

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE
2001 SPECIAL 301 REPORT
PEOPLE'S REPUBLIC OF CHINA

EXECUTIVE SUMMARY

Once again this year, IIPA recommends that China remain subject to Section 306 monitoring. Despite efforts made by the Chinese government to crack down on massive domestic piracy of all types of copyrighted products earlier in 2000, including raids netting hundreds of thousands of pirate optical media products, piracy rates in China continue to hover at the 90% level. Most alarming are reports of an increase in the production of pirate optical media products including DVDs by *licensed* as well as underground CD plants. The Chinese enforcement system continues to be plagued by a lack of coordination and transparency, making it almost impossible for Chinese authorities to launch and maintain an effective anti-piracy program. This is fueled by the ongoing problem of lack of real deterrence due to low administrative penalties and virtually nonexistent criminal prosecutions for major acts of piracy. China has, however, committed in writing to bring its copyright law and other enforcement remedies into compliance with TRIPS prior to accession, expected some time in 2001. In the run-up to China's WTO adherence, IIPA looks to China to undertake a coordinated and sustained campaign to reduce these high levels of piracy, by placing this task directly under a Vice-Premier and setting out clear lines of authority throughout the enforcement system. It is only by taking drastic, deliberate and creative action that China can bring its enforcement regime into compliance with its new TRIPS obligations – and with its obligations in the 1995 bilateral copyright enforcement agreement.

While some aspects of the enforcement system are working well (such as the NCAC title verification program for audiovisual works) and enforcement is better in certain regions than in others, growing domestic demand for copyrighted products of all kinds has resulted in a surge in domestic piracy, including continuing importation of optical media product from countries in Southeast Asia, like Taiwan, Malaysia, Macau, Hong Kong and others. Also of great concern is the increasing sophistication in the pirate market, including growing production of high-end DVDs, growing Internet piracy, and the growing production of higher quality counterfeit products, all indicating a maturing of the pirate market. Also of continuing concern is the still rampant piracy of computer software by business enterprises and the increasing trend in the preloading of computers with unauthorized copies of computer software. There are also reports that some CD production facilities are being smuggled back into China as other countries crack down and as domestic demand grows. While raiding activity continues, the copyright industries have seen little movement to increase administrative penalties or to move bigger cases to the courts for criminal prosecution. While the Chinese government has reportedly committed to looking at the problem of high monetary thresholds for criminal liability, there has been no sign of significant movement yet. Without deterrent penalties applied to larger pirate operations following criminal prosecutions, it is unlikely that China can significantly reduce its existing 90% piracy levels.

In last year's submission, we noted that the reorganized Office of Anti-Piracy and Pornography (NAPP), under the aegis of Vice Premier Li Lanqing, could possibly make a large dent

in the piracy problem. However, despite a number of successful crackdowns and seizures and despite much good will, the piracy levels have not gone down in the last year.

While problems in the enforcement system persist, China has begun attacking inadequacies and loopholes in its statutory and regulatory structure, after a long hiatus from the time it passed its initial copyright law and joined the international copyright conventions in the early '90s. A new draft copyright law, approved by the State Council on November 22, 2000, is now before the Standing Committee of the National People's Congress and also in late November, the Supreme People's Court issued a new "interpretation" of the existing copyright law that dealt forthrightly with the scope of legal protection on the Internet. This interpretation is quite helpful and cements some of the early favorable decisions rendered by the Chinese judiciary in the first set of on-line piracy cases in 1999 and 2000. IIPA commends the Chinese authorities for clarifying the application of its copyright law and procedures to the Internet. With Internet use growing exponentially in China (from 10 million in 1999 to 22 million in 2000), it was essential that the Chinese government act promptly and decisively in this area. However, another "interpretation" has not proved positive; the State Council and the People's Supreme Court must now review and significantly revise its existing "interpretation," issued in December 1998, with respect to criminal copyright infringements by eliminating the high liability thresholds, and making it easier for prosecutors to bring criminal cases and for courts to impose deterrent criminal penalties.

IIPA and its members are very pleased to see that the recent draft of the copyright law amendments do now contain provisions seeking to implement the provisions of the all-important WIPO "Internet" treaties – the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). While, as described in the copyright law section below, the draft IIPA has been able to review does not fully and correctly implement the treaties, this is a good start. We hope the National People's Congress will make the necessary amendments to implement correctly, adopt the amendments (including fixes to any TRIPS deficiencies as well) and ratify both treaties as soon as possible. The world waits expectantly for China to take this bold step and join the many other developed and developing countries that have recognized the importance of these treaties to creating a proper climate for e-commerce investment.

China has fallen behind in implementing the State Council's software legalization decree it issued in 1999 (followed in June 2000 by Document No. 18 reasserting such order) with respect to uses of unauthorized copies of software in government enterprises and ministries. This is key to building the software industry in China and demands clear rules and financial resources from the central government.

It is not difficult to sum up China's principal problem with its overall intellectual property regime: It is the absence of effective and deterrent *enforcement* that will drive the local copyright industries into the ground and continue to cause the international community to refer to China ignominiously - based on piracy levels of 90% and above – as the "piracy capital of the world."¹

¹ For a history of China's involvement in the Special 301 process, see Appendix E.

ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1995 - 2000

INDUSTRY	2000		1999		1998		1997		1996		1995	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	120.0	90%	120.0	90%	120.0	90%	120.0	75%	120.0	85%	124.0	100%
Sound Recordings / Musical Compositions	70.0	85%	70.0	90%	80.0	56%	150.0	56%	176.8	53%	300.0	54%
Business Software Applications ²	658.7	93%	437.2	91%	808.4	95%	987.9	96%	507.5	95%	488.0	96%
Entertainment Software ³	NA	99%	1,382.5	95%	1,420.1	95%	1,409.4	96%	1,380.0	97%	1,286.0	99%
Books	130.0	NA	128.0	NA	125.0	NA	125.0	NA	125.0	NA	125.0	NA
TOTALS	978.7		2137.7		2,553.5		2,792.3		2,309.3		2,323.0	

COPYRIGHT PIRACY IN CHINA

Optical Media and Internet Piracy

The levels of optical media piracy in China across all lines of copyright business continue to remain high despite periodic raiding at all levels in the production and distribution chain. The Office of National Anti-Piracy and Pornography (NAPP) has reported that as of January 2001, 113 optical disk replication lines have been closed since the 1995 U.S.-China bilateral IPR agreement. Industry estimates are that as of January 2001, there are 72 factories operating 156 replication and mastering lines in China, with 14 lines producing DVDs. Overall capacity, not including underground plants that continue to spring up around China, is estimated at close to 550 million units annually.

Through 1999 there were virtually no reports of licensed plants producing more than negligible pirate product. This has changed in 2000 with reports that even licensed plants are now producing measurable amounts of pirate product for domestic consumption. This means there has been a marked fall-off in the monitoring of licensed plants by the appropriate authorities which must resume and a weakening of political will to raid licensed plants, as was done in 1996-97. In addition, there is continuing production from underground plants, including plants that are reported to have been smuggled back into China as other countries in the region, particularly Hong Kong, have adopted or are considering optical media regulations or are cracking down on their own plants. All this is being caused by significant increases in local demand for optical media products of all kinds in China, and what appears to be a fall-off in the aggressiveness of enforcement. That demand has also led to continuing imports of pirate optical media products from other territories in Southeast Asia, including Hong Kong, Macau, Taiwan, Malaysia and even Burma. Even though the general conclusion has been that Chinese authorities have indeed tried, through raiding and administrative proceedings, to fight piracy within China, that fight has not

²BSA loss numbers for 2000 are preliminary.

³ IDSA estimates for 2000 are preliminary.

significantly reduced the quantity of pirate product available in the marketplace; indeed, some industries report that amounts are increasing.

The recording industry confirms this analysis. Last year IIPA reported that official government estimates of the piracy rate for music and sound recordings in China now exceed that of the industry itself and RIAA/IFPI and IIPA used the Chinese government estimate of a 90% piracy rate. In 2000, RIAA/IFPI estimates sound recording piracy at 85%, a small drop due to significant improvements in the market in Shanghai (which is seeking to become a “model city” for copyright protection). The local industry continues to press its own government hard to do more, as they watch their own sales decline due to piracy. The international industry is very concerned that, despite the extensive controls within China on CD production (which controls are, however, not being fully implemented), the new optical media legislation in Hong Kong and Macau is likely to result in the reduction of imports of pirate product, leading to huge pressure to expand domestic production within China.

The crisis in the local industry is continuing but, in response to the onset of WTO membership, some cities have taken some positive actions. For example, Shanghai announced a series of policies in 2000 to try to clean up the market in a bid to become the culture center of China and the “modern city on copyright protection.” Shanghai is seeking the cooperation of international record companies. This is reflected in the Shanghai Music Festival, which took place in November 2000.

Reports continue that pirates purchase publishing numbers from legitimate audiovisual publishing houses, many of whom have to sell these numbers merely to survive.

Internet piracy, in particular Websites offering videogames and MP-3 files of sound recordings for downloading without authorization, remains a growing threat. There are now an estimated 22 million Internet users in China and that number is growing exponentially every year. While it is difficult to estimate the number of pirate sites, RIAA/IFPI report that there are at least 100 active Websites offering Chinese, U.S. and other international repertoire, down from last year’s figure of 200 sites. The reduction may be due to the MyWeb.com case which likely has succeeded in deterring some Web pirates. The IDSA reports very high levels of Internet piracy of videogames in China.

As discussed further below in the enforcement section, the Chinese courts should be praised for taking on Internet piracy even when some scholars within China believed that the copyright law was somehow unclear on on-line infringement liability. The Supreme People’s Court has now taken the positive step of issuing their “interpretation” which follows, indeed expands upon, liability for infringements decided in individual cases. However, Chinese administrative enforcement officials have not taken meaningful action against internet piracy despite requests to do so.

Piracy of audiovisual product in digital format also remains a serious problem, with continuing huge seizures of VCDs throughout China. Now new DVD plants are coming on line, with reports that a total of 14 exist, but with some not yet operational. It is clear that piracy in DVD format is increasing with many raids and large seizures in 2000. Already close to 700 titles of MPA product are being released in pirate form in China, which threatens further investment by U.S. motion picture companies in the DVD business in China. In Guangzhou, for example, it is reported that pirate DVDs are plentiful and sell for less than \$1! MPA also believes that in 2001 the

increase in the smuggling into China of illegal DVD production lines will continue without sustained vigilance by Chinese authorities. In January 2000, NAPP, the Ministry of Finance, PPA and the NCAC announced a reward scheme for information on pirate optical media production. This scheme assisted in the successful raiding of many CD plants in 2000 and led to the first seizure of DVD lines being used to pirate U.S. motion pictures. NAPP has reported that in early February 2001, another two underground DVD lines were seized in Guangdong Province.

While MPA reports some progress in fighting piracy, the scope of the problem remains immense. A December report in The NY Times related the story of one of the largest Chinese distributors of U.S. product who sold 300,000 legitimate copies of Titanic while pirates sold an estimated 20 million to 25 million. The owner of this business reported that pirates generally outsell the legitimate distributors by 35 to 1! That story also reported that within a week after the November 17 release of How the Grinch Stole Christmas, VCD copies were on sale in the major cities for \$1.20 each! The LA Times reported in August 2000 that pirate DVDs containing Three Kings on one side and Stuart Little on the other side were selling in a Beijing retail shop for around \$3. The article reported that prerelease copies of films like Gladiator, shot by camcorder in the theater and called "cinema versions" were also available shortly after U.S. theatrical release for less than \$2. MPA reports that on January 17, 2001, Hong Kong Customs seized 2.2 million CD-ROMs from a vessel bound for China containing pirate movies (approximately 33,000 were MPA member company titles) in compressed format with the films covered by JPEG image files to hide them. As a result, the Hong Kong manufacturers were raided and five replication lines were seized plus molds and stampers. This illustrates both the current sophistication of pirate operations in Hong Kong and is but another example of how much product is being imported into China to satisfy the booming domestic market.

Pirate VCDs, CDs and CD-ROMs are sold in distribution networks consisting of large wholesalers and distributors, retail shops, street markets and individual vendors. On a positive note, MPA reports that the Chinese authorities plan to close down two-thirds of the over 40 audiovisual marketplaces that have become havens for pirate distributors.

In the area of computer software, a nationwide survey of over 80 Chinese software enterprises, conducted in mid-2000 by a research entity under the Ministry of Information Industries, found that the number one barrier to their development was the widespread piracy of their products. The most damaging type of piracy is the unauthorized use of software by companies (discussed below), but counterfeiting and hard disk loading are also major concerns. Some governments have sent helpful orders to the marketplace not to sell unauthorized copies of software or preload illegal software on computers before they are sold. These are model public education efforts that should be replicated throughout China. However, they will not be taken seriously without vigorous and sustained enforcement coupled with meaningful penalties. Unlike with other pirate products, there was no concerted crackdown on the illegal sale of pirated software in 2000 despite its widespread availability and open sale in many markets. The government is encouraged to initiate a crackdown on the open sale of pirate software, or at the very least include pirate software in the government's nationwide crackdowns on pirate audiovisual and musical products and counterfeit products. Increased attention should also be given, particularly by the AIC and PSB, to the increased production and availability of high-quality counterfeit software products in the marketplace. Finally, there is a growing trend on the part of computer manufacturers, distributors and retailers, to load illegal software onto computers before they are sold. In many cases this takes place when the computer manufacturers either sell empty machines or sell machines loaded with one type of software, knowing that it will be replaced at some point in the

distribution channel with illegal software. Government officials have taken limited action against this hard disk loading piracy. The penalties are minimal (less than 5,000 RMB, or \$600) and are seen as a mere cost of doing business by the pirates. Far more raids and stiffer penalties are necessary to address this problem.

Other than via seizures of other pirate product (like VCDs) where pirate console and PC-based games show up, China has made no concerted effort to get at the piracy of videogames in China, which remains at among the highest levels of all copyright industry products. It is estimated that pirate console-based videogames constitute 99% of that market in China (though piracy of PC-based games is reported to be significantly less). It is reported that close to 50% of console-based games are imported from Malaysia, Taiwan and Macau (compared to almost 100% in 1999), whereas there has been a marked reduction in the import of pirate PC-based games (from 70% in 1999 to under 10% in 2000. It is suspected that this is due to the reemergence of domestic pirate production to satisfy an increasing local demand.

Government Use and Corporate End-User Piracy of Business Applications Software

As in other countries, unauthorized use of software in enterprises in China causes well over half the piracy losses faced by the software industry. In February 1999, the State Council reissued a "Notice" released by the National Copyright Administration of China in August 1995 ordering all government ministries at all levels to use only legal software. This welcome announcement (the so-called "Red Top Decree") put the highest levels of the Chinese government behind software legalization throughout government ministries, and sent a message to the private sector that it should not be using software without authorization. On June 27, 2000, the State Council again spoke on this issue with the release of Document No. 18, which made clear that no entity (public or private and regardless of level) might make unauthorized use of software. In 2000, the Business Software Alliance cooperated with the National Copyright Administration to carry out a series of software asset management training seminars for government officials and some companies in four markets, and looks forward to expanding that program to another four to six markets in 2001. BSA is also encouraged by the steps the Shanghai government plans to take to implement Document No. 18, including setting up a special fund for the legal licensing of software by government entities, and by the apparent movement in the same direction by the Beijing government. However, far more needs to be done to make the orders contained in the State Council Decree and Document No. 18 a reality, including programs initiated by the central government. The most urgent need is for detailed software management guidelines governing the procurement and use of software; ensuring that government entities have the funding to comply with these guidelines; and ensuring that government officials receive adequate training on the management of software assets.

APEC leaders decided last year to make it a priority to promote the legal use of software in their markets, in particular in all government entities. As the 2001 host of APEC, China has an opportunity to show leadership in this area, but this will require taking some early, concrete steps towards government legalization.

End-user piracy in the private sector remains the greatest barrier to the development of the software industry in China, domestic and foreign companies alike. Unless steps are taken to establish an effective administrative and judicial enforcement regime against this type of piracy, it

will continue to retard the growth of this critical industry. As noted below, enforcement in this area has been very difficult.

Other Types of Piracy

Piracy of music CDs is, of course, very high but pirate audiocassettes still have a major share of the market in China. On the other hand, videocassette piracy has shrunk significantly in favor of VCD and DVD piracy, the latter growing at an alarming rate.

The unauthorized public performance of U.S. motion picture product continues mostly unchecked in hotels, clubs, minitheaters and even government facilities. These public performances compete directly with plans to release popular titles in Chinese theaters and threatens the development of the legitimate theatrical market in China. Although the Chinese authorities have taken a number of actions against these facilities, the thrust of these actions has been against pornography, not copyright protection.

Television piracy continues to be a concern in 2000. There are 38 provincial broadcast television stations and 752 local stations, all run by the government, which reach over 300 million households. These stations commonly make unauthorized broadcasts, increasingly including popular MPA member company titles. These stations commonly rely on counterfeit "letters of authorization" or "licenses" from companies in Hong Kong, Thailand or Taiwan, which purport to have rights to the title. Some stations also try to hide behind the "fair use" exception, broadcasting heavily edited versions of MPA member company films under the guise of "introduction to film."

There are approximately 2,100 registered cable systems in China, serving 70 million cable households, plus 1,000 cable systems in remote areas, all of which routinely include pirated product in their programs. Since 1999, only enforcement actions against Hanzhou Cable TV (October 1999) and Qsintao Cable TV (June 2000) have been taken.

Cartridge-based games suffer high rates of piracy as well. Retail pirate sales activity is rampant and China Customs has been unable to adequately restrict the import of pirate integrated circuits and components manufactured in Taiwan and then assembled in China for domestic consumption and export.

AAP has found no noticeable improvement in the market for books and journals in China in 2000, with piracy still hampering development of the legitimate market. Though there are some licenses in China, and though some illegal reprints of legitimate editions result in administrative actions and small fines, on the whole piracy of U.S. works continues unabated. The vast majority of illegal copying is in educational institutions. Scientific and professional journal subscriptions are virtually nonexistent, while the number of students and researchers in institutions of higher learning, and professionals in state institutions, grows. It is estimated that pirated journals make up between 50% and 90% of the journal holdings of nearly all of China's approximately 1,000 universities. For example, IIPA reported that only nine subscriptions to *Chemical Abstracts* — the most important journal and database in the field of chemistry — were bought in 1999 by the entire Chinese government. In negotiating a higher education loan with the World Bank, an offer for funds to update journal collections was apparently refused. The reason given was that: "journals are purchased domestically"!

Traditional reprint piracy is also prevalent. *China Daily* reported In June 2000 that piracy of the most popular English textbook in China, *College English*, caused losses of \$2.4 million just to the Chinese distributor of that text, the Shanghai Foreign Language Education Press.

No one is allowed to publish without getting a publishing license and being assigned an ISBN number. It has been reported that some local publishers sell ISBN numbers to would-be publishers, which then publish illegal translations. The recent huge worldwide success of the Harry Potter books created its own anecdote. A legitimate Chinese publisher paid an advance of \$17,000 for the first three books, a *de minimis* figure for these titles. The publisher's argument was that the books would be pirated immediately and he could not expect significant sales. The publisher was of course correct; immediately there were huge pirate print runs, and apparently in several editions! Losses to the U.S. publishing industry are estimated to have increased to \$130 million in 2000.

COPYRIGHT ENFORCEMENT

Administrative and Criminal Enforcement

In 2000, the enforcement problems that have plagued China continued, despite significant raiding activities in some cities and a number of successful campaigns in early 2000 against pirate optical media factories. These problems include virtually no criminal prosecutions and attendant deterrent penalties that would help cut down on pirate optical media production by owners of these factories and generally ineffective and nondeterrent administrative enforcement against distributors and retailers, with low fines.

MPA, acting in concert with NAPP and other national and local agencies, cooperated in a number of major raids in which at least 200,000 DVDs were seized. NAPP coordinated an additional raid in July where two DVD lines were seized (a first in China), as well as 200,000 more VCDs and DVDs with an estimated total worth of \$12 million. More than 35 people were arrested in these various raids, which were part of a general anti-piracy campaign during the first two-thirds of 2000. While this kind of activity is welcome, the industry has no report on what happened with the persons arrested, whether they were merely fined, prosecuted criminally or let go altogether. More transparency in this part of the enforcement process is desperately needed. *The LA Times* reported that during the campaign in the early part of 2000, 1.72 million pirate optical media products were seized. While this is positive, it also illustrates the massive dimension of the problem.

It is hoped that a new atmosphere will develop as China gets closer to WTO membership. China has, in a number of documents and protocols, promised major enforcement reforms which it agreed to have in place by the date of its accession. That date appears to be approaching and while China has put itself on the road of legislative and regulatory reform, actual sentencing with deterrent penalties has yet to emerge. The government is now freely acknowledging that enforcement efforts remain insufficient and more needs to be done to deter piracy. In part this is due to the near completion of the bilateral agreement on China's joining the WTO, but it is also due to greater pressure from local industries (often in combination with the U.S. and international industries) increasingly damaged by the high levels of piracy in China and now willing to press openly for change.

As noted above, the copyright industries uniformly experience high rates of piracy and find it difficult to measure progress because of the lack of transparency in the enforcement system, particularly the lack of industry access to levels of fines and other penalties for infringement. While the Chinese government claims huge successes through statistics purporting to summarize results from enforcement actions, Alliance members have no way to verify these accounts. For example, as we reported last year, NAPP has claimed that over the last five years through 1999, 6,536 pirate “dealers” have been subjected to jail terms and 12,179 “copyright violators” have been fined. These statistics came as a surprise to our industries, which have, according to the latest reports, rarely seen a jail term ever imposed for piracy of a U.S. work. (IIPA suspects that these so-called “jail terms” involve convictions for pornography, not copyright infringement.) In 2000, however, the Chinese press in Shanghai reported a criminal conviction of a Chinese citizen that infringed Chinese works, in that case, copyrighted maps. The court found that the two defendants printed 170,000 counterfeited maps, sold 112,000 of these and earned roughly \$13,250. This was enough to meet the minimum thresholds under Article 217 of the Criminal Code and the court sentenced the two defendants to two years and one-and-one-half years in prison. U.S. copyright owners would be most pleased to see this kind of result in the cases involving the 34 arrests in the optical media factory raids described above. So far, this has been rare, at best.

There are myriad deficiencies in the administrative enforcement system in China, but as discussed below, some of these appear to be the target of legislative and administrative changes now pending:

- The NCAC has continued to require clearance in Beijing of copyright enforcement actions taken locally by copyright bureaus involving foreign rightholders. This has slowed down and bureaucratized enforcement at the local level and in many cases effectively stopped any action from taking place. Requiring this procedure only of foreign rightholders (the procedure is enshrined in the copyright law regulations) is a clear violation of the “national treatment” principle in TRIPS. In the IPR protocol agreed to between the U.S. and China in connection with WTO accession, China promised to eliminate this practice before adherence.
- Copyright officials do not have the clear authority to take action against key types of piracy, or the resources and political mandate to do so. For example, it is unclear to many officials what authority and powers they have to address the problem of rampant corporate end user piracy. Even if they did have this authority, they have few resources to take this problem on, and perhaps most importantly do not have the clear political mandate to take action in this area. These problems must be addressed if meaningful administrative enforcement is to be taken against this type of piracy.
- Fines are too low, both as written and as imposed; these need to be increased significantly, imposed in practice and widely publicized throughout China, and the results provided to the U.S.G. as promised in the bilateral IPR agreement. China has only promised to recommend changes to the Supreme Court interpretations setting the high threshold for criminal liability and it has indicated that administrative fines will be increased, but no specific actions have yet been taken. In a very promising development, the State Council has proposed instituting statutory damages in civil cases (see below).

- Markets and retail shops selling pirate CDs, VCDs and CD-ROMs are not being closed even after subsequent administrative “convictions” for copyright piracy or trademark violations. The IPR protocol promises that this will change, but the new draft copyright law does not appear to include this as an additional remedy for infringement. Enforcement against this type of piracy by other authorities, in particular the AIC and PSB, is also critically important and these entities should be directed to impose deterrent penalties.
- The system is almost entirely nontransparent; it is often impossible to ascertain what penalties are imposed in particular cases. Rightholders cannot, for example, obtain documents from for the government on the activities of CD plants (even though every order the plant accepts must be recorded and reported to the authorities). Foreign rightholders are usually told that these are “national confidential documents.” IIPA members have no evidence that these practices will change.
- There is a lack of time limits for investigations, leading to long delays and resulting failure to deter pirates. Prior drafts of the copyright amendments would have required executing civil provisional remedies within 48 hours of the request by the right holder. Unfortunately this provision has been deleted.
- There is still “local protectionism” by administrative agencies involving politically or financially powerful people engaged in pirate activities.
- Administrative enforcement for copyright infringement against public performance piracy has been nonexistent; the same is true for cable piracy.

In contrast with the above, however, MPA continues to report positively on the title verification program run by NCAC. At the end of August 2000, a total of 6,089 title verification requests have been submitted to NCAC by MPA, and 2,594 titles have been challenged as unauthorized.

**ADMINISTRATIVE COPYRIGHT
ENFORCEMENT STATISTICS
2000**

ACTIONS	2000 MPA
Number of raids/searches conducted	636
Number of administrative cases brought by agency	631
Number of defendants found liable (including admissions/pleas of guilt)	631
Ratio of convictions to the number of raids conducted	99%
Ratio of convictions to the number of cases brought	99%
Number of cases resulting in administrative fines	440
Total amount of fines levied	N/A
US\$0-\$1,000	401
\$1,001-\$5,000	37
\$5,001-\$10,000	2
\$10,000 and above	0
Total amount of restitution ordered in how many cases (e.g. \$XXX in Y cases)	

With respect to criminal enforcement, IIPA provided, in its last three annual submissions, a detailed analysis of the new criminal law provisions and the Supreme People's Court's "interpretation" of those criminal provisions. Because these actions by the Chinese government and Judiciary made it even more difficult to meet the threshold of criminal liability, there have been virtually no criminal actions commenced involving U.S. copyrights, further diminishing the deterrent impact of the enforcement system.

We urge the U.S.G. to press the Chinese government to redeem its commitment at least to "recommend" to the Supreme People's Court that its "interpretations" be significantly amended to make criminal prosecutions more available. Indeed, as discussed below the State Council has ultimate authority merely to order those amendments.

CIVIL ENFORCEMENT

One positive development is the increasing sophistication and effectiveness of the IPR courts throughout China. One fallout from this positive development is the increase in the number of civil cases for damages being brought by Chinese right holders and increasingly by U.S. right holders. The recording industry has increasingly turned to civil remedies, including in the Internet piracy area, since criminal enforcement is simply unavailable as a practical matter. The results have been generally positive with the previous problem of woefully inadequate damages being turned around slowly as the judges become more aware of the economic harm being done by infringements throughout Chinese society and the economy. Hopefully, this trend will accelerate when the new copyright amendments, spelling out the measurement of damages and improving civil procedures, including improved provisional remedies and for the first time establishing statutory damages, are adopted.

One recent case of note, filed in December 2000, involves a civil suit by the Educational Testing Service (ETS) seeking damages against the Beijing New Oriental School, which has for years administered the TOEFL and GRE tests to Chinese students seeking entrance into U.S. universities. ETS alleges that the school has been stealing ETS's highly secure test questions and test forms and selling them to its students at a significant profit. The school also distributed these highly secret test questions widely in China. ETS claims that the security and integrity of the tests have been compromised to the extent that it has led some U.S. universities to doubt the authenticity of all test scores from China, harming the entrance prospects of Chinese students. The school had been sued by ETS before but that suit failed to stop the conduct. The case is pending in the Beijing People's Court.

Civil Cases Involving Internet Piracy

Last year we reported on a number of Internet cases decided in favor of rightholders, in spite of arguments by some Chinese academics that the copyright law could not be applied to on-line activities. These cases included the *Beijing On-Line* case, the international recording industry's case against MyWeb.com, the latter having been settled favorably by the record companies. Since then, other rightholders have received judgments against on-line infringements.

With the recent issuance of the Supreme People's Court's "interpretations" of the copyright law and on-line infringements, many of the purported ambiguities have been settled in favor of right holders, including liability for linking activities. These interpretations are discussed further below.

DEFICIENCIES IN STATUTORY LAW AND REGULATIONS

New Copyright Law Amendments

In IIPA's 1999 Special 301 submission, we reviewed the latest draft of the new copyright amendments that were at that time pending before the Standing Committee of the National People's Congress. IIPA noted the large number of problems with that draft and its incompatibilities (and those of the 1990 law) with TRIPS and Berne. That draft was then withdrawn and a new draft was approved by the State Council on November 22, 2000 and transmitted to the National People's Congress to begin its review process. The draft analyzed here may not be the latest draft pending in the NPC, since it is reported that the draft is a work in progress. Nevertheless, we here provide the main outlines of the draft and IIPA's comments.

This new draft makes a number of positive amendments, many of which move into the law provisions that are currently contained in the implementing regulations issued in June 1991. It also includes, as noted above, provisions seek to implement the WIPO treaties. Below is a brief and preliminary discussion of the most important of these changes.

1. The new draft amends Article 3 of the current law (which lays out protected subject matter) and which now reads "cinematographic, television and video-graphic works" to read "cinematographic works and other works created by similar means." This is an odd amendment which comes close to incorporating the archaic and outmoded phraseology of the 1971 text of the Berne Convention, e.g., "...and works created by a process analogous to cinematography." The motivation is unclear and the previous description is highly preferable. The modern trend is to be technologically neutral and therefore refer to an "audiovisual work" which would include a cinematographic film, a motion picture embodied in any medium, a television program (regardless of medium) etc. This problem is compounded since "videographic works" receive treatment under neighboring rights, creating possible confusion. All audiovisual works, regardless of format must be protected as works under Berne and TRIPS. We suggest that this formulation be further amended.
2. A revised new Article 8 authorizes the creation of collecting societies which can sue in the names of their members. But it is left unclear whether this provision extends to the creation of anti-piracy organizations which can "enforce" the rights of their members in the association name. This change is sorely needed in China, particularly for the benefit of foreign rightholders, and other laws or regulations which inhibit the formation of such organizations should also be amended or repealed. In the draft provision, the State Council retains the right to develop specifics in this area and the drafters have expressly declined to define the issue further. It is also not clear whether and how this provision will apply to allow collecting societies to represent only foreign works or sound recordings, or foreign collecting societies seeking to represent Chinese works or sound recordings.

3. Article 10 is significantly revised to spell out the moral and economic rights of authors and other rightholders. Article 10(3) dealing with moral rights includes a broad right of alteration, which is not part of the moral rights provided in the Berne Convention's Article 6*bis* and, if unwaivable, would conflict with the economic right of adaptation which is fully transferable. This provision should be deleted. Moreover, the right of integrity does not limit that right to acts which would be "prejudicial to his [the author's] honor or reputation."
4. Article 10 now spells out specific economic rights and eliminates the prior formulation of the "right of exploitation" and the words "and the like" which permitted the right to be interpreted very broadly. The rights as stated appear complete from a TRIPS standpoint, but the provision implementing the WCT public communication/making available right is unnecessarily limited to transmissions "through the Internet." The drafters must avoid tying these exclusive rights to particular technologies. Limiting the right to this particular means of transmission would be incompatible with the technologically neutral provision in the WCT. The "through the Internet" language should be deleted. The spelling out of a specific right of reproduction also does not take advantage of the opportunity to clarify that temporary and transient reproductions are covered as required by Berne, TRIPS and the new treaties. This clarification is of primary importance to establishing a baseline of protection for works, particularly in the digital, networked environment. A right of importation should be included.
5. A new Article 23 lists various exceptions to exclusive rights which, expressly subject to the tripartite test in TRIPS Article 13 are nevertheless overbroad. Examples include Article 23(7) which would allow a State organ to make "use" of a work "for the purpose of fulfilling its official duties." This can be interpreted to permit, for example, reproduction of textbooks without compensation in State educational institutions – a clear TRIPS violation. Article 23(9) providing an exemption for free live performances of any work should be limited to nondramatic works. Other provisions also need to be expressly narrowed, including the broad private copying right which must be subject to exclusive rights in many circumstances occurring in the digital and Internet environment.
6. A new Article 24 is included which sets up a compulsory license for anthologizing for purpose of creating textbooks. The provision is somewhat unclear in IIPA's translation and would appear to be limited to the first nine years of the Chinese educational system. If applied to higher level foreign textbooks, this provision would blatantly violate the Berne Convention and TRIPS. However, since the bilateral international treaty regulations and Berne and TRIPS govern and supercede inconsistent domestic law on all subjects relating to copyright and foreign works, it would appear that this provision may have been intended to apply only to Chinese works. Unfortunately, however, this provision, if interpreted broadly, would dash all hopes of eliminating the current two-tier system of protection under which Chinese citizens and works enjoy a lower level of protection than their foreign counterparts.
7. A new Article 36 creates a publisher's right in the layout of a literary work (including newspapers and magazines) and its "decorative design" is added with a term of 50 years.
8. The draft does not take advantage of the opportunity to extend terms of protection to life plus 70 years and 70 or 95 years from publication. This is the modern trend.

9. A new Article 41 spells out the rights of producers of sound recordings. The draft should include exclusive public performance and broadcasting rights (rather than the right of remuneration in Article 45) and the exclusive public communication/making available right should not be limited to transmissions “through the Internet.” Even if an exclusive broadcast/public performance right is not included, provisions should be added to ensure that certain uses of sound recordings that are the equivalent of interactive transmissions in economic effect should be given an exclusive right. An exclusive importation right should also be added.
10. The amendments also do not clarify that Article 18 of Berne applies fully to the objects of neighboring rights, particularly to sound recordings owned by foreigners. However, this right is granted in the international treaty regulations and, as noted, treaty provisions prevail over inconsistent statutory law. It is unclear, however, why this change was not made directly in the law.
11. There is a new Article 47 to provide for the equivalent of a temporary restraining order or preliminary injunction in a civil case. One TRIPS deficiency in the Chinese law has been the absence of a specific provision granting *ex parte* search authority to stop infringement and to preserve evidence as required under TRIPS Article 50. While IIPA commends the addition of this important remedy, two matters must be clarified. The amendment makes no mention that the remedy applies “without notice to the defendant,” namely the critical *ex parte* element of Article 50, nor is it clear that the remedy extends this provisional remedy to cases where it is used to preserve evidence, so important to the software industry in particular. IIPA’s translation does read that the plaintiff may also apply for the “adoption of property preservation measures,” but this could apply only to the infringing articles themselves and not to all other documents and other material that would be evidence in a subsequent civil proceeding. If necessary, this must be clarified or modified further in order for China to meet its TRIPS obligations.
12. The old Article 46 (new Article 49) has been amended to add specific TRIPS–required remedies such as confiscation etc. (These remedies were included in the 1991 implementing regulations but not in the Law itself). The provision permits the NCAC not only to assess damages but also an administrative fine. The current law says damages “or” a fine. Liability is extended to the new “making available” right, but, as noted above, only when that act is committed “through the Internet.” This phrase should be deleted.
13. A new subarticle (6) has been added to the new Article 49 making illegal intentionally circumventing technological protection measures (TPMs) and removing or altering rights management information (RMI) – both WCT and WPPT obligations. However, the TPM provision extends only to the act of circumvention and not to devices (or components) and services used to circumvent when they meet the three tests included in the DMCA and the proposed EU Copyright Directive. The NPC must extend protection to such circumventing devices and services in order to meet the “adequate and effective protection” obligation of both treaties. Without such addition, this protection will be rendered meaningless as a practical matter. Moreover, the provisions on TPMs and RMI, since they are not copyright violations, should be dealt with in a separate article to ensure that these “violations” are not subject to all the rules which might apply to copyright infringements.

14. A new Article 50 is added spelling out measurement of damages. This is a welcome provision. It includes reference to actual losses or to unlawful income where actual loss is difficult to calculate. It also includes specific language allowing the court to impose statutory damages where it is difficult to prove actual damages. It sets a ceiling amount of 500,000 Yuan or about \$60,500. While this amount is too low if very large infringements are involved, it is nevertheless a welcome development which will assist in deterring certain types of piracy. Unfortunately, the amendment is unclear whether these new statutory damages apply per work, per copy, or per act. The provision would be far more useful and effective if it was clarified to apply to each copy infringed, and for the determination as to whether to rely on statutory damages lies with the right holder rather than the court to ensure that the difficult and sometimes impossible process of determining actual damages can be avoided entirely where appropriate. At present, the provision seems to leave this question to the discretion of the judge. The explanatory material accompanying the transmittal of the Bill to the NPC states that this provision provides "for heavier administrative penalties." It is true that the draft spells out specific new clarified remedies of confiscation and requires restitution "and" a fine, but it is hoped that new regulations will be issued also increasing the administrative fine maximum to an amount larger than the current 100,000 Yuan or \$12,100.
15. A new Article 51 is very useful and shifts to the defendant the requirement to prove that the acts involved were not authorized and that the copies being distributed "have a lawful source." Essentially this imposes a standard of strict liability on the defendant including shifting the burden of proof. This provision could be most useful as an anti-piracy tool.
16. While the copyright law does not deal with criminal remedies, it nevertheless is critical that knowing corporate end user piracy is criminalized, as required by Article 61 of the TRIPS Agreement. This should be clarified in the Criminal Law or in appropriate software regulations or Court "interpretations" and finally put beyond question.

While this is only a preliminary analysis, it is clear that while there remain some TRIPS deficiencies, the amendments contain a number of very positive changes, particularly in the area of civil enforcement. It is hoped that the amendments will be further modified to deal with these remaining deficiencies, that the onerous two-tier system will be fully eliminated, and that administrative remedies will be further enhanced. And now given the issuance of the Supreme People's Court's "Interpretations" (discussed below) on the scope of the existing Copyright Law and liability in the on-line environment, it is even more important that the NPC fix the provisions, particularly the provision on technological protection measures, intended to implement the WCT and WPPT to bring them in line with the developing international standard for implementing these obligations. We urge the Chinese government to take these small but critical additional steps.

Criminal Code "Interpretations"

As noted above and in our prior submissions, the 1997 formalization of the provisions on copyright in the Criminal Code plus the Supreme People's Court "interpretations" given to those provisions has resulted in a worsening of the situation with respect to subjecting pirates to criminal sanctions. While ultimately the Criminal Code should be amended, many of the problems that infect the criminal system can be corrected, at least at the statutory/regulatory level, by the Supreme

Court itself and/or by the State Council agreeing to revisit these “interpretations” and make criminal cases much more available to both Chinese and foreign rightholders. This is a very high priority for U.S. industry. Such a commitment is contained in the U.S.-China IPR Working Party “protocol” but in a manner committing the State Council only to “recommend” such change. The State Council has ultimate authority to make these changes directly.

In particular, the \$6,000 threshold of income to the defendant, has, as a practical matter, made criminal remedies unavailable. Moreover, prosecutors have been reading these “interpretations” to relate to income at pirate prices and have counted income only on the basis of what is found to have actually been distributed not what pirate product may be sitting in a warehouse waiting to be distributed. All these provisions should go to the issue of the amount of the penalty to be imposed, not to the basis of liability in the first place. In this respect, China is far out of the mainstream of thinking within the international community and has prolonged and made virtual impossible its ability to reduce piracy rates. These interpretations should be immediately amended.

Application of the Copyright Law to Internet Disputes: “Interpretations”

At the same time as the State Council released its new draft Copyright Law amendments, the Supreme People’s Court issued its “Interpretations of Laws on Solving Online Copyright Disputes,” with effect from December 20, 2000. Again, IIPA will cover only the highlights of these interpretations which are generally very positive (with one possible exception) with respect to protecting the on-line environment from rampant piracy.

1. Basically, the “Interpretations” apply the existing provisions of the copyright law to all digital forms of works, particularly the reproduction right and other exploitation rights including covering unauthorized Internet transmissions as infringing “disseminations.”
2. Article 3, however, is unclear in that it appears to provide a loophole for dissemination of works “published on the Internet in newspapers and magazines or [works] disseminated on the Internet,” unless the rightholder clearly states that those works may not be “carried or extracted.” The provision then says that the works must be paid for by the particular Website. It is unclear whether this provision applies to works “first” published on the Internet (when a rightholder might be able to add a prohibition against further carriage without permission), or whether it is limited purely to works published in newspapers and magazines.⁴ In any of these cases, however, this would amount to a TRIPS-incompatible compulsory license. We assume this is not what is meant by this ambiguous and potentially very dangerous provision. For example, the final sentence of Article 3 reads that “however, a Web site that recarries and extracts works beyond the scope as prescribed for reprinting in newspaper and magazine articles shall be considered copyright infringement.”

⁴ One legal commentator described this provision as follows: “If a work has been published in newspapers, magazines or disseminated through computer networks and does not bear a ‘copying or editing is forbidden’ statement, a website holder may use that work on its website without the author’s approval, but it must quote the source and pay a remuneration to the copyright holder.” If this is the correct interpretation, the provision blatantly violates TRIPS and the Berne Convention as a prohibited compulsory license. How would any copyright owner of a motion picture, sound recording videogame, book be able to put such a notice on every work it has created? This provision would permit a pirate to upload any of these works, or sound recordings, with impunity, since none would carry such a notice unless, perhaps, it were produced specifically for initial publication over the Internet in China. Under China’s international obligations, this provision, if so interpreted cannot apply to foreign works or sound recordings.

This sentence could be read to refer to “beyond” the scope of the right holder’s license. The provision is unclear.

3. Article 4 establishes the contributory liability of ISPs under Article 130 of the Civil law. While further analysis is needed, this provision appears to be quite positive.
4. Article 5 makes ISPs fully liable where they have knowledge of the infringement, either before notice from the rightholder or after receiving notice and failing to take down the infringing site. The ISP must have “adequate evidence” of infringement. What constitutes “adequate evidence” of infringement, and the proper communication of this information to the ISP, must be defined. The speed with which the ISP moves to take down infringing material must also be defined.
5. Article 6 requires the ISP to provide the rightholder with “online registered data” about the infringer, or they otherwise violate Article 106 of the Civil Code (IIPA does not have a copy of this provision at this writing).
6. Article 7 appears to establish what is needed to provide adequate notice of the infringement to the ISP, including “proof of identity, a certificate of copyright ownership and proof of infringement.” Depending on how these are interpreted, they could be unnecessarily onerous requirements. While past experience indicates that these may not be applied literally and that proof of infringement will be taken to mean “evidence of infringement,” such as a screen shot, this is far from clear and should be further defined. It is also unclear what is meant by a certificate of ownership. It is assumed this does not mean a Chinese copyright registration certificate since this would violate the formalities prohibition of Berne and TRIPS. Perhaps it refers to an affidavit. This needs to be clarified. If the ISP does not take the site down at this point, it will be subject to suit in the People’s Court to order them to do so. It would appear from Article 5 that damages could also be awarded.
7. Article 8 insulates the ISP from liability to its customer when it takes down allegedly infringing material following the right holder’s providing adequate evidence. This is very positive. On the other side, right holders providing a “false accusation of infringement” where the alleged infringer suffers losses can be held liable.
8. Article 9 lays out the specific parts of the Copyright law that apply to online infringements and includes reference to Clause 8 of Article 45 which refers to the catch-all “other acts of infringement.” This could prove very positive, allowing the courts to take an expansive approach to exclusive rights on the Internet.
9. Article 10 adopts essentially the damage and statutory damages provisions in the copyright law amendments discussed above. This is also very positive, though again the ceiling amount of \$60,500 is too low where large infringements are concerned.