

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2006 SPECIAL 301 REPORT

PEOPLE'S REPUBLIC OF CHINA (PRC)

EXECUTIVE SUMMARY

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

Actions to be Taken in 2006:

- **Follow Through on Key JCCT Commitments:** The Chinese Government committed in April 2004¹ and again in July 2005 to take some significant steps to improve copyright protection. The Chinese Government must take the following actions, among others, to make good on its commitments, including the general commitment to “significantly reduce” piracy levels:
 - **Bring a Significant Number of Criminal Prosecutions for Copyright Piracy:** Due to a reluctance on the part of many in China to provide a meaningful criminal remedy in copyright cases, which are effectively thwarted by continued overly high and complex thresholds and structural difficulties in the transfer of cases for criminal prosecution to the People’s Procuratorate, the Chinese Government has still not met this JCCT commitment from 2004, or its TRIPS obligations. It is essential that the Supreme People’s Procuratorate begin taking significant numbers of criminal cases, leading to deterrent sentences, and that the new Regulations on Timely Transfer of Suspected Criminal Cases in the Enforcement of Administrative Law allow for “on the spot” referrals where there is a “reasonable suspicion” that the infringer has done acts which, upon further investigation, would meet the criminal thresholds. Failure to bring more prosecutions for copyright piracy raises a serious question about China’s compliance with its international legal obligations by failing to provide a deterrent to further infringements.
 - **Prosecute Software End-User Piracy:** The Chinese government declared that “software end-user piracy is considered to constitute ‘harm to the public interest’ and as such will be subject to administrative penalties nationwide,” and that “software end-user piracy is subject to criminal penalties in appropriate circumstances.” IIPA is unaware of a single criminal case against end-user piracy; without such cases, China cannot live up to this JCCT commitment or its international obligations.
 - **Bring Criminal Cases Involving Sound Recordings as Well as Other Works:** The Chinese Government confirmed that “the criminal thresholds in the 2004 Judicial

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

Interpretation (JIs) are applicable to sound recordings,” and yet, IIPA is unaware of a single criminal copyright case in China involving sound recordings.² The commitment in the JCCT to cover sound recordings is meaningless if the Chinese Government does not bring a single case.

- **Bring Criminal Cases Against Exporters:** The Chinese Government confirmed that the “JI makes exporters subject to independent criminal liability,” and yet, IIPA is unaware of a single criminal copyright case in China convicting a pirate for the crime of exporting pirate product. Meanwhile, once again in 2005 significant quantities of pirate product seized around the world, particularly optical discs, were sourced from China.³
- **Ensure Use of Legal Software by Government and SOEs:** China promised that “[b]y the end of 2005, the Chinese government will complete its legalization program to ensure that all central, provincial and local government offices are using only licensed software, and will extend the program to enterprises (including state-owned enterprises) in 2006.” We have seen no evidence indicating China has met this 2005 goal, nor have we seen final plans to implement the promise with respect to SOEs in 2006.
- **Ensure Pre-Release Enforcement for Motion Pictures, and Include Other Works as Well:** China promised to “regularly instruct enforcement authorities nationwide that copies of films and audio-visual products still in censorship or import review or otherwise not yet authorized for distribution are deemed pirated and subject to enhanced enforcement.” This should also apply to other subject matter, such as entertainment software, sound recordings, books and periodicals. In particular, the content review process for entertainment software products on all platforms should be conducted in as expeditious a manner as possible so as to reduce delays in getting legitimate products to market.
- **Crack Down on Internet Piracy:** China promised to run a “nationwide crack-down on Internet piracy, including through enforcement at Internet cafes.” Such efforts must be sustained far beyond a few months and significantly enhanced in 2006 in order to stem the massive and growing Internet piracy in China. Important steps to ensure proper legal norms governing the Internet include issuance of improved regulations (now in the drafting stage) regarding enforcement of copyright on the Internet (discussed below) and the establishment of a dedicated government task force to be responsible for strictly enforcing these regulations.
- **Join the WCT and WPPT:** China promised to “submit to the National People’s Congress the legislative package needed for China to accede to the WIPO Internet Treaties” by June 30, 2006. China should join these important treaties in 2006.
- **Impose Deterrent Administrative Penalties:** The Chinese Government must, in addition to providing deterrent criminal enforcement, significantly increase the level of administrative penalties/remedies imposed on pirates, including shop closures, if it is ever to lower piracy levels.
- **Legitimize Book Distribution Practices on University Campuses:** The National Copyright Administration (NCA), in cooperation with local copyright bureaus and rightholders, should take action to ensure that universities throughout the country are distributing only legitimate books to their students. Rampant unauthorized photocopying at

² One case, involving defendants WANG Jinsheng, SONG Chundong, and LIU Chunshu, reportedly involved “570,000 optical discs” but the type of work involved is unspecified in published reports IIPA has seen. All the other criminal copyright cases known to IIPA involved product other than sound recordings.

³ EU statistics from 2004 show that 30% of IP-related contraband (which includes but is not limited to copyright piracy) seized in EU ports emanated from China, making it the number one country of origin, and 26% of all cases involving pirate “audio CDs, games, software, DVDs etc.” were from China, again leading the pack. Thailand came in second (21%), followed by Malaysia (9%), Pakistan (8%), Indonesia (6%), and Hong Kong (5%). *DG TAXUD European Commission*. These statistics on seizures from the EU demonstrate anecdotally that China is not providing effective deterrence against piracy, including exports.

university textbook centers across China is causing tremendous harm to the market for both Chinese and English language educational materials. Photocopied textbooks, either kept in stock in a warehouse separate from the textbook center storefront or produced on demand, often bear the crest of the universities themselves.

- **Issue Revised Internet Regulations with Robust Notice and Takedown:** The State Council is set to issue a set of regulations governing copyright protection on the Internet, including notice and takedown. IIPA has recommended changes necessary to provide adequate protection for temporary reproductions and communications to the public (including an interactive “making available” right), and effective “notice and takedown” mechanisms. These important recommendations should be adopted so that judges, law makers, and enforcement authorities will have clear and fair rules to protect content in China in the digital age.
- **Amend the Criminal Law to Bring It into Compliance with TRIPS:** China must at least criminalize copyright piracy “on a commercial scale,” including piracy involving acts not currently cognizable under China’s Criminal Law. Criminal enforcement of copyright piracy also continues to be burdened by the fact that in order for any act under Article 217 to be punishable, it must have been done “for the purpose of making a profit.” An amended law should ensure that thresholds are low enough to criminalize all “copyright piracy on a commercial scale” as required by the TRIPS Agreement. China is also the only country in the world that calculates a threshold for bringing criminal cases based on pirate profits and business volume at pirate prices.
- **Investigations by Foreign Right Holders:** Foreign right holders cannot reasonably be expected to fully avail themselves of the Chinese legal system unless they can investigate suspected infringements. China should open the way for foreign right holders and their association representatives to do so, and make evidence rules for administrative and court actions more transparent and logical.
- **Assign Specialized IPR Judges to Hear Criminal Cases, and Move Cases to the Intermediate Courts:** The record of China’s development of a cadre of well trained IPR judges to sit on specialized IPR tribunals at the Intermediate level courts in China to hear civil cases has been a success. Now China should commit and implement similar reforms in the criminal justice system to enhance deterrent enforcement against copyright piracy.
- **Provide Effective Market Access for All Copyright Materials:** In addition to fully implementing China’s minimum WTO market access commitments (particularly in the area of trading rights), the Chinese Government must, if it wishes to address rampant piracy in the country and foster the growth of creative industries in China, provide effective market access to all copyright industries, looking beyond the bare minima of WTO toward a fairer and more open market for all.

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

PEOPLE'S REPUBLIC OF CHINA
Estimated Trade Losses Due to Copyright Piracy
(in millions of U.S. dollars)
and Levels of Piracy: 2001-2005⁴

INDUSTRY	2005		2004		2003		2002		2001	
	Loss	Level								
Motion Pictures⁵	244.0	93%	280.0	95%	178.0	95%	168.0	91%	160.0	88%
Records & Music⁶	204.0	85%	202.9	85%	286.0	90%	48.0	90%	47.0	90%
Business Software⁷	1276.1	88%	1488.0	90%	1787.0	92%	1637.3	92%	1140.2	92%
Entertainment Software⁸	589.9	92%	510.0	90%	568.2	96%	NA	96%	455.0	92%
Books	52.0	NA	50.0	NA	40.0	NA	40.0	NA	130.0	NA
TOTALS	2366.0		2530.9		2859.2		1893.3		1932.5	

PIRACY AND ENFORCEMENT UPDATES IN CHINA

Physical Piracy Remains Rampant: It is not surprising, with the lack of criminal prosecutions and the lack of deterrence in administrative enforcement in China, that piracy rates of physical copyright products remain virtually the highest in the world, at 85-95% depending on the industry sector and product format (e.g., 95% of DVDs in China are pirate). Raiding activity continued in 2005, under Vice Premier Wu Yi's leadership. A 15-month national anti-piracy campaign ended in December 2005 (IIPA is unaware of any decision to maintain this enhanced anti-piracy campaign). Despite seizures of millions of discs in raids run by the Beijing Copyright Administration or the Guangzhou and Shenzhen Municipal General Culture Market Administrative Enforcement Task Forces (many jointly with the Motion Picture Association,⁹ with the recording industry,¹⁰ and with a local video distributors' group),¹¹ IIPA members report no deterrence and no meaningful decrease in the widespread availability of pirate products. Thus, this campaign resulted in no meaningful reduction in piracy rates. None of the raids involving sound recordings will apparently result in criminal prosecution despite massive seizures; stores

⁴ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2006 Special 301 submission at www.iipa.com/pdf/2006spec301methodology.pdf.

⁵ MPAA's trade losses and piracy levels for 2005 are available for a limited number of countries and are based on a methodology that analyzes physical or "hard" goods and Internet piracy. For a description of the new methodology, please see Appendix B of this report. As loss numbers and piracy levels become available for additional countries at a later time, they will be posted on the IIPA website, <http://www.iipa.com>.

⁶ The estimated losses to the sound recording/music industry due to domestic piracy are US\$202.9 million for 2004, and exclude any losses on sales of exported discs. This number is also based on a "displaced sales" methodology. 2005 loss estimates were unavailable.

⁷ BSA's 2005 statistics are preliminary. They represent the U.S. publishers' share of software piracy losses in China, and follow the methodology compiled in the Second Annual BSA/IDC Global Software Piracy Study (May 2005), available at <http://www.bsa.org/globalstudy/>. These figures cover, in addition to business applications software, computer applications such as operating systems, consumer applications such as PC gaming, personal finance, and reference software. BSA's 2004 piracy statistics were preliminary at the time of IIPA's February 11, 2005 Special 301 filing; the 2004 data has been revised and is reflected above.

⁸ ESA's reported dollar figures reflect the value of pirate product present in the marketplace as distinguished from definitive industry "losses." The methodology used by the ESA is further described in Appendix B of this report.

⁹ The Motion Picture Association reports 125 joint raids with the two authorities against 49 warehouses, 6 packing factories and 70 retail shops resulting in the arrest of four persons, revocation of eight audiovisual licenses and seizure of over 5.5 million pirated optical discs.

¹⁰ The recording industry group operating in China, the International Federation of Phonographic Industries, reports 33 raids in 2005, mostly in southern China, resulting in a seizure of well over 2.5 million discs.

¹¹ The Guangdong Chamber of Audiovisual Distributors (GDCAVD) reports that it conducted 907 raids in various cities in Guangdong Province and seized a total of 20,810,000 illegal optical discs. GDCAVD reports that 23 of the raids have been referred to the Ministry of Public Security for criminal investigation; however, to our knowledge, no criminal proceedings have yet been instituted.

raided are often back in business the day following the raid.¹² Recent raids outside the major cities or the South are encouraging indications of hopefully greater transparency of enforcement efforts in outlying cities.¹³ Raids involving product from other sectors, including the book publishing sector, continue to be non-transparent and appear to target only Chinese language publications.

Internet Piracy Threat Rapidly Growing: Internet piracy is progressively worsening as the number of Internet users and broadband penetration increase in China.¹⁴ While the penetration rate per capita and per household is still relatively small, the sheer numbers of broadband lines (reported to be 35 million as of September 2005) makes China one of the world's largest potential markets in terms of Internet delivery of copyright content, and unfortunately, one of the world's largest emerging Internet piracy problems.¹⁵ Hundreds of websites emanating from China now offer streams, downloads or links to unauthorized files of copyright materials (music, films, software, and books). Disturbingly, there are many Bit Torrent (BT) sites based in China now (BT is a recent P2P architecture which allows for faster file sharing due to the way users cooperate in uploading and downloading pirate content simultaneously). There are at least four "eMule/eDonkey" servers; at least seven specialized "MP3 search engines" which offer deep links to thousands of infringing song files for instant downloads or streaming; and at least eight China-based peer-to-peer (P2P) services (including Kuro China, whose Taiwanese affiliate has been found guilty in a criminal court in Taiwan). The largest MP3 search engine is Baidu, the subject of two civil lawsuits in 2005; it lost one in September 2005 but has appealed.¹⁶ Most of the pirate websites in China generate income through advertising, so they are profit-making ventures even though the copyright materials are provided for free. At least three of the P2P services (including Kuro China) charge subscription fees. Unfortunately, the availability and use of these services, spurred by the rapid growth of broadband technologies in China, indicate that Internet piracy will be one of the greatest challenges industry and the Chinese Government must face.

Entertainment software publishers also face the problem of so-called "offline server" piracy in China. These servers make unauthorized or pirate online games readily available or without adherence to terms or conditions set forth in a licensing agreement. The "offline server" operator creates a "mirror" server to the legitimate servers operated by entertainment software

¹² For example, the recording industry reports that a major retail pirate distributor in Shenzhen was raided in May 2005, resulting in seizure of 40,000 pirate sound recordings and motion pictures, but was back in business shortly after the raid and even increased its business volume. Two storage facilities in Guangzhou were raided in August and September 2005, resulting in seizure of over 60,000 pirate optical discs. Again, the facilities were back in business shortly after the raid and have since grown their operations.

¹³ In December 2005, the Chaoyang police department took raids with the Motion Picture Association on two shops, and filed a complaint with the district prosecutor, seeking a criminal charge against a major supplier of pirate product. Unfortunately, the two shops raided were back in business the next day, and no criminal charges are likely to be filed.

¹⁴ China saw rapid expansion in 2005 in terms of the number of broadband lines. By the end of September 2005, there were 35 million broadband lines in China (up from over 25 million in December 2004), with lines split between roughly 25 million DSL lines and 10 million cable lines. See Point Topic Ltd., *World Broadband Statistics Q3 2005*, December 2005, Press Release at <http://www.point-topic.com/content/dslanalysis/ukbb051229.htm>. The Chinese newspaper, Economic Daily, reported in January 2006 that the number of Internet users in China grew by 18 percent in 2005 to 111 million. *In China, 111 Million Net Users Counted*, ZDNet (Reuters), January 18, 2006, at http://news.zdnet.com/2100-1035_22-6027969.html.

¹⁵ *Id.* The Economic Daily (China) reported that as of the end of 2005, 64 million Chinese accessed the Internet via broadband connections.

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

companies, not only diverting traffic and subscription revenue from the legitimate site but also, by bypassing authentication and verification processes, allowing the play of pirated games.

Enforcement against Internet piracy in China in 2005 has been made more difficult by recent Chinese government decisions. In 2003 and 2004, thousands of takedown notices were sent to ISPs and content providers, and, for the music industry, for example, the actual takedown rate was quite high.¹⁷ However, the April 2005 “Administrative Measures on Protecting Copyright on the Internet made such takedowns more difficult and compliance by ISPs fell precipitously in 2005.”¹⁸ The Administrative Measures appear not to allow e-mail notices and require that the notices include, for each infringing site, evidence of all infringements and proof of copyright ownership for each book, song or film infringed, among other things. The ISPs thus ignored notices that do not meet this unrealistically burdensome standard.¹⁹

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

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

In October 2005, the NCA together with seven other government agencies (Ministry of Propaganda, GAPP, MII, MPS, National Anti-Pornography and Publication Office, and the Beijing Copyright Administration) announced a special campaign from October 2005 to February 2006 to target Internet piracy. Right holder organizations were asked to provide information on infringing sites. Pursuant to this campaign, the recording industry filed complaints in November with the NCA against about 120 large illegal dedicated music sites and by mid-January 2006, at least 24 of these sites had been closed.²⁰ The motion picture industry made complaints against 88 sites and reports that the PSB handled case investigations involving two websites (these were subsequently returned for failure to meet the criminal threshold). Criminal charges also may be sought against a third site. NCA and the Motion Picture Association are also working on formalizing closer relations to combat Internet piracy.

¹⁷ The music industry achieved takedowns of three China-based servers of at least seven international sites (Supermusic, Crazymp3, 21century-mp3, Mp3explosion, Easymph3s, Realalbums, and Finestmp3s), infringing music files hosted on large Chinese portals like Wanwa, Hitmusic, Sohu, and 9sky (9sky has since become a licensed music site, as have four other sites), and 17 “eDonkey” servers based in China.

¹⁸ From September to November 2005, the takedown rate by ISPs was as low as 25%.

¹⁹ Administrative Measures on Protecting Copyright on the Internet, issued by the National Copyright Administration of China (NCAC) and the Ministry of Information Industry (MII), effective April 30, 2005.

²⁰ In one case, the recording industry requested NCAC to take action against a large fee-charging site claiming to be the largest Chinese music site, against which the industry had filed a formal complaint with NCA in April 2005. The site’s web records include false information and the site switched service providers seven times to evade takedown notices. We have no further information on the results of this or other complaints, or whether any of the recording industry cases were dealt with by administrative fines or were referred to the Ministry of Public Security for criminal investigation and possible prosecution.

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

China Once Again Takes Center Stage as Mass Producer of Optical Media for Export: We believe there are roughly 86 optical disc plants in China, with 1,374 total lines bringing total disc capacity based on IIPA's conservative methodology to a staggering 4.8 billion discs per year. Most of the production lines are interchangeable, switching easily between audio CD, VCD, DVD, and even CD-R or DVD-R production. Unfortunately, a considerable amount of China's production is once again destined for export. In 2005, infringing product from China has been found in nearly every major market in the world, including (but not limited to): Germany, Italy, Australia, Norway, Belgium, Canada, Mexico,²¹ the United States, Russia, the United Kingdom, the Netherlands, Israel, Paraguay, Lithuania, Singapore, Taiwan, the Philippines, Indonesia, Vietnam, Hong Kong, Malaysia, Thailand, Chile, and South Africa. Some shipments are disguised in container shipments of electronic and other goods or are sent via express mail and courier companies. The known shipments and seizures around the world are, of course, only the tip of the iceberg of the total exports of pirate optical discs from China. China's factories have once again returned to plying the export trade, after enormous enforcement efforts in the late 1990s largely eradicated massive pirate production for export. News also spread in 2005 of China's plans to create its own format of HD-DVD which will not be compatible with any existing player, and that will not be bound by current copy protection.²² The prospect of an unprotected format created in China harkens back to the advent of the VCD, a Chinese-invented pirate format, and raises questions about the Chinese Government's will to deal with the piracy issue.

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

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

²¹ The Mexican Association of Gift Producers (AMFAR) reported that during 2005 holidays, nearly 80% of traded merchandise was imported from China through illegal means. *AMFAR: 80% of Chinese merchandise, illegal*, Corporate Mexico, January 18, 2006.

²² *China to Develop New Format Based on HD-DVD*, October 7, 2005, at <http://www.msnbc.msn.com/id/9618578/> (reporting a *Xinhua* news agency report).

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

Illegal printing of books, which is a more sophisticated endeavor than photocopying, continues to plague publishers in China as well. Whether it appears in the form of a high level technical or medical book that looks exactly like the original, or a cheap bestseller sold under a bridge in Beijing, this type of piracy is devastating the market—not only for foreign publishers but also the Chinese companies that have the legitimate reprint or translation rights to these titles. A quick stroll across a pedestrian bridge outside the Beijing International Book Fair venue in September 2005 resulted in easy access to titles such as *The DaVinci Code*, the sixth *Harry Potter* book, and many more. Titles such as these are sold by street vendors throughout major cities and in book markets such as the Tianshuiyuan market in Beijing.

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

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

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

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

The manufacturing and assembly of cartridge-based handheld games also continues to be a massive problem in China, as the country remains the world's primary producer and exporter of infringing *Nintendo* video game products. In 2005, a total of 244,000 counterfeit *Nintendo* products, all originating from China, were seized in 15 countries in Asia, North America, Latin America, the Middle East and Europe. These large export seizures are due to the lack of sustained enforcement against the factories engaged in massive counterfeit production as well as a lack of effective customs inspections procedures to interdict the exports before they leave the country.²³

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

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

The Criminal Enforcement System Remains Non-Deterrent: Despite China's promise in the JCCT to increase the number of criminal prosecutions for copyright piracy, little has yet been done. The current criminal system in China continues to operate ineffectively and without deterrence.²⁴ Moreover, as discussed below in connection with the copyright law and related laws and regulations, there are on-their-face legal issues of what acts constitute crimes, and what proof meets the criminal thresholds (including, *inter alia*, how to measure harm to meet the thresholds).

Further, there is not one Ministry that takes responsibility for criminal copyright enforcement, including the raid, arrest, seizure, and transfer of a case file for prosecution. Retailers, distributors, warehouse owners, and even pirate producers know that administrative raids will rarely if ever be transferred for criminal prosecution, so they operate for the most part

²³ Hong Kong has become a key transshipment point for counterfeit *Nintendo* products. In 2005, it is reported that over 85,000 infringing *Nintendo* products were shipped through the HKSAR.

²⁴ We focus on the practical issues related to criminal enforcement, but note that as a political matter, a fundamental issue remains that copyright piracy is still viewed by many in China as a problem to be dealt with administratively rather than in the criminal courts. Administrative enforcement of copyright has been under the auspices of the National Copyright Administration of China (NCA), which is neither properly equipped nor staffed with the resources or personnel to address the large-scale piracy problem in China. The failure to have any one agency in charge, which has the wherewithal to do the job of achieving deterrent enforcement, has led to *ad hoc* approaches to enforcement.

in the open without fear of effective enforcement action, much less effective criminal enforcement. Repeat offenders often pay insignificant administrative fines and thus disregard administrative orders to cease their infringing activities. Unless criminal prosecutions are brought, piracy will remain pervasive in the country as mere administrative actions have long been proved to be without a deterrent effect on pirates and counterfeiters.

IIPA has repeatedly stressed the absence of criminal prosecutions. While the Chinese government reports such prosecutions, IIPA and its members are aware of only a very few that have involved U.S. or other non-Chinese works.²⁵ One of these cases was the infamous *Guthrie* case (involving a large DVD wholesale piracy ring run by a citizen of the United States). While this case did involve piracy of U.S. product, it is dwarfed by comparison with the organized criminal activities conducted by Chinese citizens, who are rarely prosecuted for their crimes.²⁶ We do note, however, that the “special campaign” against Internet piracy appears to be targeting some of the websites/services for criminal prosecution. As discussed below, however, it is not yet clear whether and how the new thresholds will be met to enable criminal prosecution of Internet pirates.²⁷

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

Civil Cases Brought, Including Against Internet Pirates: The copyright industries have fared far better in the civil courts in China.²⁸ Unfortunately, the average awards do not come close to compensating the right holder for the injury suffered as a result of the infringement. For example, the average damages awarded in the recording industry cases were about RMB3500 (US\$435) per title, which in the majority of the cases does not even cover legal fees and expenses, much less compensate the right holder for its loss. Moreover, awards for legal fees and costs are usually a small fraction of the actual costs incurred. Documentation requirements to prove copyright ownership and status of the plaintiff are overly burdensome, and ascertaining information regarding defendants sufficient to succeed in these actions is difficult, as the domain name or other registration information for these Internet operators is usually inaccurate or incomplete. Additional burdens are imposed by the Chinese court’s requirement on who may act as the “legal representative” of a party. Under these provisions,

²⁵ Known cases involving foreign product include *In re TONG Yaxi* (People’s Court of Yuzhong District, Chongqing, August 12, 2005), which involved U.S. motion picture product, and *In re Li WENHU, CHEN, SU, ZHONG*, which involved the Belgian literary works *Tintin* (the author’s representatives were reportedly very active in pursuing this case).

²⁶ *In re Randolph Hobson GUTHRIE III, Abram Cody THRUSH, WU Dong and WU Shibiao* (Shanghai No. 2 Intermediate Court, April 19, 2005).

²⁷ In October 2005, the Supreme Court and the Supreme People’s Procuratorate issued a clarification to the JIs, specifically stating that transmission over the Internet of sound recordings falls within Article 217 of the Criminal Code and the JIs. IIPA hopes that this change sets the stage for far greater numbers of prosecutions in Internet copyright-related cases, involving sound recordings as well as other works. It is reported that in November 2005, the Guangdong Public Security Bureau raided an Internet café, seizing the equipment and arresting two suspects operating a website which was alleged to have offered thousands of songs for download over the Internet. Investigations are ongoing and it is unclear whether this case will be referred to the People’s Procuratorate for criminal prosecution.

²⁸ Since 2002, the motion picture industry has brought ten civil cases, four against factories and six against retail outlets in Shanghai. All these cases were concluded successfully. The record industry has recently shifted the focus of its civil cases to Internet piracy, filing 87 civil cases against Internet infringers since 2003. As of January 2006, 61 cases have been concluded, 59 successfully, while another 26 cases remain pending.

courts have even required the chief executives of major multinational corporations to appear in person to prove, for example, copyright ownership and subsistence.

MARKET ACCESS AND RELATED ISSUES

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

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

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

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

Entertainment software companies face lengthy delays in the censorship (approval) process in China, wiping out the market window for legitimate distribution of an entertainment software product (this window is usually shorter for entertainment software titles than for other works). Each entertainment software title must go through an approval process at the General Administration of Press and Publications (GAPP), which takes several weeks to several months. As has been committed for other industries, and consistent with the JCCT outcome, the Chinese Government should rid the market of pirated game titles which are still under GAPP review. Another serious concern involves the creation of an apparently new approval process with the Ministry of Culture for online versions of games. Since the business model for entertainment software involves games to be played on all kinds of platforms, including computers, consoles, handheld devices, and the Internet, there is no reason for two reviews.²⁹

²⁹ IIPA notes as a general trend that inconsistencies in the laws and regulations in China are beginning to appear (and have detrimental market effects) in the handling of copyright material in traditional media versus content on the

The review function should be lodged with only one agency, either the GAPP or the MOC. Video games distributed on physical optical disc media also increasingly have an online component. Two separate content review processes before two different agencies would be burdensome, adding not only additional costs but also further delay in releasing new product into the market. Further, transparency in the review process is sorely needed.

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

Recording Industry: Record companies are prevented from developing talent in China and from getting legitimate product quickly to market. The fact that U.S. record companies cannot "publish" or release a recording without permission of a state owned company, and cannot manufacture, distribute or engage in retailing of their products, artificially segments China's market, making it extraordinarily difficult for legitimate companies to participate effectively. U.S. record companies are skilled at and desirous of developing, creating, producing, distributing and promoting sound recordings worldwide.³⁰ The universal experience of nations in which the international record companies do business is that local artists have expanded opportunities to have their music recorded and distributed widely. The in-country presence of U.S. companies also has brought jobs and expertise in a wide variety of areas. China should permit U.S. (and other foreign) sound recording producers to engage in:

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

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

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

³⁰ The work of these companies encompasses a wide range of activities, including developing and investing in state of the art recording, mastering and engineering facilities; identifying and training talented singers, songwriters, composers, and musicians; promoting and advertising acts and recordings; establishing efficient and competitive distribution systems to take products from recording studio to replicator to wholesalers to retailer; and using global arrangements and distribution services to release products in markets outside the local market. U.S. record companies have long sought to bring these skills to China to develop and record Chinese artists for the Chinese market and for export.

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

- **Onerous and Indefensible Import Quota for Theatrical Release of Films:** Under the terms of China's WTO commitment, China agreed to allow 20 revenue sharing films (theatrical release) into the country each year. However, the Chinese have stated that 20 is a "maximum," not a "minimum," an interpretation of its commitment which is not justified and should be corrected. Censorship and the monopoly import structure (described below) are the tools by which this quota is imposed and enforced. Demonstrably unfair contractual conditions still prevail for theatrical-release motion pictures in China, ensuring that the film distributor/studio gets only a small proportion of the box office compared to what they would get if the market were opened.
- **Cutting the Screen Quota for Foreign Films:** SARFT regulations require that foreign films occupy less than one third of the total screen time in cinemas. Even where foreign blockbusters are allowed into China under the film quota system, the screen quota then mandates that the distributor restrict the number of prints available to cinemas.
- **Monopoly on Film Imports and Film Distribution:** China Film continues to be one of the entities holding a state-enforced monopoly on the import of foreign films. China Film held the sole monopoly on the distribution of foreign films until "Huaxia Distribution" was authorized by SARFT to be a second distributor of imported films in August 2002.³¹ Like China Film, Huaxia is beholden to SARFT and its operations are virtually transparent to China Film, thwarting any real competition between the two. Foreign studios or other distributors cannot directly distribute revenue-sharing foreign films.
- **Restricted Market Access for Foreign Satellite Signals:** Foreign satellite channels may only be shown in three-star hotels and above and in foreign institutions. Moreover, foreign satellite channels beaming into China are required to uplink from a government-owned satellite for a fee of US\$100,000, placing a significant and unnecessary financial burden on satellite channel providers. Further, foreign satellite channels are not allowed carriage on local cable networks without government approval or landing permits. Offending news items on sensitive subjects in China are still routinely blacked out by officials who monitor all broadcasts over the national satellite system. Only a handful of foreign channels have been granted approval, and carriage is currently limited to Guangdong province.
- **Broadcast Quotas, Content Restrictions, and Restrictive License Practices for Satellite Channels:** SARFT's "Regulations on the Import and Broadcasting of Foreign TV Programming" effective October 23, 2004, sets severe quotas on the broadcast of foreign content (e.g., no more than 25% of all content broadcast can be foreign films or television dramas, with a 0% allowance during prime time).³² The China TV Program Agency under CCTV must approve all importation of foreign programming under the guidance of SARFT. The Chinese have also issued regulations restricting who can invest and what kinds of programs can be produced in China, again with the aim of severely restricting foreigners'

³¹ Huaxia is a stock corporation with investment from over 20 shareholders, the largest of which is SARFT, with over 20%, then China Film, Shanghai Film Group and Changchun Film Group, each with about 10%.

³² Broadcast of foreign film and television dramas may not comprise more than 25% of total air time each day and 0% during prime time on any channel other than pay television, without SARFT approval. Other foreign programming (news, documentaries, talk shows, travel shows, etc.) is restricted to no more than 15% of total air time each day. Foreign animation programming may not exceed 40% of total animation programming delivered by each station; and to further complicate matters, only producers of domestic animation programming can import foreign animation programming and no more than an equal share of what they produce.

ability to operate in China, and restricting the kinds of content to be permitted (of course, this belies the fact that pirate content comes in unfettered, unregulated, and uncensored).³³

- **Black-Out Periods:** The Chinese government has decreed “black-out periods” (during which no new revenue sharing blockbuster foreign films may be released) in an effort to restrict competition with Chinese films being released in the same period. This ban artificially drives down foreign right holders’ theatrical revenues and contributes to increased piracy, as pirates meet immediate consumer demand for major foreign titles by offering illegal downloads through the Internet, pirate optical discs, and pirate video-on-demand channels.
- **Local Print Production Requirement:** China Film continues to require that film prints be made in local laboratories, reducing right holders’ ability to control the quality of a film copy and potentially resulting in increased costs.
- **Import Duties Should be Based on Value of Physical Media:** Import duties on theatrical and home video products may be assessed on the potential royalty generation of an imported film, a method of assessment which is excessive and inconsistent with international practice of assessing these duties on the value of the underlying imported physical media.

Book Publishers: Publishers must be, but are not, afforded full trading rights (the right to freely import directly into China), and must be permitted to engage (with wholly owned companies) in wholesale and retail distribution activities. There was some question as to whether China fulfilled some of these commitments with its 2004 Foreign Trade Law, which went into effect on July 1, 2004. It now appears that this law did little to rectify the problem. Regulations subsequent to the law, promulgated in August 2005, have not been released to the public, contributing to the ongoing transparency problem in China. Statements from the Chinese government about these regulations, however, indicate that they tightened rules on private ownership of publishing functions, if anything. U.S. publishing companies have been told that they may not import other than through licensed import agencies and that they may not hold their own stock for distribution in China. It appears that foreign publishing companies are allowed to engage in distribution of Chinese-produced materials, but this does most foreign publishing companies little good, considering they are prohibited from producing materials in China. Core publishing activities such as editorial and manufacturing work, printing, and obtaining International Standard Book Numbers (ISBNs) remain off limits to foreign companies. Restrictions on these activities result in greater expense to publishers and consumers alike, and discourage development of materials prepared specifically for the Chinese market. These restrictions also create delays in distribution of legitimate product in the Chinese market, opening the door for pirate supply. Finally, restrictions and high fees related to access to foreign servers result in high costs to publishers of electronic materials (such as academic and professional journals) in making their products available in China, resulting in fewer, lower quality options available to Chinese scholars and students.

TRAINING AND PUBLIC AWARENESS

MPA, IFPI and BSA have undertaken hundreds of training and awareness programs throughout China in 2005. The trainings have involved police, prosecutors, judges, customs

³³ The “Interim Management Regulations on Sino-Foreign Joint Ventures and Sino-Foreign Cooperative Television Program Production Enterprises,” effective November 28, 2004, sets out the 49% minority joint-venture restriction for “production ventures”; investment requirements of foreigners; licensure requirements; requirements that foreign partners must be “specialized radio or TV ventures”; restrictions on access to non-media investors; and perhaps most important from a content perspective, requirements for use of “Chinese themes” in two-thirds of the programming.

officials and administrative agency enforcement personnel. Training and awareness has always been a high priority for the copyright industries in China.

COPYRIGHT LAW AND RELATED ISSUES

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

Draft Transfer Regulations: On June 29, 2005, the Supreme People's Procuratorate along with the National Office for Rectification and Standardization of the Market Economic Order, Ministry of Public Security, and the Ministry of Supervision in accordance with the State Council's Regulations on the Transfer of Suspected Criminal Cases by Administrative Law Enforcement Organs, issued draft "Regulations on the Timely Transfer of Suspected Criminal Cases in the Enforcement of Administrative Law." It is hoped that final issuance of these regulations will in fact lead to more and speedier criminal referrals. IIPA commented on these draft regulations and noted, *inter alia*: 1) it is essential that the regulations allow for "on the spot" criminal referrals where there is a "reasonable suspicion" that the infringer has performed acts which, upon further investigation, would meet the criminal thresholds (not when the administrative body determines the threshold has been met, as the draft currently indicates),³⁴ 2) because the most critical decision in China's enforcement system is whether the "thresholds" have, or have not, been met, the regulations should include a repetition of the various elements of the 2004 JIs so that administrative organs, the PSB and the SPP, have one single term of reference.³⁵ The effectiveness of these regulations will be judged by whether they lead to a greater number of prosecutions of criminal copyright cases, and whether foreign right holders can expect the Chinese Government to refer significant numbers of criminal cases in the future.

Issuance of New "Regulations for Protection of Copyrights on Information Networks" Is Needed to Confirm Protection of Digital Rights, and Foster Stronger Cooperation by ISPs in the Fight Against Internet Piracy: Two sets of Draft Regulations for Protection of Copyrights on Information Networks, intended to implement Article 58 of the Copyright Law of the People's Republic of China (2001), were issued, first on August 1, 2005, and then again, after revisions following comments, including by IIPA, on September 8, 2005.³⁶ Unfortunately, the revised draft was weaker in a number of areas. Overall, IIPA's chief concerns with the September 8 draft include the following (among other concerns identified):

- **Coverage of Temporary Copies:** The draft regulations should re-insert protection for reproductions, including temporary reproductions (the definition was deleted in the September 8 draft).

³⁴ Since the administrative organs do not have the kind of investigative authority that resides in the PSB and the SPP, or the ability to detain suspects or to secure information effectively from suspected pirates that would provide evidence that would help prove that the thresholds have been met, IIPA believes the "test" for when the PSB or SPP gets involved in a case initially commenced by an administrative organ should not be so strict.

³⁵ The Regulations allow for the Procuratorate or the local police to become involved in a criminal investigation, but many important terms which determine whether the police or Procuratorate get involved, such as "complicated" and "large amount of money" (Article 10), "very significant," "complicated," "difficult" (Article 11), and "very significant and have great impact" (Article 12), are vague and left undefined.

³⁶ IIPA understands that it is intended that these regulations when finally promulgated will supersede the April 30, 2005 NCAC and Ministry of Information Industry (MII) "Administrative Measures on Protecting Copyright on Internet." Those Measures contain various rules as to notices to ISPs and takedown of infringing materials from the Internet. While those Measures contain some problems, and remain in force as of this writing, we focus in this report on the draft regulations since they will apparently supersede the Measures.

- **Communication to the Public Must Include Full “Making Available” Right (Not Just Right of “Upload”):** The definition of “communication to the public” should extend to all communications “whether by wire or wireless means, including the making available to the public of the work/sound recording in such a way that members of the public may access the work/sound recording from a place and at a time individually chosen by them.” While the Article 3 description of “communication to the public” appears broad, the next clause, read strictly, could limit the right to the act of “uploading,” which would be insufficient to meet the WCT and WPPT standards.
- **Technological Protection Measures:** The treatment of technological measures does not measure up to the standards required by the WCT and WPPT. Devices and services are not covered (as they were in the prior draft); copy controls are not clearly covered; exceptions to the prohibition against circumvention remain overbroad; the prohibition against right holders using what the draft terms so-called “inappropriate” technological measures must be deleted, as should associated requirements to disclose TPMs (and penalties related to both).
- **Service Provider Liability:** Provisions on the liability of service providers and limitations on such liability are improved from the August draft, since the limitation on remedies (compensation) will preserve the possibility of a right holder seeking injunctive relief against a service provider that does not take down infringing content. It is important that 1) the ISP qualify for the safe harbor only if it does not know of infringements (provided in the current draft) or if it “is not aware of facts from which infringement is apparent” (not in the current draft); 2) the ISP “expeditiously” takes down material once becoming aware of “such facts” (the time period in the draft is five days, which is too lengthy); 3) the notification can be made by a right holder representative (the draft says “the right holder”); 4) in lieu of the actual URL, information sufficient to locate the infringing site should be adequate to make a notice valid; 5) a notice should be valid if it “substantially” complies with the requirements; and 6) Article 16 allows a right holder to request the ISP to identify the user.

The Criminal Law Should be Amended to Cover All “Commercial Scale” Piracy: Articles 217 and 218, the criminal piracy articles of the Criminal Law of the People’s Republic of China (1997), fail to cover all possible commercial scale piracy, and as such, these provisions violate TRIPS Article 61. In addition, China is one of the only countries in the world that requires proof that the act in question was undertaken with the “purpose of reaping profits,” and is the only country we know of that has a threshold (“gains a fairly large amount” or “when the amount of the illicit income is huge”) for criminal liability calculated based on pirate profits or income.³⁷ China should remove the “purpose of reaping profits” standard since commercial scale piracy can be, and in the digital age often is, engaged in without any purpose of reaping profit (e.g., on a P2P Internet site where no money is exchanged). The criminal provisions also need an update to take into account the WCT and WPPT (WIPO “Internet” Treaties), which China has promised to adhere to in 2006. Thus, we propose that Article 217 be amended to achieve the following, among other things: (1) expressly criminalize end-user piracy; (2) add the TRIPS-required reference to all the exclusive rights now provided in the law (and include the WIPO treaties rights and importation); (3) criminalize violations of the anti-circumvention and rights management information provisions; (4) remove “purpose of reaping profits” to criminalize offenses that are without profit motive but that have a “commercial scale” impact on right holders; (5) eliminate distinctions between crimes of entities and individuals; and (6) increase

³⁷ As noted below, the new IJ set forth what “other serious circumstances” and “other particularly serious circumstances” are, but nonetheless, as the alternative thresholds such as the per copy thresholds may be difficult to meet even where commercial scale piracy exists, China should instead choose to modernize its criminal provisions by removal of these vague standards or by significantly lowering the thresholds.

the level of penalties overall. China must also make good on its promise to criminalize the importation and exportation of pirate product (under the JIs such acts are actionable under “accomplice” liability, but the penalties available are much lower and generally non-deterrent).³⁸ We also note that the JI provisions on repeat offenders, while included in the 1998 JIs, were not included in the 2004 JIs; we seek confirmation that the recidivist provision in the 1998 JIs remains intact, since it is not inconsistent with the 2004 JIs.³⁹

Criminal Thresholds Should be Lowered or Abolished Entirely: The 2004 Supreme People’s Court JIs still leave thresholds too high. The 2004 JIs made only minimal decreases in the monetary thresholds and leave in place calculation of “gain” or “illicit income” at pirate prices. Further, to date copyright owners have not found that the copy thresholds (1,000, 3000, and 5,000) have proven helpful in generating new criminal prosecutions, although copy thresholds could be helpful if lowered significantly (in 2004, IIPA had proposed 50 copies of software or books and 100 copies of recorded music or motion pictures for criminal liability, and twice this number for more serious offenses; the Supreme People’s Court adopted a number 30 to 60 times higher than what IIPA proposed). A copy threshold is not even available in Article 218 “retail” cases, so that only the monetary thresholds apply in those cases (which are more difficult to meet particularly since they are measured at pirate prices). A new challenge is how to meet the threshold in the case of Internet infringement. The severity of Internet piracy clearly calls for adjustments to the thresholds in the JIs so that Internet piracy, when on a commercial scale, is actionable even if pirate profit is not proved.

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

³⁸ In the JCCT, the Chinese Government committed that the Chinese Ministry of Public Security and the General Administration of Customs would issue regulations “to ensure the timely transfer of cases [involving pirate exports] for criminal investigation.” The JCCT outcomes indicate that the “goal of the regulations is to reduce exports of infringing goods by increasing criminal prosecution.” A draft has not emerged although IIPA understands that one is due in mid-2006.

³⁹ According to Article 17 of the 2004 JI, “[i]n case of any discrepancy between the present Interpretations and any of those issued previously concerning the crimes of intellectual property infringements, the previous ones shall become inapplicable as of the date when the present Interpretations come into effect.”

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