

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE 2002 SPECIAL 301 REPORT PEOPLE'S REPUBLIC OF CHINA

EXECUTIVE SUMMARY

On November 1, 2001, the Standing Committee of the National People's Congress took the necessary domestic action for China to finally join the WTO. On December 11, 2001, China officially became a WTO member following the approval of its accession protocol by the world's trade ministers gathered in Doha, Qatar in mid-November. Immediately before taking this historic step on November 1, the NPC, on October 27, adopted amendments to China's 1990 copyright law, intended to bring the law into TRIPS compliance and, as well, to make additional amendments dealing with on-line distribution of copyrighted material, looking eventually to China's ratification of the two WIPO "Internet" treaties. In December, the Chinese government issued new software regulations and began drafting new copyright regulations to implement the new amendments.

These historic developments were accompanied by other actions during the year designed to better regulate the audio and audiovisual market, to deal with corporate end-user piracy of software and to begin tackling the mammoth problem of wholesale journal piracy throughout the Chinese government, its research institutions, and its universities and libraries. These actions were accompanied by statements from Chinese leaders citing the critical need for China to better protect its intellectual property and to do a better job fighting rampant piracy throughout the land. All these were very positive developments – indeed, IIPA members believe that China is now fully aware at the highest levels that intellectual property protection must become a part of the national tapestry of economic growth.

Yet piracy remains at or over 90% within the vast Chinese market and losses to U.S. and Chinese creators and companies continue at staggeringly high levels. The Chinese authorities, despite expressions of political will, have simply not devoted sufficient resources and taken the actions necessary to make any serious dent in national piracy levels. From the piracy viewpoint, China continues to remain one of the worst markets in the world for legitimate copyright businesses, though progress has been made in some of the big cities, particularly Shanghai, and in Beijing and even Guangzhou in the South. Now that China is a full WTO member, it must acknowledge openly that it is not yet in compliance with its WTO obligation to provide deterrent enforcement against commercial scale piracy. With 90% piracy rates, there is simply no denying this critical and unfortunate fact.

China has also put major emphasis on e-commerce and the growth of the Internet. Internet use is growing at high rates, with 33.7 million Internet users at the end of 2001.¹ With an estimated 3.5% of global Websites, it is essential that China put its enforcement house in order so that this new piracy threat does not spin out of control as did optical media piracy starting in the mid-90s and continuing even now.

¹ Source: CNNIC Internet Report 2002/01.

While IIPA applauds these positive developments, described in more detail below, we must continue to recommend that China remain subject to Section 306 monitoring under Special 301 and that the U.S. government engage China in undertaking a thorough review of its progress toward complying with its TRIPS and upcoming WIPO Treaties obligations generally and, in particular, with its TRIPS enforcement obligations.

PEOPLE'S REPUBLIC OF CHINA: ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1996 - 2001

INDUSTRY	2001		2000		1999		1998		1997		1996	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	160.0	88%	120.0	90%	120.0	90%	120.0	90%	120.0	75%	120.0	85%
Sound Recordings / Musical Compositions ²	47.0 ²	90%	70.0	85%	70.0	90%	80.0	56%	150.0	56%	176.8	53%
Business Software Applications ³	714.6	93%	765.2	93%	437.2	91%	808.4	95%	987.9	96%	507.5	95%
Entertainment Software	455.0	92%	NA	99%	1,382.5	95%	1,420.1	95%	1,409.4	96%	1,380.0	97%
Books	130.0	NA	130.0	NA	128.0	NA	125.0	NA	125.0	NA	125.0	NA
TOTALS	1,506.6		1085.2		2137.7		2553.5		2792.3		2309.3	

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 over 90% despite the seizure of a record number of pirate disks in 2001. IIPA members report that the Chinese authorities conducted over 20,000 raids against optical media pirates (production, wholesale and retail) in 2001 and seized over 51 million VCDs, CDs and CD-ROMs and 4.9 million DVDs. Given that Chinese authorities are seizing but a small fraction of the pirate product circulating in China, these statistics show the massive levels of piracy in China. Fortunately, this also shows that the Chinese enforcement authorities are taking action; but, unfortunately, it seems to be having little effect on the overall national piracy rate. The authorities also raided six underground, unlicensed CD factories and seized one DVD mastering line, one VCD mastering line, four DVD replication lines and nine CD replication lines. By the end of 2001,

² The estimated losses to the sound recording/music industry due to domestic piracy are US\$47 million for 2001, and excludes any losses on sales of exported discs, which have decreased substantially in the last few years. This number is also based on sales at pirate prices. Using a "displaced sales" methodology, the industry estimate for losses would be US\$418.5.

³ BSA loss numbers for 2001 are preliminary.

Chinese enforcement authorities had seized a cumulative total of 133 replication lines since the 1995 U.S.-China bilateral IPR agreement. Industry estimates are that as of January 2002, there are 72 factories operating 162 replication and mastering lines in China, with 18 lines producing DVDs. Overall capacity, not including underground plants that continue to spring up around China, is estimated at close to 567 million units annually.

In last year's submission through 1999 there were virtually no licensed plants producing more than negligible pirate product. This began to change in 2000, with reports that even licensed plants were producing measurable amounts of pirate product for domestic consumption. Pirate production in both licensed and unlicensed plants continued throughout 2001, and industry now estimates that approximately 80% of the plants operating in China produce some pirate product to satisfy a huge domestic demand. Much of this production is accomplished through fraudulent licensing documents from Hong Kong, Taiwan and other Asian territories and is admittedly difficult to control. However, this means there continues to be a marked fall-off in the monitoring of licensed plants by the appropriate authorities. Adding to the plant production increases is the new and increasingly widening phenomenon of commercial "burning" of CD-Rs, which has also contributed to the massive output of pirate product in China. Raiding levels have also decreased from the levels of previous years. In addition to what appears to be growing production levels in underground, unlicensed plants, it is estimated that at least 50% of the pirate optical media product trading in China is imported from other territories in Asia, including Hong Kong, Taiwan, Malaysia, Thailand and even Myanmar, and increasingly in CD-R format. All in all, even though the Chinese authorities, especially the Ministry of Culture, have indeed made valiant efforts, through raiding and administrative proceedings, to fight piracy within China, that fight has not significantly reduced the quantity of pirate product available in the marketplace; indeed, by all accounts that amount is increasing to satisfy the growing local demand.

Despite the severe problems affecting the domestic market, industry reports that there continue to be negligible exports from China. It was the export piracy that gave rise to the 1995-1996 crisis that almost resulted in U.S. trade retaliation. Unfortunately, that problem has moved to other countries in Asia, like Taiwan, Malaysia, Indonesia and other territories, particularly as the Asian criminal syndicates have widened and deepened their influence in the region.

The crisis in the local music industry is continuing for a third year in a row with revenues down due to continuing piracy. As we noted last year, Shanghai has attacked this problem directly. The rest of China has much to learn from how this city is dealing with piracy. Nevertheless, the recording industry believes that concerted actions by the authorities, especially by the Ministry of Culture, in the last quarter of 2001 are gradually showing some positive results nationwide

Piracy of audiovisual product in digital format remains a serious problem, with continuing huge seizures, as noted above, of VCDs throughout China. In addition, many new DVD plants have come on line, with reports that a total of 18 exist. Piracy in DVD format is particularly damaging to U.S. companies given the vast global growth in this format for serving the home video business. Already close to 900 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. Pirate DVDs are selling for US\$1.02 to US\$2.50 and there are now over 5.3 million DVD players in China. VCDs, the format invented by the Chinese pirates, are selling for US\$0.76 to US\$1.92 per title in major cities, and VCD players can now be purchased for as little as US\$43. MPA estimates there are over 55 million VCD players in China.

While MPA reports some progress in fighting piracy, particularly in the major cities of Shanghai, Beijing and Guangzhou (the nationwide piracy rate has dropped slightly to 88% as a result), the scope of the problem remains immense, with losses increasing from US\$120 million to US\$160 million for 2001. Part of this increase is due to the new CD-R piracy beginning to infect all of Asia.

As a way of getting control of the audiovisual market and to help control piracy, the Ministry of Culture (MOC) issued an administrative order in early 2001 centralizing the wholesale and retail sale of AV product. As a consequence, 232 markets were closed in 2001, a pattern that will definitely assist in controlling piracy as smaller pirate markets are shut down in favor of national, tightly controlled chains.

While corporate end-user piracy is the major problem for the business software industry in China, counterfeiting of enterprise software and hard disk loading are also major problems. China's software counterfeiting problem is again on the increase and exports are a major concern. Some of the most sophisticated counterfeits of software anywhere in the world are produced in southern China. To help assist in both these areas, some local 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, which now are far too low to act as an effective deterrent. The growing trend reported on last year on the part of computer manufacturers, distributors and retailers, of loading illegal software onto computers before they are sold has received some assistance from Microsoft's recently announced venture with Legend Computer, the largest computer manufacturer in China, to load only legitimate operating system software onto new computers. It is expected that this historical arrangement will be duplicated with other manufacturers. In order to deal with the counterfeit and hard disk loading problem, the Chinese government must 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 AICs and PSB, to the increased production and availability of high-quality counterfeit software products in the marketplace.

Unfortunately, we must report again that the government has made no concerted effort to address videogame piracy in China, which remains at among the highest levels of all copyright industry products. It is estimated that PC-based videogame piracy stands at 99% of that market in China, with console-based games not far behind at 90%. Although pirated products are still being imported from Hong Kong and Taiwan, it is estimated that about 70% of this product is now domestically produced, with about 5% resulting from the burning of CD-Rs.

Internet piracy of videogames is a growing phenomenon and IIPA hopes that the Chinese government will begin to recognize the problem. With over 33.7 million Internet users and over 277,100⁴ Websites (as noted above, representing 3.5% of all Websites), China's response will be all important. The videogame industry estimates that 25% of the piracy occurring now in China results from the downloading of videogames off the Internet. 4.5 million of these Internet users are dependent on Internet cafés, where a large number of pirated games are downloaded. But the government is principally concerned with these Internet cafés installing blocking software; it shut

⁴ Source: CNNIC Internet Report 2002/01.

down 17,000 such cafes that refused to do so and ordered another 28,000 to install such software. None of this activity, however, was directed at the vast download piracy occurring in these cafés. The Chinese government must bring the same pressure to bear on the problem of Internet piracy occurring in Internet cafés as they do in seeking to block subversive and pornographic material.

The recording industry is also plagued by Internet piracy in China. There have been an increasing number of sites hosted on Chinese servers containing infringing MP3 files. The increasing volume of these infringing song files and the number of sites hosting them give rise to grave concern. Some of these sites make available 20 to 30 song files from albums of popular artists for download. File-sharing services based in neighboring Asian territories have also established a number of mirror sites 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 taken the positive step of issuing their "interpretation" which follows, indeed expands upon, liability for infringements decided in individual cases. As discussed below, these "interpretations" are mirrored in the new Copyright Law amendments, making even clearer the treatment of most Internet infringements in Chinese law (though some ambiguities must be clarified in upcoming regulations). What is now needed is for Chinese administrative enforcement officials to take meaningful action against Internet piracy when requested to do so. Results to date have not been encouraging.

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

As in other countries, unauthorized use of software in enterprises in China causes the great majority of piracy losses faced by the business 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 undertook other such sessions in 2001 in Qingdao and Suzhou.

Following up on these actions, on August 28, 2001, the National Copyright Administration (NCA), Ministry of Finance, Ministry of Information Industry (MII) and State Development and Planning Committee co-issued a decree, titled "Notice on Governmental Organizations as Role Models by Using Legal Software." The decree was approved by the State Council and distributed to all provincial governments and ministry-level agencies in the central government. The decree takes a firm position on IPR protection by ordering governmental organizations at all levels to use only legal software and, most importantly, it provides that the Ministry of Finance will itemize a budget for software, to ensure that government agencies have money to buy as well as include software purchases in their own purchasing plan. In addition, the NCA and the MII shall give necessary

training on software copyright protection and software asset management. The supervision of software usage in government organizations, at all levels, is to be conducted by the NCA and its local branches.

In order to assist, BSA will continue to conduct software asset management training seminars, in partnership with NCA, MII and the Chinese Software Alliance in four major cities in 2002 targeting government end users.

While these actions signal that the government recognizes the problem, far more needs to be done to make the orders contained in these decrees a reality, including programs initiated by the central government. The most urgent needs are to continue the programs for detailed software management guidelines governing the procurement and use of software; to ensure that government entities actually have the funding to comply with these guidelines; and to ensure that government officials continue to receive adequate training on the management of software assets.

While legalizing software use by the government is moving forward, end-user piracy in the private sector remains the greatest barrier to the development of the software industry in China, for domestic and foreign companies alike. It is here where aggressive steps must be taken to establish an effective administrative and judicial enforcement regime against this type of piracy. The key to addressing software piracy and other forms of infringement is to change the way end users think about intellectual property in these products. A massive public education campaign would therefore be of critical importance to addressing piracy in the PRC. Otherwise, it will continue to retard the growth of this critical industry. As noted below, enforcement in this area has been very difficult.

Piracy of Journals and Books

At the beginning of 2001, AAP had again, as in 2000, found no noticeable improvement in the market for books and journals in China, with piracy still hampering development of the legitimate market. Though there were some licenses in China, and though some illegal reprints of legitimate editions resulted in administrative actions and small fines, on the whole piracy of U.S. works continued unabated. In last year's submission, IIPA noted that it was estimated that pirated journals made up between 50% and 90% of the journal holdings of nearly all of China's approximately 1,000 universities. We 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"!

AAP, in partnership with the International and British Publishers Associations, undertook considerable research into the issue of massive journal piracy, which resulted in a letter of August 14 from AAP President Patricia Schroeder to Vice Premier Li Lanqing, calling attention to the journal piracy problem which AAP estimated cost publishers upward of \$100 million annually. Other letters came from the IPA and PA. Virtually all journals were being pirated throughout the Chinese educational and scientific community. These industry actions resulted in a directive/statement by the Vice Premier that journal piracy was wrong and must be stopped and within a short time — in October 2001 — the major journal pirate, Guanghua, informed their customers that they would thereafter be unable to supply pirate journals to their customers.

Following this, the General Administration of Press and Publications (GAPP, formerly the Press and Publications Administration, PPA) sent a directive to all libraries advising that “with immediate effect, circulation of unauthorized journal copies is prohibited.” NCAC also issued a directive to universities and research institutions instructing them not to subscribe to pirate journals. AAP has received reports that Guanghai was closed down in December 2001, but that subscriptions to pirate journals already paid will still be honored for next year.

By mid-January 2002, local representatives of U.S. publishers were reporting considerable interest, heretofore virtually nonexistent, by libraries in China in licensing journals and many had halted their prior subscriptions to pirate journals. However, the key will be the budgeting process and, despite all this welcome news about a change in attitude, it does not appear that real funding will be available for purchasing legitimate journal subscriptions until 2003. The larger institutions have, however, been able to subscribe with existing funding. The direction is quite positive.

IIPA and AAP commend the Chinese government for taking these firm actions and we hope that they continue to result in substantial increases in legitimate journal subscriptions. Unfortunately, however, traditional reprint piracy continues to remain a problem in China. We noted in last year’s submission that *China Daily* had 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. We reported last year that the 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 continue at an estimated US\$130 million in 2001, but it is hoped that this number will decrease as journal piracy is reduced.

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, as noted above, growing at an alarming rate.

The unauthorized public performance of U.S. motion picture product continues mostly unchecked in hotels, clubs, mini-theaters and even government facilities. These public performances compete directly with plans to release popular titles in Chinese theaters and threaten 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. It is hoped that the new film and audiovisual regulations recently issued by the State Council will result in the closure of many of these sites and a significant reduction in the problem.

As noted above, software counterfeiting is on the rise in China. Some of the most sophisticated counterfeits of software anywhere in the world are produced in Southern China. BSA

urges enforcement action by a body such as the PSB at the central level to control this illegal activity.

Television piracy continues to be a concern in 2001. There are 38 provincial broadcast television stations and 368 local stations, all run by the government, which reach over 318 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 a purported "fair use" exception, broadcasting heavily edited versions of MPA member company films under the guise of "introduction to film."

There are approximately 1500 registered cable systems in China, serving 90 million cable households, all of which routinely include pirated product in their programs. In 2001, actions against An Hui Cable TV (April 2001), Hunan Zhuzhou Cable TV (May 2001) and Chengdu Cable TV (June 2001) have been taken. Unfortunately, these cable operators were given a warning only by the local Radio, Film & Television Bureau; no fine was imposed nor were their licenses revoked as a result.

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. Nintendo has taken a number of actions, and so far the authorities have been cooperative, which has resulted in the seizure and destruction of the pirate products, as well as the imposition of administrative penalties and fines.

COPYRIGHT ENFORCEMENT

There is little question that the biggest challenge facing China, now that it is a WTO member, is to bring its enforcement system into compliance with, in particular, TRIPS Articles 41, 50 and 61. To do this will require the authorities to (a) cooperate more closely with affected industries; (b) make the system far more transparent than it now is; (c) make fighting piracy a national priority articulated at the State Council level on a regular basis; (d) significantly increase administrative penalties and actually impose them at deterrent levels; and (e) increase criminal penalties, lower the criminal thresholds and actually criminally prosecute, convict and impose deterrent fines and prison sentences on pirates.

Administrative and Criminal Enforcement

In 2001, the enforcement problems that have plagued China continued, despite significant raiding activities in a number of cities, including against optical media factories. MPA reported, for example, that the Chinese authorities detained around 5,000 people, but it is unclear what type of punishment, if any, was received by these infringers. Historically, punishments have been administrative, and these fines have been insignificant. Any criminal prosecutions were not for the offense of piracy but for other offenses, like pornography or operating an illegal business.

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 imposed for piracy of a U.S. work. (IIPA suspects that these so-called “jail terms” involve convictions for pornography, not copyright infringement.) However, as we noted in our 2000 submission, 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 US\$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 look forward to more such convictions, particularly for serious infringements.

Most enforcement is done through an administrative system in China which regularly proves to be insufficient to deter further piracy as required by TRIPS Article 41. There are myriad deficiencies in the administrative enforcement system in China, as discussed below:

- The NCAC appears to have continued to require clearance in Beijing of copyright enforcement actions taken locally by copyright bureaus involving foreign right holders, in accordance with Article 52 of the Copyright Law Implementing Regulations promulgated in 1991. This risks slowing down and bureaucratizing enforcement at the local level and in many cases could effectively stop any action from taking place. Requiring this procedure only of foreign right holders (the procedure is enshrined in the copyright law regulations) is a clear violation of the “national treatment” principle in TRIPS. In the IPR portion of the Working Party protocol agreed to between the U.S. and China in connection with WTO accession, China promised to eliminate this practice before adherence. This will need to be done in the new copyright law implementing regulations that we understand are currently being drafted.
- 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. In the WTO Working Party Protocol, the State Council formally committed to recommend to the Supreme People’s Court the lowering of the RMB50,000 (over US\$6000) threshold for sustaining a criminal prosecution. We have seen no action yet to redeem this commitment. China has indicated that administrative fines will be increased, but no specific actions have yet been taken. As noted below, however, China has, in a welcome development, instituted a new system of civil statutory damages, which is discussed below in the section on the new copyright law amendments.
- IIPA reported above that many markets are being closed pursuant to plans instituted by the Ministry of Culture to regularize the audio and audiovisual marketplace. The new audiovisual regulations also contain a closure remedy for licensing and related violations. However, markets and retail shops selling pirate CDs, VCDs, DVDs, CD-

ROMs and other pirate products are not being closed even after subsequent administrative “convictions” for copyright piracy or trademark violations. The IPR Working Party protocol promises that this will change, but the copyright law amendments do not include such an important and deterrent remedy.

- The system is almost entirely nontransparent; it is often impossible to ascertain what penalties are imposed in particular cases. Right holders cannot, for example, obtain documents from the government on the activities of CD plants (even though every order the plant accepts must be recorded and reported to the authorities). Foreign right holders 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 a resulting failure to deter pirates. However, in another welcome development, the new copyright law amendments require the court in civil cases to execute an *ex parte* search within 48 hours of the request by the right holder.
- There is still “local protectionism” by administrative agencies involving politically or financially powerful people engaged in pirate activities.
- As discussed in the section on the new software regulations, it continues to be unclear what authority and powers officials have to address the problem of rampant corporate end-user piracy. Even if they did have this authority, they have few resources to tackle this problem without the regular use of the AICs and PSB. This problem must be addressed if meaningful administrative enforcement is to be taken against this type of 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 2001, a total of 7,122 title verification requests have been submitted to NCAC by MPA, and 2,763 titles have been challenged as unauthorized.

ADMINISTRATIVE COPYRIGHT ENFORCEMENT STATISTICS 2001	
ACTIONS	MOTION PICTURES
Number of raids/searches conducted	983
Number of administrative cases brought by agency	769
Number of defendants found liable (including admissions/pleas of guilt)	769
Ratio of convictions to the number of raids conducted	78%
Ratio of convictions to the number of cases brought	78%
Number of cases resulting in administrative fines	501
Total amount of fines levied	
US\$0-\$1,000	493
\$1,001-\$5,000	4
\$5,001-\$10,000	4
\$10,000 and above	0
Total amount of restitution ordered in how many cases (e.g. \$XXX in Y cases)	

Over the last few years, it has become clearer that the Chinese enforcement authorities have not sought to prosecute piracy under China's criminal law provisions. While criminal enforcement does occur under other laws such as those dealing with pornography or running an illegal business, it will be difficult for China to convince its people that piracy is an economic crime that damages the Chinese economy and Chinese culture until it is made specifically subject to criminal prosecution. As discussed in detail below, the piracy provisions in Article 217 and 218 of China's criminal law have not been used because of the high thresholds established by the People's Supreme Court in its "interpretations" of these provisions. These thresholds must be substantially lowered and the "interpretations" otherwise amended to permit effective criminal prosecutions.

We urge the U.S.G. to press the State Council 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.

CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS	
2001	
ACTIONS	MOTION PICTURES
Number of Raids conducted	N/A
Number of cases commenced	N/A
Number of defendants convicted (including guilty pleas)	N/A
Acquittals and Dismissals	N/A
Number of Cases Pending	N/A
Total number of cases resulting in jail time	N/A
Suspended Prison Terms	
Maximum 6 months	
Over 6 months	
Over 1 year	
Total Suspended Prison Terms	
Prison Terms Served (not suspended)	
Maximum 6 months	
Over 6 months	
Over 1 year	
Total Prison Terms Served (not suspended)	N/A
Number of cases resulting in criminal fines	N/A
Up to \$1,000	
\$1,000 to \$5,000	
Over \$5,000	
Total amount of fines levied	N/A

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, for example, has increasingly turned to civil remedies, including in the Internet piracy area, since criminal enforcement is simply unavailable as a practical matter. In 2001, the recording industry brought over 40 cases against suspected infringers in the courts (out of 100 potential cases that were prepared for court submission, but many of which cases were settled). 26 of these cases resulted in judgments for the copyright owners and involved factories, music

distribution companies and retailers. Also included were further cases involving illegal distribution of MP3 files on the Internet.

As discussed below, the new copyright law amendments made certain positive changes which should assist in bringing successful civil cases against infringers.

- Provisional remedies were added in Articles 49 and 50 and, as we understand it, it is intended that these operate on an *ex parte* basis.
- Court-determined “pre-established” damages can now be awarded up to a maximum of RMB500,000 (US\$60,000) where the “actual losses suffered by the holder of the right or the profit earned by the infringing party cannot be determined.”

While these changes are significant improvements, U.S. right holders have continued to have problems in successfully bringing civil cases in China. These and certain other provisions must be further clarified in implementing regulations to be issued in the next few months.

The recording industry had been successfully establishing the subsistence and ownership of its members’ rights in sound recordings found to have been pirated by providing an IFPI “certification” attesting to these facts. This had worked successfully until, in December 2001, NCAC issued a letter relating to some questions propounded to the courts by certain CD factory defendants. This letter has created grave doubts in the minds of judges and threatens to undermine the gains achieved in civil litigation to date.

This letter stated that the owner of a sound recording must submit to the court copies of contracts it has signed with the performers and composers to prove that it is properly authorized by these right owners. This should be wholly unnecessary, since the record producer has a separate right in its sound recording, not deriving from any rights that exist in the performer or the composer’s work. The letter also stated that the right holder was required to provide notarized carriers (such as a CD) and inlay cards from the original titles carrying the copyright notices, logos and trademarks. Finally, NCAC required that a technical test be conducted (only test results from state-run laboratories are accepted) to remove any doubts whether the sound recording in dispute is the same as the recording owned by the record producer. This will result in significant delays and costs when even street hawkers demand complex and expensive “technical tests” when it is clear that the recording in question is pirated. By putting these unnecessary obstacles in the path of right owners, the NCAC is sending precisely the wrong signals to the pirates, in effect urging them to raise these trivial technical arguments and therefore inhibit the fight against piracy.

The business software industry also commenced two civil cases in 2001 relying on advice that the civil procedure code provided a ready *ex parte* remedy against corporate end users of unauthorized software and in consideration of NCAC’s Document 01 issued in March 2001 directing local copyright authorities to take action against corporate end user piracy. Unfortunately, the results have been less than encouraging. In May 2001, three BSA members tried to file civil actions against four target companies for end user infringements. There was a total of 11 separate actions. The right holders applied for evidence preservation (*ex parte*) orders from two courts in which the actions were filed – in Shanghai and Pudong. From this point on, through the passage of the copyright amendments in October, 2001 and the issuance of the new software regulations in December, until January 4, 2002, the two courts still have not issued orders to run the raids against

the target companies. The new copyright amendments require the execution of such orders within 48 hours of the application!

Two BSA members also sought to commence civil cases against two corporate end-users in the Shenzhen IP Court. While the court first agreed to accept the cases (*ex parte* search orders were also requested), a month and a half passed when a court official was sick and, when the official returned, the court demanded that the four actions be refiled as 37 separate actions, or one separate action for each work. Discussion and argument ensued, following which the right holders sought to withdraw the cases altogether. The court then decided that it would accept the original four cases, but in the end BSA felt that it was not in its best interest to continue these cases.

Until the Chinese courts are willing to take swift and definitive action against end-user piracy, U.S. and Chinese software companies will continue to suffer. Despite these sad results, in April 2001, Microsoft won a civil lawsuit in Shanghai against a Chinese computer company involved in hard disk loading of its software. The court awarded damages of RMB280,000 (US\$33,735) and ordered the company to publish a written apology in the local paper. The company had earlier been fined RMB10,000 for the same conduct in a previous administrative case.

In December 2000, a civil suit was filed by the Educational Testing Service (ETS) seeking damages against the Beijing New Oriental School, which had for years administered the TOEFL and GRE tests to Chinese students seeking entrance into U.S. universities. ETS alleged 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 claimed 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. This case is still pending in the Beijing People's Court, but there is some hope that it may go to trial this spring. The progress of the case has been hindered by inadequacies in Chinese procedural law, including lack of meaningful discovery and serious difficulties in preventing relevant evidence from being destroyed without actually seizing it through a court order after posting money as security (bonds are not used).

CIVIL COPYRIGHT ENFORCEMENT STATISTICS 2001	
ACTIONS	MOTION PICTURES
Number of civil raids conducted	0
Post Search Action	0
Cases Pending	0
Cases Dropped	0
Cases Settled or Adjudicated	0
Value of loss as determined by right holder (\$USD)	0
Settlement/Judgment Amount (\$USD)	0

STATUTORY LAW AND REGULATIONS

The New Copyright Law Amendments

Draft legislation amending China's 1990 copyright law has been pending before the Standing Committee of the National People's Congress since 1998. On October 27, 2001, following review of many variant drafts, the Standing Committee adopted the "Decision to Amend Copyright Law of the People's Republic of China," thereby amending that law.⁵ The new amendments to the copyright law ("2001 Copyright Law") makes a number of very significant and welcome changes to the 1990 law and attempts to bring that law into compliance with TRIPS. Importantly, the amendments also attempt to implement the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) to ensure that the law keeps up with technological developments, particularly protection of copyrighted material on the Internet and other advanced information networks. Below is a brief summary of the positive changes made, followed by a summary of some of the problems and weakness, most of which IIPA hopes can be repaired in the regulations to the 2001 copyright law, now being drafted and due to be promulgated, IIPA understands, in the next few months. The regulations governing computer software were issued in December 2001. Following is a preliminary discussion of the most important changes of the 2001 Copyright Law.

1. The new amendments, in Article 10, spell out in detail the various exclusive rights which authors enjoy under the law and in Article 2 extend those rights and all provisions of the law to other nations that are WTO members or otherwise members of bilateral "copyright agreement" or multilateral "treaty" to which the two states are parties. Among the positive changes made are to
 - Extend TRIPS-compatible rental rights to computer programs and cinematographic works;
 - Add a right of distribution as required by the WIPO treaties;
 - Add a TRIPS rental right for computer programs (Article 10(7)) and sound recordings (Article 41), adding also cinematographic works and video recordings
 - Add various rights of broadcasting, exhibition, display, and public performance;
 - Add a WIPO treaties-compatible exclusive right of "transmission via information network"⁶ (Article 10(12)) for works, as well as WIPO treaties-compatible exclusive rights for a producer or performer to "transmit [to] the public via information network" a sound recording, video recording (Article 41) or performance (art. 37(6));
2. Add a TRIPS-compatible protection for compilations of data (Article 14);

⁵ Copyright Law of the People's Republic of China, Adopted at the Fifteenth Session of the Standing Committee of the Seventh National People's Congress on September 7, 1990, Amended in Accordance with "Decision to Amend Copyright Law of the People's Republic of China," Adopted at the Twenty-fourth Session of the Standing Committee of the Ninth National People's Congress on October 27, 2001 (translation on file at IIPA).

⁶ The final formulation is an improvement on the previous draft, which used the term "Internet" instead of the broader term "information network." The term "transmission" may mean something closer to "dissemination," and in another unofficial translation we have seen, the term was translated as "communication."

3. Narrow the exceptions to exclusive rights by adding the Berne Article 9(2)/TRIPS Article 13 “tripartite” test language in the chapeau; and narrows other limitations to bring them closer to compliance with Berne/TRIPS [(Article 22(3), (4), (7) and (9))]. However, the implementing regulations must further narrow these exceptions following the three-step test, particularly Article 22(6), which would appear to permit the creation of compilation coursepacks under certain circumstances.
4. Make clear in Article 15 that the producer of a film holds the economic rights in that work;
5. Add provisions on collecting societies, making clear that they can sue in their own name for copyright owners that have authorized the society to deal in their work (but see discussion below);
6. Repeal the provision that limited publishing contracts to 10 years;
7. Provide TRIPS-compatible anti-bootlegging provisions (Article 37);
8. Add provisions on technological protection measures (TPMs) and rights management information (RMI) Articles 47(6) and 47(7) (but see discussion below);
9. Add a “publishers right” in the format or graphic design in the law (Article 35) with a term of 10 years.

In the area of enforcement, certain positive amendments were made, including

1. Eliminating the “commercial purpose” criteria for certain civil liability;
2. Ensuring civil liability for all new or amended rights including rental, transmission over information networks, and for violating the TPMs and RMI provisions;
3. Clarifying that the NCAC can confiscate illegal income and infringing material, but limits confiscation of equipment to that “primarily” used in the infringements and only “where the circumstances are serious;”
4. Adding a provision on damages which allows profits of the infringer to be taken into account and allows compensation for expenses incurred by the right holder in its effort to stop the infringing act;
5. Providing for the first time in the copyright law for “property preservation measures (Article 49), and court-ordered measure “to secure evidence, even prior to the filing of a complaint” (Article 50). Such order must be executed in 48 hours. We understand that this is meant to provide a full *ex parte* remedy, in compliance with TRIPS Article 50, even though the latter is not expressly stated;
6. Providing for a form of “pre-established” damages (up to RMB 500,000 or US\$60,000) where actual damages are difficult to determine (Article 48). These latter two amendments are particularly welcome.

7. Adding a provision that the court has the power to confiscate “unlawful profits, infringing copies and properties used in unlawful activities” (Article 51). Confiscation of implements is not limited to those “primarily” used in the infringing activities – a welcome provision.
8. Appearing to shift the burden of proof to the alleged infringer in certain cases (Article 52), a provision that, if properly applied, will have a major impact in civil cases.

While these changes are positive, there are deficiencies which should be remedied in the regulations to follow. One most notable deficiency is that criminal liability is not affected and there are apparently no plans to amend the criminal code. Some of these other deficiencies include:

1. While the Law [Article 47(6)] provides anti-circumvention protection, it may not fully implement the WIPO treaties obligation, in that it: 1) does not expressly prohibit the manufacture or trade in circumvention devices, components, services, etc.; 2) does not define “technical protection measures” to clearly cover both “copy-controls” and “access controls”; 3) does not make clear that copyright exceptions are not available as defenses to circumvention violations; 4) does not expressly include component parts of circumvention technologies (assuming devices are covered); 5) imposes an “intent” requirement as to acts (and business/trade if such activities are covered), which might make proving a violation difficult; 6) does not provide for criminal penalties for circumvention violations (since the copyright law only deals with civil and administrative remedies). Many of these points can be clarified, if not entirely fixed, in implementing regulations.
2. While the law protects against “intentionally deleting or altering the electronic rights management system of the rights to a work, sound recording or video recording” without consent of the right holder [Article 47(7)], this protection may not fully satisfy WIPO treaties requirements and requires further elaboration in the implementation process. For example, the Law does not expressly cover “distribution, importation for distribution, broadcast or communication to the public” of works or other subject matter knowing that RMI has been removed or altered without authority, as required by the WIPO treaties, nor does it define “electronic rights management system” in a broad, technology-neutral manner.
3. Temporary copies are not expressly protected as required by the WIPO Treaties. As with the Copyright Law prior to amendment, protection of temporary copies of works and other subject matter under the 2001 copyright law remains unclear. According to an earlier (February 2001) draft amendment of Article 10, “reproduction” as applied to works was to include copying “by digital or non-digital means.” The phrase “by digital or non-digital means” was removed from the final version of Article 10(5) prior to passage. Article 10(5) also fails (as did the definition of “reproduction” in Article 52 of the old Law, which was deleted, and Article 5(1) of the 1991 Implementing Regulations) to specify that reproductions of works “in any manner or form” are protected. Addition of either of these phrases might have indicated China’s intent to broadly cover all reproductions, including temporary reproductions, in line with the Berne Convention and the Agreed Statement of the WIPO Copyright Treaty.⁷ As it stands, the current Article 10(5) description of the

⁷ The agreed statement to Article 1 of the WIPO Copyright Treaty provides,

reproduction right includes “one or more copies of a work by printing, photocopying, copying, lithographing, sound recording, video recording with or without sound, duplicating a photographic work, etc.” Objects of neighboring rights (arts. 37, 41 and 44) mention “reproduction” (e.g., Article 41 provides sound recording and video recording producers a “reproduction” right), but the Article 10(5) description is not expressly applied *mutatis mutandis* (it should also be noted that the Article 41 reproduction right for sound recording producers does not expressly extend to indirect reproductions, as required by TRIPS (Article 14.2) and the WPPT (Article 11). This deficiency should be fixed in the implementing regulations;

4. A new compulsory license (Article 23) permits the compilation of “[p]ortions of a published work, a short work in words or music, or a single piece of artwork or photographic work” into elementary and high school (so-called “el-hi”) textbooks, and “State Plan” textbooks (which we are still trying to determine would not include university textbooks, which would cause great concern for U.S. publishers); in addition, sound recordings, video recordings, performances, and broadcasts apparently are subject to this compulsory license. IIPA hopes that the Chinese government will confirm that this compulsory license provision will not be read to apply to foreign works and other subject matter since it would violate the Berne Convention and TRIPS if it did. If it is interpreted to apply to foreign works, then it would violate the Berne Convention, TRIPS and the International Treaty regulations referenced above [(which implemented the 1992 U.S.-China Memorandum of Understanding (MOU)], even if it were further confirmed that it only applies to foreign printed materials used in elementary or high school “textbooks” (hard copies). The damage to publishers would be particularly significant if “State Plan” were to encompass university textbooks and/or if “textbook” includes forms other than “printed” forms (e.g., digital forms or multimedia). The regulations must be framed to exclude foreign works or limit their scope in a manner consistent with the Berne Appendix.
5. The provisions on collecting societies leave 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 right holders, and other laws or regulations which inhibit the formation of such organizations should also be amended or repealed. Regulations should clarify these points and ensure effective and fair treatment of foreign right holders.
6. The treatment of works and sound recordings used in broadcasting continues to remain woefully deficient and out of date. While Article 46 spells out that broadcasters must obtain permission to broadcast “unpublished” works (e.g., an exclusive right), Article 47

[t]he reproduction right, as set out in Article 9 of the Berne Convention, and the exceptions permitted thereunder, fully apply in the digital environment, in particular to the use of works in digital form. It is understood that the storage of a protected work in digital form in an electronic medium constitutes a reproduction within the meaning of Article 9 of the Berne Convention.

Dr. Mihaly Ficsor, who was Secretary of the WIPO Diplomatic Conference in December 1996, has stated that the term “storage” naturally encompasses temporary and transient reproductions. Ficsor notes that “the concept of reproduction under Article 9(1) of the Convention, which extends to reproduction ‘in any manner or form,’ must not be restricted just because a reproduction is in digital form, through storage in electronic memory, and just because a reproduction is of a temporary nature.” Mihaly Ficsor, *Copyright for the Digital Era: The WIPO “Internet” Treaties*, Colum.-VLA J.L. & Arts (1998), at 8.

provides a mere “right of remuneration” for the broadcast of all other works, with the sole exception of cinematographic and “videographic” works. Such a broad compulsory license (not even limited to noncommercial broadcasting) is not found in any other law, to IIPA’s knowledge. Furthermore, the broadcast of sound recordings is not even subject to a right of remuneration by virtue of Article 41 and Article 43. Record producers should enjoy full exclusive rights for both performances and broadcasts in line with modern trends. 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.

7. The draft does not take advantage of the opportunity to extend terms of protection to life plus 70 years and 95 years from publication. This is the modern trend.
8. A full right of importation applicable to both piratical and parallel imports should have been included.

Deficiencies also occur in the enforcement area:

1. Administrative fines have not been increased. This must be done in the implementing regulations, both for NCAC and in other regulations, as appropriate for other administrative agencies like the SAICs.
2. As noted above, criminal remedies are not dealt with at all. Criminal remedies must be extended to include violations of the TPMs and RMI provisions in order to comply with the WIPO treaties obligations.

The New Computer Software Regulations

The new regulations governing computer software were issued on December 28, 2001 and became effective, replacing the 1991 regulations, as of January 1, 2002. Following are some of the problems and deficiencies in these regulations:

1. The regulations fail to clarify whether temporary copies are protected.
2. As noted above in the discussion of the TPMs and RMI provisions of the 2001 copyright law amendments, these regulations do not fix any of the deficiencies in the Amendments provisions but merely repeat the statutory language. This should be remedied when the copyright law regulations are published and, with respect to these issues, those regulations should extend to computer programs as well as all other works.
3. Article 17 of the regulations establishes a potentially huge and TRIPS-incompatible exception to protection for software. To the extent this provision allows any use (including reproduction, etc.) of software for learning and to study the design of the software, it goes well beyond what is permitted under Berne 9(2) and TRIPS Article 13. To be compatible with TRIPS this provision must be revised and implemented so that (a) it applies only to software within the lawful possession of the person engaged in the activity; (b) it may be carried out only if the information is not otherwise available, such as by licensing

arrangement; (c) it only applies to information or design related to the interoperability of the program with hardware or a noncompeting program; (d) the information cannot be used to generate a competing program; and (e) it is subject to the three-part test in Berne 9(2) and TRIPS Article 13. Any such provisions on decompilation should follow, at a minimum, the standards in the EU Software Directive, from which these conditions are taken.

4. Article 30 of the regulations creates a huge loophole and will have significant adverse effects on enforcing the copyright law against corporate end-user pirates. It provides that the possessor of infringing software is relieved of liability if the possessor is ignorant, or reasonably ignorant, of the infringing nature of the software. This is inconsistent with Article 52 of the 2001 law itself, and with Article 28 of the regulations, which puts the burden of proof in such cases of infringement on the possessor. Even under the terms of regulation itself, it is not clear that liability will attach where the right holder or administrative authority can show that it would have been unreasonable to think that the software was legal. The provisions of Article 52 of the law and Article 28 of the regulations should govern. If Article 30 is abused, it would so weaken enforcement against corporate end-user piracy that it would amount to a violation of TRIPS Article 41. Article 30 of the regulations is also highly problematic when it provides that if discontinuation or destruction of the illegal use of software would bring great loss to the infringer, the right holder will be forced to license the software to the infringer at a "reasonable royalty." It is not clear what will meet the standard of "great loss" to the infringer or how a "reasonable royalty" should be calculated. This provision extends beyond the exceptions and limitations permitted by TRIPS Article 13 by establishing a compulsory license that directly conflicts with the normal exploitation of the work and the legitimate interests of right holders. The normal damages provision of the law should govern in these cases.
5. The regulations should make clear that the new provisional remedies provided for in Articles 49 and 50 of the 2001 copyright law should apply in the case of administrative enforcement, as well as before the courts.
6. The administrative penalties in the regulations (Article 24) are woefully inadequate and must be significantly increased to take into account the value of the software that is pirated. The vehicle of the copyright law regulations should be used to correct this grave deficiency.

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 right holders. 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. The U.S.G. should press the State Council to redeem this commitment.

In particular, the US\$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. 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 virtually impossible its ability to reduce piracy rates. These interpretations should be immediately amended.

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

The Supreme People’s Court issued its “Interpretations of Laws on Solving Online Copyright Disputes,” with effect from December 20, 2000. In general, these “interpretations” were incorporated into the new 2001 Copyright Law and need not be amended further except to incorporate the new terminology in the new Law, such as “transmission over information networks.” Article 3 of the “interpretations,” however, as discussed below, remains deficient. Indeed, the State Council has reserved to itself (Article 58) the task of issuing regulations governing “the right to transmit via information networks.” Again, IIPA will cover only the highlights of these interpretations which (except for Article 3) are generally very positive with respect to protecting the on-line environment from rampant piracy.

1. Basically, the “interpretations” applied the existing provisions of the 1990 copyright law (and are consistent for the most part with the 2001 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 right holder 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 right holder 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.⁸ 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 re-carries and extracts works beyond the scope as prescribed for

⁸ 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, or 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.

reprinting in newspaper and magazine articles shall be considered copyright infringement.” 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 right holder 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 right holder with “online registered data” about the infringer, or they 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. Additionally, 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 1990 copyright law that apply to online infringements and includes reference to Clause 8 of Article 45 which refers to the catchall “other acts of infringement.” This should be conformed to the new law and 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.

2001 SARFT Satellite Management Regulations

In 2001, SARFT, in charge of regulating the radio, television and related business, issued new regulations governing foreign satellite broadcasts. They provided that foreign satellite

broadcasters beaming into China were required to start beaming from an encrypted government-owned satellite platform from January 1, 2002, although that date has slipped due to a delay by SARFT and the MII in finalizing details over who should have control over it. To get on to the platform, foreign channels are required to pay an annual carriage fee of \$100,000 per channel. These regulations are unclear, not transparent, and contradictory to the spirit of the WTO. This 1) makes future business planning by foreign operators difficult; 2) unnecessarily increases the cost of doing business; 3) creates a form of double censorship; and 4) excludes industry input in selecting the encryption system and technology that would provide the most confidence to content providers for the protection of their programs. The regulations also should have, but failed to, reinforce the importance of copyright protection.

Conclusion

More effective enforcement remains the key challenge to the Chinese government in a WTO world. On the legal issues mentioned above, the new copyright law regulations should be used to remedy the deficiencies noted in the copyright law and the software regulations. The State Council can also make appropriate and necessary changes and clarifications in new regulations that can be issued dealing with transmission over information networks. The USG should, before any of these new regulations are promulgated, engage the Chinese authorities on all the copyright-related issues mentioned here.