holders who would like to more effectively and efficiently provide their products to Chinese consumers. China's failure in this regard also subjects China to potential WTO dispute settlement claims over its failure to meet its obligations.

Ownership/Investment Restrictions: The Chinese government allows foreign book and journal publishers, sound recording producers, motion picture companies (for theatrical and home video, DVD, etc. distribution), or entertainment software publishers, at best, to enter the Chinese market except only as a partner in a minority-share (up to 49%) joint venture with a Chinese company.⁵⁷ These limitations should be eliminated. In too many instances, China does not permit any foreign ownership.

The Censorship System: 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 only recorded, 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.

The Ministry of Culture's recently issued (December 11, 2006) *Opinion on the Development and Regulation of Internet Music*, discussed in more detail below, imposes unnecessarily burdensome censorship and ownership requirements on legitimate online music providers. The *Opinion* would require censorship approval for all foreign music licensed to such providers while requiring only recordation for domestic repertoire. Especially because of the large number of titles involved, implementation of this *Opinion* would impose virtually impossible delays on these foreign business and the right holders who license their product to them.

Entertainment software companies continue to 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 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.⁵⁸ The review function should be lodged with only one agency, either

⁵⁷ In what was considered a positive development in IIPA's 2006 submission, ownership restrictions on cinemas had been lifted slightly, allowing up to 75% foreign ownership in Beijing, Shanghai, Guangzhou, Chengdu, Xi'an, Wuhan and Nanjing, compared to 49% everywhere else. However, these regulations were rescinded later in 2006 and after investments had been made under the new rules, returned to the 49% rule. As a consequence, one U.S. company simply left the market. Moreover, 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.

⁵⁸ 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 (including the new *Opinion* discussed above and below in the text) 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

the GAPP or the MOC. As more entertainment software products distributed on physical optical disc media increasingly have an online component, such games would become subject to two separate content review processes before two different agencies. The effort to comply with two review procedures before two different agencies could potentially exacerbate the delay in getting new releases to market, but in addition, would be burdensome to publishers. Further, transparency in the review process is likewise sorely needed.

Restrictions on Anti-Piracy Investigations: China maintains severe restrictions on the ability of copyright industries' trade associations in China from engaging in investigations in the anti-piracy area as well as limiting the number of employees that such "representative offices" may employ. Companies that invest in China are not subject to these same restrictions. Because copyright-based companies conduct virtually all their global anti-piracy operations through their designated trade associations, and given the restrictions on becoming a foreign invested company in China, these rules severely hamper the fight against piracy in China. These rules make no sense and are apparently rules imposed by NCAC. They should be eliminated at the earliest date.

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 distribute a recording in physical format except through a minority joint venture with a Chinese company (and may not "publish" a recording at all—a stage in the process of bringing materials to the market left entirely to state owned companies), 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.⁵⁹ 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.
- 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)).

The new *Opinion on Development and Regulation of Internet Music* would significantly stifle the development of legitimate online music commerce in China, including both Internet-based music services and the fast-growing mobile phone delivery of music content. It imposes a complete prohibition on foreign ownership of online and mobile music services and, as noted above, burdensome, discriminatory and unnecessary censorship requirements. Foreign record

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.

⁵⁹ 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.

companies should be able to service Chinese consumers as part of these online music services and be able to import and deliver music content without restriction under China's WTO commitments.

Book and Journal Publishing Industry: The U.S. book and journal publishing industry continues to suffer from severe restrictions on its activities within China. Below are listed the fundamental issues hindering this industry from offering the widest possible array of tailored products to the Chinese consumer.

- **Trading Rights:** Foreign companies are prohibited from importing material into China. Importation is limited to 38 State-owned trading companies, through which all imports must be channeled. Under the terms of China's WTO accession, foreign-invested and foreign-owned companies should be permitted to engage in direct importation of their products.
- **Distribution:** Foreign-invested and foreign-owned companies should be permitted to engage in wholesale and retail distribution of all product (locally produced or imported) in the Chinese market. It appears that foreign publishing companies may be allowed to engage in distribution of Chinese-produced materials, but this does most foreign publishing companies little good, considering they are prohibited from publishing or printing (for the local market) in China.
- **Publishing:** Liberalizations to core publishing activities would allow foreign companies to better tailor a product to the Chinese market. Activities such as obtaining Chinese International Standard Book and Serial Numbers (ISBNs or ISSN), editorial and manufacturing work and printing for the Chinese market remain off-limits to foreign companies. Restrictions on these activities result in greater expense to publishers and consumers alike, and discourage development of materials most appropriate for Chinese users. These restrictions also create delays and a lack of transparency in dissemination of legitimate product in the Chinese market, opening the door for pirate supply.
- **Online content:** High fees related to access to foreign servers by users of the China Education and Research Network (CERNET) 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 options available to Chinese scholars and students.

Motion Picture Industry: There has been no change in 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. The monopoly import structure (described below) and the censorship mechanism go hand in hand with the way this quota is imposed and enforced. Demonstrably unfair and adhesive contractual conditions (under the so-called "Master Contract") still prevail for theatrical-release motion pictures in China, ensuring that the film distributor/studio gets only a small proportion of the box office while in the rest of the world the convention is to split the box office 50-50 between studios and distributor. This creates a completely non-competitive environment for film importation and distribution in China.
- **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, in violation of China's WTO trading rights commitments. 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 2002.⁶⁰ Like China Film, Huaxia is beholden to SARFT and its operations are virtually transparent to China Film, which it effectively controls, 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 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).⁶¹ 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).⁶²
- **Black-Out Periods:** The Chinese government has on various occasions 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.

⁶⁰ 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%.

⁶¹ 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.

⁶² 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.

- **Import Duties Should be Based on the 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.

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.

Administrative-Criminal Transfer Regulations: It was hoped that the Criminal Transfer Regulation would lead to more and easier referrals from administrative agencies to the PSB. However, as IIPA noted in last year's filing with respect to the draft regulation, it was left unclear whether transfers were required upon "reasonable suspicion" that the criminal thresholds had been met. There appears to be no uniform practice among administrative agencies and PSB offices on this critical question and further clarification, which would allow such "reasonable suspicion" transfers, is critically necessary. Reports in the Chinese press routinely refer to such referrals occurring (though in a very limited number of cases, likely given that the thresholds are too high) but it is never, or very rarely, reported what happens to the case after that event. In general, however, the adoption of these regulations does not appear to have led to an increase in transfers or any further clarity on when they are required.

Adoption of the New "Regulations for Protection of Copyrights on Information Networks": In a welcome transparent process, the new "Internet Regulations" were issued and entered into force on July 1, 2006 and set out the legal infrastructure, along with provisions of the Copyright Law, for protecting content online. In general, IIPA welcomed the new regulations as responsive to many of the comments made by it and other members of industry over a long comment period. Some concerns remain, however:

- **Coverage of Temporary Copies:** The SCLAO which had ultimate responsibility, following a drafting and vetting process in NCAC, for the final regulations decided not to clarify coverage for temporary copies. While there is support in many quarters for an additional regulation clarifying this issue and extending the scope of the regulations to ALL the rights implicated by reproducing and transmitting content online, Director General Zhang of the SCLAO indicated to IIPA in its November meetings that this issue remains controversial. IIPA noted that over 100 countries around the world extend, or have committed to extend, such protection.
- **Coverage of the Regulation Generally:** IIPA had voiced concern in its series of comments that the regulations were limited only to the communication to the public right. Director General Zhang responded that he believed that all other rights were covered directly by Article 47 of the Copyright Law. This would appear to result in the conclusion that Article 47 also mandates the coverage of devices and services with respect to copy controls. We indicated that further regulations would be highly desirable to remove any ambiguity in coverage. He did not close the door to this possibility.
- **Technological Protection Measures:** The treatment of technological protection measures was substantially improved in the final regulations. Both devices and services are now covered by the prohibition as are "acts." Access controls are also covered. The test of what constitutes a circumvention device still remains unsatisfactory. Exceptions were significantly narrowed, though remain overbroad in some areas.

- **Service Provider Liability and Exceptions:** The final regulation is a substantial improvement over earlier drafts and generally tracks the DMCA and EU Copyright Directive provisions. The “safe harbors” provide limitations only for liability from damages, not injunctive relief, and ISPs are liable if they know or should have known that the material was infringing even absent express notifications (and of course there is no safe harbor unless the ISP takes down the infringing material after compliant notice). The nature of what constitutes a compliant notice is less than clear, however, and has given rise to some confusion, and therefore lack of compliance by ISPs. However, it was clarified in a letter to IIPA that email notices would suffice, though this must be directly communicated to all ISPs in China. Exceptions still cause some concern with Director General Zhang confirming that the Article 9 statutory license will apply to foreign works which are owned by a Chinese legal entity. This would violate the Berne Convention and TRIPS. Zhang also confirmed that Article 8, which affects publishers, would not apply to foreign works. Zhang also said that ISPs are liable for linking activities under Article 23, which we believe is the correct reading and would appear to contradict the decision of the Beijing Court in the recent *Baidu* decision.
- **Exemptions for Libraries, Educational Bodies and “Similar Institutions”:** IIPA remains concerned about certain aspects of Articles 6, 7 and 8. A representative list of potential issues includes (a) overbroad language applying to teachers, researchers and government organs in Article 6; (b) Article 7’s reference to “similar institutions,” which may open up the scope of exemptions far beyond organizations that perform the traditional functions leading to these exemptions; (c) failure to limit Article 7 to “nonprofit” entities; and (d) failure to clarify that Article 8 does not apply to foreign works.⁶³

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. Examples of omissions include the exhibition and broadcast right, the translation right and others, the infringement of which do not constitute crimes even if done “on a commercial scale.” 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.⁶⁴ 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, or in the case of hard disk loading where the software might be characterized as a “gift”). The criminal provisions also need an update to take into account the WCT and WPPT (WIPO Internet Treaties), to which, as discussed below, the NPC has now authorized China to accede. The most important update would be to criminalize the circumvention of TPMs. 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 interactive public communication right); (3) criminalize violations of the anti-circumvention and rights management information provisions; (4) remove “purpose of reaping profits” to criminalize

⁶³ Director General Zhang of the SCLAO confirmed to IIPA that Article 8 did not apply to foreign works but this should be confirmed in writing and a notice made available widely.

⁶⁴ As noted below, the new IIs 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.

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).⁶⁵ 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.⁶⁶

Criminal Thresholds Should be Lowered or Abolished Entirely: The SPC’s 2004 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, 3,000, and 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 illegal gain threshold applies in those cases (which is far more difficult to meet particularly since pirates do not keep records showing their “profit”). 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 with clear copy thresholds and even if pirate profit is not proved.

China Should Deposit Its Instruments Of Accession To The WCT And WPPT Immediately: While China committed to pass accession legislation in the NPC by June 30, 2006, the NPC finally did so in December 2006. This was applauded by IIPA but it is unclear why China has delayed depositing in Geneva so that the treaties would go into effect 90 days thereafter. Director General Zhang indicated that something might have to be done to cover performers with respect to the Treaties’ obligations and this may account for the delay.

China Should Adopt Full Communication To The Public And Broadcasting Rights For Record Producers: China should provide performers and phonogram producers with rights of communication to the public, including of course broadcasting, and it should clarify whether the right of public performance in sound recordings still exists. The right of public performance for foreign sound recordings was initially accorded in the “International Copyright Treaties Implementation Rules”, in force since September 1992. The “Implementation Rules” were issued, *inter alia*, to comply with China’s obligations under a January 1992 MOU with the U.S., in which China had undertaken to grant a public performance right to foreign works and sound recordings. However, the 2001 Copyright Act failed to confirm this right, so no public performance right is clearly acknowledged by legislation, and the status of the right for foreign sound recordings is unclear. China should also establish clear rules that promote more responsible practices on the part of all players involved in the digital transmission of copyright materials. Legal accountability will lead to the development and deployment of advanced

⁶⁵ 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.”

⁶⁶ 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.”

technological measures which will advance legitimate commerce while preventing unfair competition.

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.

TRAINING AND PUBLIC AWARENESS

MPA, IFPI and BSA have undertaken many training and awareness programs throughout China in 2006. 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.

MPA, for example, has provided the following trainings:

- From January 16-20, 2006, the MPA’s Greater China Team and representatives from Hong Kong Customs, the Content Overseas Distribution Association and the Japanese External Trade Organization conducted three IPR training seminars for 239 Chinese law enforcement officials in Beijing, Shanghai and Shenzhen.
- On May 17, 2006, the MPA, in association with the Internet Society of China’s Copyright Union, held a very successful half-day seminar entitled "Global Enforcement of Motion Picture Copyright on the Internet" in Beijing. Some 75 attendees participated in the seminar, including representatives of Beijing, Shanghai, and Shenzhen ISPs and ICPs as well as officials from NCAC, the Beijing Copyright Administration and the Public Security Bureau.
- On May 30-31, 2006, the MPA provided training to 180 National Culture Market Administrative Enforcement officials during a seminar held in Taiyuan, the capital of Shanxi Province. MPA China representatives delivered presentations on global trends in copyright enforcement, MPA anti-piracy strategies, and the identification of illegitimate audio-visual products. Ministry of Culture officials delivered presentations on the Administrative Measures for Culture Market Enforcement, which came into effect on July 1, 2006. MOC delivered a report on a copyright infringement criminal case involving a pirated optical disc shop that was prosecuted in Nanjing.
- On September 5 and 7, 2006, the MPA and “Content Japan” representatives organized training seminars in Hangzhou and Shanghai for local law enforcement officials. In attendance were Director Chen Tong of the MOC’s Market Supervision Bureau, Deputy Director General Tin of the Zhejiang Culture Administration, and Director General Zhou of the Shanghai Municipal Culture Market Administrative Enforcement Task Force, as

well as representatives from the Tokyo and Shanghai offices of the Japan External Trade Organization (“JETRO”).

- On July 28, 2006, the MPA organized a training seminar in Guangxi Province for the National Anti-Pornography and Piracy Working Committee (NAPP), the Guangxi Copyright Bureau, and the Guangxi Press and Publication Bureau. Also in attendance were representatives from the Japan External Trade Organization (“JETRO”).
- Sponsored by the MPA, the NCAC Symposium on Cracking-down on Internet Piracy was held in Beijing on July 20, 2006. Wang Ziqiang, the Director General of the NCAC’s Copyright Department, presided over the symposium. Officials from the NCAC, Beijing Copyright Bureau, and the Ministry of Public Security (MPS) described their experiences and the difficulties encountered in the prosecution of internet piracy cases. Officials also provided an explanation of the internal working procedures of the MPS for the handling of criminal cases related to internet piracy.
- On September 29, 2006, the MPA participated in the “IPR Criminal Enforcement Seminar” organized by the US Embassy and MPS, which was held in Shanghai. The seminar focused primarily on copyright issues, but also dealt with trademark-related enforcement. National and local-level MPS enforcement officials participated in the seminar and discussed the use of criminal actions for IPR enforcement. Representatives from the MPS, the People’s Procuratorate, and the NCAC also attended. The seminar concluded with a panel discussion in which industry representatives had the opportunity to speak about the challenges of bringing criminal IPR actions in China.
- On August 9, 2006 MPA was invited to give a presentation on the impact of optical disc piracy on the film industry at a training seminar conducted by the Beijing Press and Publications Bureau and the Beijing Copyright Bureau. The training seminar was organized as part of the nationwide “100-Day Anti-Piracy Campaign”. The MPA’s involvement in enforcement training programs has led to requests from the Beijing Press and Publication Bureau for MPA involvement in expanded training programs to be conducted next year.

The record industry provided the following trainings:

- In April 2006, a training for the representatives of the business and legal departments from local branches of China Telecom in Beijing. This is the biggest ISP in China.
- In April 2006, there was a round table training course for about 40 IP judges of China in Hangzhou.
- The industry participated in a Workshop on Administrative & Judicial Protection of Copyright of the Shenzhen Copyright Enforcement Program in July 2006.
- It participated in the Copyright Criminal Protection Seminar in Shanghai in September 2006, organized by the US Embassy Beijing.

In December 2006, it made a presentation at the EU-China Conference on the Development of Collective Management Societies and the enforcement of copyright.