

PEOPLE'S REPUBLIC OF CHINA (PRC)

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2011 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that USTR maintain China on the Priority Watch List in 2011.¹

Executive Summary: High copyright piracy levels persist in China, from pervasive use of unlicensed software by businesses and pre-installation of unlicensed software (hard disk loading piracy) at the distribution level, to widespread online piracy of music, films, television programming and other copyright materials, and piracy of hard goods. The continued overall lack of deterrence against piracy, market closures or barriers for creative content (some of which have been found to violate China's WTO commitments), and the imposition or spectre of discriminatory policies toward foreign content, suggest a conscious policy seeking to drive Chinese competitiveness while permitting free access to foreign content through unapproved pirate channels. China's principal reliance on its woefully under-resourced administrative system to deal with IPR infringements rather than through criminal enforcement presents a significant hurdle to effective enforcement.²

At the same time, with the launch of a new Special Campaign on IP enforcement, and through commitments made in recent bilateral forums, the Chinese Government has indicated measures it will take to achieve higher levels of copyright protection. Specifically, the recent meeting of the Joint Commission on Commerce and Trade (JCCT) in December 2010 and the summit between President Obama and President Hu in January 2011 resulted in a number of important commitments by the Chinese to ensure legal use of software in the government and state-owned enterprises (SOEs), seek effective measures to deal with Internet infringements (including intermediary liability), deal with digital library infringements, and ensure that China's "indigenous innovation" policies do not effectively limit market access for U.S. intellectual property owners, compel transfers of intellectual property to access the Chinese procurement market, or create conditions on the use of or licensing of U.S. intellectual property.³ New Opinions on handling criminal copyright infringement cases contain helpful provisions which could foster an effective criminal remedy against online piracy activities. IIPA commends the efforts of the U.S. Government to secure these important commitments. However, as has been the case with past commitments to improve copyright protection and market access made by the Chinese Government, it remains to be seen whether the Chinese will implement them in a sustainable and meaningful way, at the central and provincial levels, to ensure that copyright piracy in all its forms is curbed and to provide a fairer and more open market for U.S. creative content.

Priority Actions Requested in 2011:

Enforcement

- Increase the number and effectiveness of criminal prosecutions, including against online piracy and those services that facilitate piracy, such as Baidu; bring criminal cases against corporate end-user software piracy; allow specialized IPR judges to hear criminal cases; and move more criminal IPR cases to the intermediate courts.
- Follow through on China's commitments at the recent JCCT and Obama-Hu summit to ensure legal use of software by the government and SOEs by 1) treating software as property and establishing software asset

¹ For more details on China's Special 301 history, see IIPA's "History" Appendix to this filing at <http://www.iipa.com/pdf/2011SPEC301HISTORICALSUMMARY.pdf>, as well as the previous years' country reports, at <http://www.iipa.com/countryreports.html>.

² In November 2010, the Chinese Government announced a "special campaign on fighting against infringing IP and manufacturing and selling counterfeiting and shoddy commodities," to last from October 2010 to March 2011. While the industries support sustained enforcement campaigns, this campaign has mostly focused on physical piracy and lacks the permanence to significantly reduce piracy.

³ See The White House, Office of the Press Secretary, *FACT SHEET: U.S.-China Economic Issues*, January 19, 2011, at <http://www.whitehouse.gov/the-press-office/2011/01/19/fact-sheet-us-china-economic-issues> and United States Trade Representative, *21st U.S.-China Joint Commission on Commerce and Trade: Fact Sheet*, December 15, 2010, at <http://www.ustr.gov/about-us/press-office/fact-sheets/2010/21st-us-china-joint-commission-commerce-and-trade>.



management systems for government agencies, 2) allocating current and future government budgets for legal software purchases and upgrades, 3) implementing software legalization pilot programs for 30 major SOEs, and 4) conducting audits to ensure that government agencies at all levels use legal software and publish the results.

- Increase actions by SARFT, GAPP, MOC, and the Ministry of Industry and Information Technology (MIIT) to revoke business licenses and halt online services that deal in/provide access to infringing materials, and shut down websites that operate without government-issued licenses.
- Enhance “pre-release” administrative enforcement for motion pictures, sound recordings, and other works.
- Crack down on web-based enterprises’ piracy of library academic journals as promised in the 2010 JCCT outcomes, and otherwise take steps to legalize usage of books and journals at universities and by government.
- Combat piracy occurring on mobile networks, such as unauthorized WAP sites, and unauthorized downloading and streaming of infringing music to smart phones.
- Expand resources at National Copyright Administration of China (NCAC), local Copyright Administrations, and Law and Cultural Enforcement Administrations (LCEAs), commensurate with the scale of the piracy problem, for more effective enforcement actions against all forms of piracy.
- Impose deterrent fines in administrative enforcement actions.
- Allow foreign rights holder associations to increase staff and conduct anti-piracy investigations.

Legislation and Related Matters

- Follow through on JCCT and bilateral commitments to hold accountable violators of intellectual property on the Internet (including growing hard goods sales on e-commerce sites), including those who facilitate the infringement of others, through appropriate amendments and regulations.
- Confirm that corporate end-user software piracy and hard disk loading of unlicensed software are criminal offenses, including issuing a Judicial Interpretation and amending the Criminal Code and Copyright Law and case referral rules as needed; and remove the “public harm” requirement as a hurdle to administrative enforcement.⁴
- Amend the Copyright Law and subordinate legislation/regulations to ensure full compliance with Berne, TRIPS, and the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT).
- Increase damages against copyright infringers in civil cases to deter piracy and adequately compensate the copyright holders.
- Significantly increase maximum statutory damages of RMB500,000 (US\$75,850) in the Copyright Law and related laws to ensure deterrence in the new technological environment.
- Review and amend the 2006 Internet Regulations to provide for a mandatory “notice and takedown” procedure for hosted content and penalties for non-compliance of right holders’ notices; ensure their effectiveness and implement them with more aggressive administrative and criminal enforcement.
- Amend the Copyright Law to clarify ISPs’ liabilities and introduce measures designed to ensure that there are incentives for active cooperation between Internet service providers and content holders in addressing the use of networks for the transmission of infringing materials in the non-hosted environment, e.g., infringements occurring using peer-to-peer (P2P) filesharing services, web bulletin boards, torrent sites, link sites and cyberlockers.
- Amend the Copyright Law to grant full communication to the public rights for related rights.
- Extend term of protection for sound recordings to at least 70 years from publication, and preferably to match the U.S. term of 95 years from publication, or 120 years from fixation.

Market Access

- Bring laws into compliance with WTO panel decision on market access for published materials, audiovisual materials, and recorded music.
- Refrain from implementing “indigenous innovation” policies that discriminate against foreign products or condition market access based on whether a product’s intellectual property is owned or developed in China.

⁴ The Business Software Alliance reports that administrative officials are often unwilling to act against enterprises engaged in use of unlicensed software due to the vague “public harm” requirement, notwithstanding China’s 2005 declaration that software end-user piracy is considered to constitute “harm to the public interest” and as such is subject to administrative penalties nationwide.

- Ease the many market access restrictions noted in this filing, including the duopoly for theatrical film distribution and the ban on game consoles.
- Withdraw or significantly modify the Ministry of Culture *Circular on Strengthening and Improving Online Music Content Examination* which imposes burdensome procedures for online distribution of sound recordings, new discriminatory censorship procedures for foreign sound recordings, and WTO-inconsistent restrictions on the ability of foreign-invested enterprises to engage in the importation and distribution of online music.

PIRACY AND ENFORCEMENT CHALLENGES AND UPDATES IN CHINA

Previous IIPA submissions, including those made to USTR in the Special 301 process, those related to China's WTO compliance,⁵ those describing "notorious markets,"⁶ and the recent submission before the USITC on identification and quantification of piracy in China,⁷ have described in detail the many forms of copyright piracy and enforcement challenges in China faced by IIPA members. The following highlights key piracy and enforcement challenges and updates.

Internet Piracy: According to the China Internet Network Information Center (CNNIC), China's Internet population stands at 457 million Internet users as of December 2010, with over 66% of them using mobile phones to surf the web, by far the largest in the world.⁸ More spectacular is the percentage of those users with high-speed broadband interconnections, at an estimated 450 million users. Of mobile users, 303 million now have mobile Internet access,⁹ and there is growing evidence that piracy is taking place directly on mobile devices over wireless broadband networks (3G), and the pre-loading of infringing files on mobile devices is a problem for copyright industries.¹⁰ Of all Internet users, according to CNNIC, 79.2 % use the Internet for "Web music," 66.5 % use the Internet for "Web game," 62.1% use the Internet for "Web video" and 42.6% use the Internet for "Network literature."¹¹

These statistics speak volumes, since for most of the copyright sectors, legitimate content is not made available in significant quantities online in China due to the prevalence of piracy, market access restrictions, or other discriminatory measures which effectively keep legitimate content out. Internet piracy of music is an illustrative example, estimated at 99% piracy and fueled primarily by businesses like NASDAQ-traded Baidu, that direct users to infringing content and are supported by advertising.¹² The harm caused by Internet piracy of music can perhaps be

⁵ International Intellectual Property Alliance, *China's WTO Compliance: (1) Request to Testify at October 6, 2010 Hearing and (2) Notice of Testimony Regarding China's Compliance with its WTO Commitments*, 75 Fed. Reg. 45693 (August 3, 2010), September 22, 2010, at <http://www.iipa.com/pdf/ChinaWTOrequesttotestifyandtestimonytoTPSCFinal092210.pdf>.

⁶ International Intellectual Property Alliance, *2010 Special 301 Out of Cycle Review of Notorious Markets: Request for Public Comment*, 75 Fed. Reg. 60854 (October 1, 2010), Docket No. USTR-2010-0029, November 5, 2010, at <http://www.iipa.com/pdf/IIPAOCRNotoriousMarketstoUSTRFINAL110510.pdf>.

⁷ International Intellectual Property Alliance, *China: Intellectual Property Infringement, Indigenous Innovation Policies, and Frameworks for Measuring the Effects on the U.S. Economy*, Written Submission, Investigation No. 332-514, 75 Fed. Reg. 25883 (May 10, 2010), July 9, 2010, at <http://www.iipa.com/pdf/IIPACHinalTCWrittenSubmission070910.pdf>.

⁸ China Internet Network Information Center (CNNIC), *Statistics Report on the Development of Internet in China*, January 2011, at <http://research.cnnic.cn/img/h000/h12/attach201101211728520.pdf>.

⁹ The latest Internet numbers represent significant increases over previous years, especially in the areas of increase in access to the Internet via mobile devices and laptops: 66.2% of all Internet users in China employed mobile Internet as of December 2010, up from 60.8% in December 2009; and 45.7% of all Internet users in China employed laptops for Internet as of December 2010, up from 30.7% in December 2009. Meanwhile, 78.4% of Internet users in China used desktops as of December 2010, still representing a majority of Internet users.

¹⁰ For example, the total value of recorded music sales and licensing in China last year was US\$124 million. Of this, only \$30 million was physical sales. More than 80% of the remaining \$94 million was due to revenue generated through mobile platforms, the greatest single contributor being ringback tones. Given the extremely high piracy rates, it is evident that significant losses accrue due to mobile piracy of copyright materials. Mobile broadband provides instant access to infringing copyrighted material, not only music, but also video, books, software and videogames. The record industry notes that a wide range of unauthorized WAP sites and mobile applications, "Apps" (Apple), and Android and other domestic mobile platforms offer infringing song files for streaming and download. Chinese made mobile phones, e.g., Malata Group, now have built-in features linking the phone to infringing WAP sites such as 3g.cn, aitmp3.com, 3Gwawa.net, wap.kxting.cn, wap.soso.com, to allow mobile phone users to gain access to thousands of infringing song files hosted at remote servers.

¹¹ See *supra* note 8 above at 31. All these percentages amount to huge spikes in actual numbers of users since the number of overall users went up so significantly. For example, the number of Internet users accessing "Web music" in December 2010 was 12.9% higher than in December 2009. Of the so-called "web entertainment" applications, the greatest increase in the sheer numbers of users was for "Network literature," which saw an increase of 19.8%.

¹² It is estimated that almost 50% of all illegal music downloads in China take place through Baidu. Baidu frequently creates "top 100" charts and indexes inducing users to find and then download or stream infringing music without permission or payment. On January 20, 2010, the Beijing No. 1 Intermediate People's Court found that Baidu's MP3 deeplinking service did not infringe the rights of Chinese and international record companies. The court determined that Baidu did not have "reason to know" that the tracks to which it was linking were infringing under Article 23 of the Internet regulations, despite the fact that Baidu's

best understood in numbers by comparing the values of China's legitimate market with that of other countries. The value of total legitimate digital sales in 2009 in China was US\$94 million, and total revenue (both physical and digital) was a mere US\$124 million. This compares to \$7.9 billion in the U.S., \$285 million in South Korea and \$142 million in Thailand — a country with less than 5% of China's population and with a roughly equivalent per capita GDP. If Chinese sales were equivalent to Thailand's on a per capita basis, present music sales would be US\$2.8 billion, and even that would represent under-performance and reflect significant losses to piracy. It is fair to say that China's lack of enforcement against music piracy—particularly on the Internet, amounts to more than US\$2 billion in subsidies to Chinese Internet companies who can provide their users with access to music without negotiating licenses therefor. In addition to serious infringement problems with sites like Baidu, Sogou, and Xunlei's Gougou, there are many other websites such as 1ting.com, sogua.com, qq163.com, haoting.com, 520music.com and cyberlocker sites such as Rayfile, Namipan, and 91files which have been implicated in music piracy activities in China. A wide range of recordings have been found on web "forums", such as pt80.com and in-corner.com. These forums direct users to download or stream unauthorized sound recordings stored in Chinese cyberlockers. An increasing number of pre-release albums have been shared by postings at forums which have registered users in the hundreds of thousands — decimating the market for those recordings. Although cease and desist notices have been sent to the administrators of the forums and cyberlockers identified, immediate takedowns of such "URLs" and/or postings are rare. Illegal P2P filesharing remains prevalent in China. Many Chinese-based P2P services, such as Xunlei, VeryCD,¹³ etc., assist in large scale illegal file-sharing activities that have caused serious damage to the recording industry. Most of these illegal services offer songs for free, generating income from advertising and other services.

The entertainment software industry continues to report steadily growing Internet piracy of videogames in China. P2P downloads of infringing video game files is fast becoming the predominant form of piracy along with websites that offer infringing video game product that can be accessed from home PCs and from Internet cafés. The Entertainment Software Association (ESA) reports that during 2010, ESA vendors detected 16.7 million connections by peers participating in unauthorized file sharing of select member titles on P2P networks through ISPs located in China, placing China second in overall volume of detections in the world.¹⁴ This comprises 11.57% of the total number of such connections globally during this period. In addition to P2P piracy, China is home to a growing number of online auction and e-commerce sites that serve as platforms for the commercial distribution of pirated game products and circumvention devices. Sites such as Alibaba.com, Aliexpress.com, GlobalSources.com, Made-in-China.com, DHgate.com, Taobao.com, and Tradetang.com are among the top online marketplaces selling videogame circumvention devices, as well as being cited by industry as offering other copyright infringing products to consumers and businesses, including scanned copies of commercial bestsellers (trade books) and academic textbooks. Unfortunately, most of these sites are unresponsive to rights holder takedown requests. Alibaba should, however, be commended for their cooperation with videogame right holders in the removal of infringing items. The Business Software Alliance (BSA) also reports that online distribution of pirated business software including both downloading/linking/P2P sharing as well as online sales is a significant and growing problem.

For the motion picture industry, the Internet in China presents a monumental opportunity for growth of legitimate online video,¹⁵ but poses equally monumental challenges.¹⁶ The motion picture industry remains

operators actively provided full indexes of popular songs, and knew that the sites being linked to were not those of the legitimate licensees of the plaintiffs. In a companion case, the Court held that Sohu/Sogou were not generally liable for its linking service. The Court only held that Sohu/Sogou infringed several tracks that were part of a "notice & takedown" request made by the plaintiffs, although the damages awarded were only RMB1000 (US\$152) per track. There remains evidence of Baidu's contributions to, and profiting from, the infringing activities over its services. Baidu's deeplinking service also continues to direct users in Hong Kong, Taiwan, Singapore, Malaysia, and elsewhere to infringing music files. Perhaps emboldened by the Baidu decision, there are now thousands of websites that offer streams, downloads, or links to unauthorized music files as well as other specialized deeplinking or "MP3 music search engines" such as Sogou, Gougou offering access to thousands of infringing music files for unlimited streaming and download without consent, while generating income from advertising and other services. It is hoped that the 2011 Criminal IPR Opinions will effectively address these services.

¹³ Although VeryCD closed its music and movie sections on January 21, 2011, it is unknown whether this is only temporary under the pressure of the special campaign. Also, links to download books and articles are still available.

¹⁴ These figures do not account for downloads that occur directly from hosted content, such as infringing games found on "one-click" hosting sites, which appear to account each year for progressively greater volumes of infringing downloads.

¹⁵ China's "Three Network Convergence" trial presents content owners with new business opportunities, for example, video content transmitted from the Internet to TV sets (IPTV/Internet TV), as well as challenges as broadband speed increases. In the absence of legitimate business opportunities (DVD/BD, PPV, cable TV) due to rampant hard goods and online piracy, China presents real business potential for movie products in the online video space. Arguably, China's Internet

particularly concerned about infringements on sites like Youku and Tudou which are “User-Generated Content” (UGC) sites where users upload/make available illegal copies of their favorite feature films or TV programs in China, which then become accessible to anyone in the world. Linking sites to these UGC sites or to other sites multiply the accessibility to the unauthorized content and thereby significantly increase the harm to the copyright companies. The Motion Picture Association of America continues to report that close to half of the illegal content available on the world’s “topsites” is sourced from UGC sites in China. PPLive and PPStream are examples of unauthorized IPTV webcasting channels out of China, which webcast all kinds of television content without authorization. Such pirated IPTV webcasts damage right holders both in their ability to legitimately license pay television and Internet streaming rights and their ability to foster the deployment of legitimate IPTV distribution platforms.

Other problems include illegal P2P streaming sites, illegal P2P filesharing, online sales of pirated hard goods which in 2010 spread at an alarming speed and scale along with the rapid development of e-commerce in China, and a recent phenomenon of “subtitling/translation” sites engaged in piracy. TVAnts is an example of a Chinese P2P software model which results in real-time illegal streaming of television content and live sporting event telecasts. These sites unfortunately provide an efficient environment for infringing activities online with respect to broadcast content to occur. Streaming sites allow, with or without the downloading client software, the viewing or listening to illegal content directly without making a permanent copy as occurs in a download. Other P2P sites in China, including Xunlei, are P2P filesharing sites by which users download and install the P2P client application, enabling them to search for illegal files on each other’s computers and illegally download the infringing files they want. Several of China’s top e-commerce sites now allow online shop owners to sell pirated DVD/Blu-ray discs without requesting those operating the online shops to provide government-issued AV business licenses. Finally, some “non-commercial” piracy websites (e.g., movie/TV subtitling/translation groups, software/client developers) are increasingly becoming a source of pirated content and activities. Due to the fact that these sites are operated by “volunteers” and are constantly changing IP addresses/servers inside (and outside) China, they pose a serious challenge for right holders.

The publishing industry faces unique challenges on the Internet, involving the commercial distribution of electronic copies of academic, scientific, technical and medical journals by unlicensed commercial entities operating with licensed libraries acting in violation of their licenses. This distribution is not only in violation of the terms of the license but also contravenes Chinese Copyright Law and international norms. The commercial enterprises sell subscription access to the electronic distribution service in direct competition with the legitimate publishers. In 2006, publishers became aware of the then-named “Kangjian Shixun,” now operating as “KJ Med,” which was providing electronic files of millions of medical and scientific journal articles on a subscription basis to customers in libraries and hospitals throughout China, without the permission of or payment to right holders. This matter was first raised with government authorities in early 2007 but KJ Med continues to operate unimpeded. Many of the articles illegally distributed continue to be provided by a well-known, powerful state-run medical library. Given the lack of action against the site over the past several years, there is heightened concern that copy-cat sites are following the KJ Med model.¹⁷ The issue was again a key agenda item in the 2010 JCCT dialogue and has been followed by positive engagement from NCAC in early 2011; the publishers are hopeful that this engagement will result in meaningful

video business is better positioned for the development of pay/subscription-based business models if the problem of piracy can be resolved/contained. Currently, several websites in China are adopting ad-supported online video business models with legitimately acquired content. Many are planning to roll out pay business models (subscription-based, PPV) in 2011.

¹⁶ Online video sites, especially video search engines (e.g., Xunlei) and P2P sites (e.g., UUsee, PPLive) are inspired to enter this new frontier by directly providing OEMs/TV manufacturers with content they “aggregate” from the Internet. Although SARFT has made it clear that all video content transmitted from the Internet to TV sets will need to go through the five “authorized broadcast control platforms,” companies such as Xunlei are likely to find ways to bypass the regulations to work with OEMs and attract customers with the offer of “free content.” The independent segment of the film and television industry (IFTA) reports that Internet-based piracy in China prevents the establishment of legitimate online distribution platforms and services for consumers, which independent producers may use to finance future productions. For independent producers who license content country-by-country, online piracy exports troubled marketplaces and high piracy rates to other markets instantly. The independent production sector is limited in its ability to shift to technology-enabled new business practices that might limit piracy. For example, independents, whose national distributors release on their own schedule, cannot use piracy-averting techniques like “day-and-date” release of their films.

¹⁷ In 2008, the publishing industry discovered and conducted an investigation into another Internet operation that facilitated access to online journals in a manner similar to the entity Kangjian Shixun. In mid-2009, the industry initiated an administrative complaint with the NCAC against the entity, which was providing unauthorized access to over 17,000 online journal articles published by foreign publishers to universities and other organizations. The case remains pending.

action on this matter. On October 28, 2009, Chinese agencies issued a *Notice on Enhancing Library Protection of Copyright* notifying libraries of their obligations under the Copyright Law. The Notice calls for regular random inspections by NCAC and the local copyright administrations, and as appropriate, the imposition of administrative sanctions upon libraries found to have been engaged in unauthorized copying and dissemination of copyrighted works. Unfortunately it is unclear whether the obligations outlined in this Notice have been carried out, including whether random inspections of library institutions have been conducted. A number of publishers have been working with Taobao to address the rampant copyright infringement occurring on the site. In December 2010, a ten day campaign was launched by Taobao to specifically target online book and journal piracy. This collaborative initiative is welcomed by the publishing industry and it is hoped that this will progress to sustained action by Taobao, which has been cooperating with publishers in this regard.

While home (broadband or not) and mobile Internet usage has become the predominant way Chinese access content online, piracy in Internet cafés remains a major concern, as they make available unauthorized videos and music for viewing, listening or copying by customers onto discs or mobile devices. The recording industry notes that syndicated services have even emerged, which supply website templates, software, and databases containing infringing song files for individuals or Internet cafés to set up infringing music websites with ease.

Update on Internet Piracy Enforcement – Signs of Positive Movement: While significant challenges remain, there are at least some signs that the Chinese Government is becoming more active in dealing with online infringements. The outcomes of the recent JCCT plenary session (December 15, 2010) and the subsequent summit meeting between President Obama and President Hu (January 19, 2011) contain important commitments aimed at addressing massive online piracy in China. Specifically, China committed in the JCCT “to obtain the early completion of a Judicial Interpretation that will make clear that those who facilitate online infringement will be equally liable for such infringement.” On January 19, 2011, the U.S. “welcomed China’s agreement to hold accountable violators of intellectual property on the Internet, including those who facilitate the counterfeiting and piracy of others.” Just days before President Hu’s visit to the United States (January 11, 2011) the Chinese Government issued new “Supreme People’s Court, Supreme People’s Procuratorate and Ministry of Public Security Promulgated Opinions on Certain Issues Concerning the Application of Laws for Handling Criminal Cases of Infringement of Intellectual Property Rights,” hopefully leading to stronger and clearer criteria for criminal liability for Internet-based infringements.

These high-level commitments resulted in some progress by the Chinese Government against Internet piracy in 2010, both in terms of administrative measures and seeking criminal prosecutions against infringing sites and services supporting and benefiting from infringement. For example, the Ministry of Culture on December 15, 2010 announced a Notice by which illegal websites not acquiring approval from or registering at provincial cultural departments, would be shut down. The list included 237 music websites, including yysky.com and cococ.com. As of 2009, 89 of these sites had closed. The websites were given a deadline of January 10, 2011 to delete illegal music.¹⁸ While the recording industry welcomes these enforcement actions, the industry is distressed that the Chinese Government also appears to be using censorship as justification for closing websites. As has been established, foreign recordings, in contrast to domestic recordings, must go through a very cumbersome censorship process before they can be released to the online market. Therefore, the prohibition on making available foreign recordings without censorship clearance should not be the basis for acting against licensed music site operators. In fact, many licensed music site operators have already used their best endeavors to satisfy the censorship application requirement. Other developments include the recent arrest of OpenV.com executives and several other criminal investigations that are underway. The recording industry reports that local copyright bureaus recently have come to them requesting support for criminal prosecutions against website operators. As a result, law enforcement agencies appear to have stepped up actions taken against copyright infringers in 2010, especially in combating Internet piracy, in regards to administrative measures as well as criminal prosecution. This increased action has gotten the attention of ISPs who in turn have become more cooperative in their response to rights holders’ requests for takedown of

¹⁸ Qiu Bo, *Sites Offering Songs Told to Obey the Law or Face the Music*, China Daily, December 17, 2010, at http://usa.chinadaily.com.cn/2010-12/17/content_11718277.htm. Prior to this Circular, in April 2010, MOC announced that it would “request” 117 sites to apply for an MOC Online Cultural Operating Permit. About 30 of the sites had been shut down as of December 10, although some had reemerged.

infringing content/goods on their sites. Finally, on January 24, 2011, VeryCD.com reportedly suspended all links to movie and music content on the site. Some news sources reported that many file-sharing sites similar to VeryCD, including subpig.net and uubird.com, would shortly follow suit, but these sites were as of early February 2011 still in operation. IIPA has consistently included VeryCD as being among the worst copyright infringers on the Internet. This development, if permanent, will represent a significant step forward for IPR in China. We will continue to monitor the situation closely and report any further developments.

Continuing hurdles to more effective enforcement include non-deterrent administrative fine structures (e.g., there is no daily fine for continuing to infringe); inadequate staffing and resources within local administrative agencies responsible for copyright to deal with the task of curbing infringements (including online infringements),¹⁹ and lack of cooperation at the provincial levels generally;²⁰ unwillingness of authorities or service providers to assist in identifying infringers' locations and identities;²¹ lack of a willingness to administer fines against ISPs which do not comply with takedown requests;²² unwillingness among authorities generally to enforce against Internet cafés (notwithstanding some attempt by NCAC to regulate the use of motion pictures in such premises); and the lack of an effective criminal remedy for online infringement.

Internet Infringement Case Results Mixed: The recording industry reports that on August 20, 2010, the operator of an infringing website (7t7t.com) making available infringing sound recordings for streaming and downloading was found guilty by the People's Court in Changshu in Jiangsu Province.²³ The operator was sentenced to a jail term of 6 months, suspended for 1 year, and fined RMB15,000 (US\$2,275). In addition, his earned commission of RMB12,837 (US\$1,950) was confiscated. In January 2011, three operators of another infringing site, Qishi.com, were convicted by the criminal court in Chuzhou in Anhui Province of copyright infringement. One of these operators was sentenced to 5 years imprisonment and was fined RMB1.5 million (US\$227,500). The remaining two were sentenced to jail terms of 3 years and 6 months, and 3 years and 3 months, respectively, and both were subject to a fine of RMB200,000 (US\$30,350). These cases represent a welcome sign in the direction of strengthened judicial results against online piracy. Administrative authorities also appear to be acting more aggressively in coordinating with local public security bureaus to transfer cases for criminal investigation against music streaming websites. For example, the Administration of Culture in Jiangsu Province (JSAOC) transferred a case against 51wma.com to the PSB in Suzhou, Jiangsu Province; the Jin Men PSB in Hubei Province arrested the operator of music98.net; and the PSB in Sichuan province commenced a criminal investigation against 6621.com that led to the arrest of the site operator. These cases are still under investigation and it is unknown whether these actions and deterrent sentences will be meted out after the special campaign. Cooperative arrangements among PSBs in certain localities also seem to be helping create a more coordinated approach to dealing with online infringements.²⁴ These positive outcomes are in contrast to the unfortunate result in the civil litigation against Baidu.²⁵

¹⁹ In addition, some government agencies simply do not employ their authorities, for example, the Communication Bureau has the ability to halt Internet access to any infringing websites which does not have an ICP record number, but the authorities seldom exercise this power.

²⁰ Local protectionism (e.g., Shanghai, Shenzhen) is an issue that prevents effective measures from being taken against pirate Internet sites. The industries report that coordination among enforcement authorities and industry regulators is lacking. Local telecom bureaus are not always cooperative in helping NCAC find evidence and shut down infringing sites. MIIT, SARFT, Ministry of Culture, and GAPP have not provided clear guidance that serious infringements or repeated infringement should result in revocation of the relevant business licenses. As a result, large sites that have been fined several times by NCAC or even found infringing in the civil courts for infringements can still legally operate in China.

²¹ For example, 1) the MIIT website and domain name registration process allows for fake IDs to register, making it difficult for right holders to identify infringers, 2) there is no identification authorization process which, coupled with lack of cooperation from ISPs, makes it difficult to find uploaders, 3) authorities that do take enforcement actions are reluctant to share evidence they have collected with right holders to facilitate private remedies like civil lawsuits, and 4) courts are not equipped at present to provide quick and effective evidence preservation proceedings. The implementation of "genuine name/ID" registration (IP address) will have a positive impact on fighting Internet piracy, including video streaming, e-commerce platforms, music sites and others.

²² The recording industry notes that takedown rates of complaints filed with administrative authorities like MOC, NCAC and SARFT worsened in 2010.

²³ IFPI working with the local Jiangsu PSB conducted criminal investigations into targeted infringing music websites, with copyright holder provision of a large quantity of proof to fulfill the criminal threshold.

²⁴ On December 7, 2010, Xinhua News reported on the signing ceremony of the agreement on cooperation against online crime by public security bureaus in Hainan Province. The cooperative system involved PSBs in the 11 signatory cities in the Pearl River Delta agreeing to assist one another in conducting investigations to increase efficiency, remove obstacles in evidence collection and reduce cost. A similar cooperative system established in June 2009 led to more than 7,000 leads being handled through the system, resulting in the arrest of 460 suspects in 432 online criminal cases.

²⁵ See *supra* note 12.

Enterprise End-User Piracy: The business software industry continues to face unlicensed software use by enterprises – including private businesses, state-owned enterprises and government agencies – on a massive scale. For 2010, market research firm IDC preliminarily estimates the PC software piracy rate in China to be 79 percent – nearly 8 out of every 10 copies of software deployed last year. This rate is flat from 2009 and has only dropped 3 points since 2006. The preliminary estimated commercial value of pirated PC software in China from U.S. vendors last year was nearly \$3.7 billion.²⁶ Piracy of U.S. business software in China not only diminishes sales and exports for U.S. software companies, but gives an unfair competitive advantage to Chinese firms that use this unlicensed software without paying for it to produce products that come into the U.S. market and unfairly compete against U.S.-made goods produced using legal software.

A significant hurdle to effectively dealing with enterprise end-user piracy in China is the lack of availability of criminal enforcement against end-user piracy. While the Supreme People's Court (SPC) indicated in a 2007 JI that under Article 217 of the criminal law, unauthorized reproduction or distribution of a computer program qualifies as a crime, authorities remain unwilling to take criminal end-user cases for fear of failing to meet the "for-profit" requirement in Article 217. The Chinese Government should make a clear commitment to criminalize enterprise end user piracy, providing details on the timing, framework and approach, including issuance of a Judicial Interpretation by the Supreme People's Court (SPC) and the Supreme People's Procuratorate (SPP) and corresponding amendments to the Criminal Code and Copyright Law and case referral rules for the Ministry of Public Security and SPP as needed. The 2011 Criminal IPR Opinions could be helpful in this regard, since they define in Article 10(4) the criteria of "for profit" as including "other situations to make profit by using third parties' works." Since the unlicensed use of software in enterprises involves reproduction and/or distribution, and since use of unlicensed software lowers costs and allows enterprises to "make profit," the Opinions appear to support criminalization of enterprise end-user piracy. Another key hurdle is meeting the applicable thresholds, i.e. calculation of illegal revenue or illegal profit, even if determined to be "for profit." In the meantime, the only avenue for seeking redress over the years have been the administrative and civil systems, which are under-funded and under-resourced, and which generally result in non-deterrent penalties. For example, in 2010, BSA lodged 36 complaints against end-users, including 13 with the local authorities and 23 with the National Copyright Administration for Special Campaign.²⁷ Unfortunately, in 2010, software end-user complaints shifted jurisdiction from the local Copyright Administrations to the LCEAs; as a result, only ten administrative raids were conducted in 2010. BSA brought nine newly filed civil cases in 2010, five against enterprise end-users, and one involving Internet piracy.²⁸ There is similarly a need to clarify criminal liability for hard disk loading (HDL) of unlicensed software. There have been a few such cases and at least one is in the preliminary investigation phase by a local PSB. Clarification will be helpful to building a pilot case and developing best practices.

Government Legalization of Business Software and Related Issues: Another important issue for the software industry is the need for the Chinese Government to ensure that government agencies at all levels use only legal software. At the December 2010 JCCT and in the joint statement from the summit between President Obama and President Hu in January 2011, the Chinese Government made several significant commitments on software legalization in the government and SOEs. These included: 1) treating software as property and establishing software

²⁶ BSA's 2010 statistics are preliminary, representing U.S. software publishers' share of commercial value of pirated software in China. They follow the methodology compiled in the Seventh Annual BSA and IDC Global Software Piracy Study (May 2010), <http://portal.bsa.org/globalpiracy2009/index.html>. These figures cover packaged PC software, including operating systems, business applications, and consumer applications such as PC gaming, personal finance, and reference software – including freeware and open source software. They do not cover software that runs on servers or mainframes, or routine device drivers and free downloadable utilities such as screen savers. The methodology used to calculate this and other piracy numbers are described in IIPA's 2011 Special 301 submission at <http://www.iipa.com/pdf/2011spec301methodology.pdf>. BSA's final piracy figures will be released in mid-May, and the updated U.S. software publishers' share of commercial value of pirated software will be available at <http://www.iipa.com>.

²⁷ In 2009, based on BSA complaints, 19 end-user raids were undertaken by the local copyright administrations, 13 of which led to settlements, and only 3 of which resulted in administrative fines. The maximum fine was RMB20,000 (US\$3,033). In many of these cases, there was no seizure of the unlicensed software and computers employing it. This lack of a seizure remedy spills over into civil cases, as civil courts often refuse to authorize evidence preservation against an infringer unless the application is preceded by an administrative action establishing illegal software use or a right holder has obtained especially strong evidence.

²⁸ BSA filed three civil actions in 2009, and of those and previous cases, six settled. In 2009, major software companies won several civil judgments against those engaged in corporate end-user piracy, including the *Dare Information Industry Ltd. Co.* case; the *Guangdong Huaxing Glass Co., Ltd.* in Fuoshan, resulting in the defendant paying RMB500,000 (US\$75,840) in compensation and RMB1,000,000 (US\$151,680) for software legalization, and the July 2010 *CRS Electronic Co.* case. In which the court granted an evidence preservation order for the first time in an end-user software piracy case and the defendant paid RMB780,000 (US\$118,300) in compensation.

asset management systems for government agencies, 2) allocating current and future government budgets for legal software purchases and upgrades,²⁹ 3) implementing a software legalization pilot program for 30 major SOEs and 4) conducting audits to ensure that government agencies at all levels use legal software and publish the results.³⁰ These bilateral commitments have been followed by a number of directives from the Chinese Government implementing processes for software legalization in the government and SOEs. While these commitments and directives are welcome, it remains unclear whether they will be implemented in a meaningful and sustainable manner that results in a significant increase in legal software procurements. Using accounting firms and other credible third-parties to conduct software audits and implementation of internationally recognized software asset management (SAM) practices can help achieve this result. The Chinese Government must also follow through on its commitment in prior years to ensure that all computers produced or imported into China have legal operating systems. Implementation in recent years has been spotty.

Physical Book and Journal Piracy: In addition to the Internet issues described above, the U.S. publishing industry continues to suffer from physical piracy including illegal printing of academic books and commercial bestsellers, and unauthorized commercial-scale photocopying.³¹ Well-known 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. The industry continues to monitor textbook centers and libraries at universities but there appears to be continued improvement in this regard as the presence of pirated books at these venues has markedly decreased. Where pirated textbooks have been found on library shelves, they are out of date editions and thus do not pose a threat to publishers' current legitimate market. The partnership of the Ministry of Education (MOE) with GAPP, NCAC and local authorities remains essential to tackling the ongoing on-campus infringement issues, especially given the large number and wide geographic spread of universities engaged in these practices.

Areas for possible improvement include transparency with respect to inspections, raids and formulation of administrative decisions. In October 2010, publishers worked with the Beijing Cultural Enforcement Department (CED) to conduct a raid against several targets that appeared to be the suppliers and distributors of pirated trade books being sold by itinerant vendors at several high traffic areas in Beijing. Unfortunately, despite good information about the targets, only one target's wholesale premises was actually raided as CED lacked the manpower and resources to conduct simultaneous raids. Despite the presence of Public Security Bureau (PSB) officials, CED refused to raid a storage facility previously identified as associated with the target as it was not open at the time of raid on the target. Though the raid resulted in the seizure of over 300 pirated books, it was disappointing as earlier surveillance had indicated that the combined targets were housing a large volume of apparently pirated books at their various locations. A subsequent raid was executed against the second (of three targets) at which over 1,000 books were seized, although only about 100 were English language titles. There have been no further developments regarding proceedings against the first target, and further action by the authorities against the second target is unlikely. Enforcement efforts such as these continue to be hampered by a general lack of resources leaving the authorities simply unable to handle enforcement against distribution networks or other multiple targets. Similarly the authorities are unable to respond to timely intelligence, a fact which, combined with the authorities' inability or unwillingness to enter unmanned premises, makes evasion by pirates simple and enforcement efforts severely limited in effect.

²⁹ In implementing government legalization, IIPA notes that proper budget allocations should be made not only for the central government agencies but for provincial and sub-provincial levels.

³⁰ It is our understanding that the government software audit agreed to by the Chinese Government in the summit joint statement involves an audit of agency budgets and spending on software rather than an audit of whether government agencies are using properly licensed software.

³¹ Copy shops continued to harm publishers by condoning, or providing as a service, illegal photocopying. Furthermore, English language teaching programs often use the prospect of high-quality, color materials to lure students to their after-school programs, but then make and distribute unauthorized photocopies of those materials instead of the originals.

Illegal Camcording:³² The Motion Picture Association of America reports that the number of forensic matches from illegal camcords traced to China increased to 14 in 2010. MPAA also reports that camcording piracy has become a source of pirate films on Chinese UGC sites and as masters for pirate DVDs. SARFT should immediately implement watermarking in theatrical prints and ensure that China Film Group/exhibitors step up efforts to deter illegal camcording. The government should consider a standalone law/regulations (such as that in the United States and several other countries to date). There is evidence that such a statute may be needed in China, as the first camcording case in China (in November 2008), involving a Chinese film, resulted in the three suspects being released by the police.

Other Hard Goods Piracy: Physical piracy remains rampant in China,³³ including the manufacture and distribution of factory optical discs (ODs);³⁴ the burning of recordable discs either retail or industrial copying using disc drives or towers; “hard disk loading” of software without a license onto computers for sale; production and/or sale of pirate videogames and circumvention devices; the production in China (generally for export) of high-quality counterfeit software packages; and the loading of pirate music on karaoke machines. The piracy levels for video, audio and entertainment software in physical formats continue to range between 90% and 95% of the market. China remains a source country for high quality manufactured counterfeit optical discs, many of which are found throughout the region, in Australia and in European markets such as Italy, Switzerland, Turkey, Poland and the United Kingdom.³⁵ In 2010, enforcement raids and seizures at the retail, wholesale, warehouse, or other distribution level continued to result in seizures of massive quantities of pirate product. Unfortunately, these “campaigns” do not result in significant improvements in the market for legitimate product.³⁶ In recent years, the civil courts, particularly the IPR divisions of the courts, have rendered more favorable decisions in copyright infringement cases, including some significant civil remedy awards in cases involving physical piracy.³⁷

IIPA members have voiced frustration with thresholds that make criminal enforcement rare. The entertainment software industry in particular registers its frustration in failure of the Chinese Government to bring criminal actions against manufacturers and distributors of pirated entertainment software and circumvention devices.

³² Among the harms of illegal camcording in China is that it fuels rampant online piracy negatively impacting worldwide distribution and prevents the establishment of legitimate online distribution platforms. Camcording also threatens the continued growth of the Chinese theatrical box-office marketplace.

³³ Physical piracy harms the legitimate markets for all IIPA members but in different ways. The recording industry estimated value of physical pirate product was US\$425 million in 2010, with a 95% physical piracy level; this is not an estimate of U.S. losses which greatly exceed this amount. For the independent film producers, physical piracy of DVDs remains a significant export constraint for independent producers and distributors, the majority of which are small- to medium-sized businesses. Independent producers partner with local authorized distributors to finance and distribute film and television programming. These authorized distributors find it nearly impossible to compete with pirates and report that both physical and Internet-based piracy have significantly contributed to the demise of what was left of the home video market in China. Producers and distributors confirm that DVD sales have been particularly impacted since pirated digital copies are offered for free online and with a similar quality viewing experience that a DVD can provide. Unable to compete with free, legitimate distributors often cannot to commit to distribution agreements or they offer drastically reduced license fees which are inadequate to assist in financing of independent productions. Piracy undermines and may permanently damage legitimate distribution networks essential to reaching consumers and leaves little confidence for investment in intellectual property in China. On a positive note, IFTA also reports continued success with its certification program that is operated in conjunction with the Copyright Protection Center of China, an institution directly under the NCAC. This certification program provides an administrative method of preventing false registrations in China. To date, IFTA has issued over 2,950 unique certifications that demonstrate legitimate distribution rights to IFTA member product distributed in mainland China.

³⁴ Previous IIPA submissions have described in greater detail the number of factories, production over-capacity, inter-changeable production methods (e.g., from music CD to DVD), and fraudulent practices (such as false marking of VCDs or DVDs as “Blu-ray”).

³⁵ An increasing number of pirate products found or seized around the world have “mould codes” allocated to optical disc plants located in China. Due to the lack of forensic results provided by the “PRC Police Bureau for Disc Production Source Identification Center” to overseas copyright owners, however, insufficient evidence is available to support further actions against these suspected plants. This is due to Chinese Customs adopting a recordation/registration system for the protection of intellectual property rights, rather than a system of random inspections.

³⁶ For example, IIPA members tracked the impact of the 2006 “100 Day Campaign,” directed primarily at retail piracy, on the availability of pirate product in the marketplace. While seizure statistics were very high, those studies concluded that pirate product remained available in virtually the same quantities as before the campaign commenced, just in a more clandestine manner; piracy activities also tended to return to normal when the campaign concluded.

³⁷ Several successful civil judgments against those engaged in “hard disk loading” have been obtained in the past couple of years.

- In July 2009, Microsoft won a civil judgment against Beijing Strongwell Technology & Development, one of the larger custom PC dealers in Beijing.
- In a case against Shanghai HISAP Department Store, the court awarded a total of RMB700,000 (US\$106,175) in damages and costs. Compensation in this case reportedly followed the SPC’s July 2009 announcement requesting civil judges to award damages on the “full compensation” principle. See <http://www.chinaipr.gov.cn/news/government/283006.shtml>.
- In a case against Beijing Sichuangweilai Technology & Development, one of the larger custom PC dealers in Beijing, RMB460,000 (US\$69,775) was awarded in damages.

In addition, in a case involving infringement of the Graduate Management Admission Test (GMAT), the Beijing No. 1 Intermediate People’s Court found that Beijing Passion Consultancy Ltd. infringed copyright and awarded the plaintiff RMB520,000 (US\$78,875) in damages.

Unfortunately, the methodology used by the Price Evaluation Bureau (PEB) fails to adequately account for the economic impact caused by pirated software and circumvention devices, and as a result, raids that result in the seizure of major quantities of pirated games or circumvention devices are rarely referred to the PSB unless counterfeit hardware is also involved. For instance, a factory was raided in Baiyun, Guangzhou in June 2010, where over 8,000 game copiers (circumvention devices) were seized; a similar raid in Liwan, Guangzhou in March 2010 resulted in the seizure of more than 19,000 pirated game discs. Neither of these raids were transferred for criminal action despite the enormous economic impact that would have ensued had these products made it to the market. PEB should make adjustments to the methodology it uses for assessing the value of seized goods in order to facilitate criminal prosecutions in appropriate cases.

Public Performance Piracy: Another abiding problem in China involves the unauthorized public performance of U.S. motion pictures, music videos, and increasingly, music, which occurs mostly unchecked (and unpaid for) in hotels, bars (including “Karaoke” bars),³⁸ clubs, mini-theaters (like KTV rooms), and karaoke establishments. In addition, there are instances of unauthorized broadcast by cable and/or satellite of the same.

China has long been in violation of its TRIPS/Berne Convention obligation to compensate copyright owners for the broadcast of musical compositions.³⁹ Finally, on November 10, 2009, the State Council publicly announced that commencing January 1, 2010, China’s broadcasters must begin making payments to copyright owners of musical compositions (songwriters and music publishers, through performing rights societies). The *Measures on the Payment of Remuneration to the Copyright Owners of Audio Products* would correct this longstanding TRIPS/Berne Convention violation to compensate copyright owners for the broadcast of musical composition. However, such payments are wholly inadequate and the tariff would result in one of the lowest payment rates in the world. Broadcasters could either choose to pay rights holders based on very low percentage of a station’s advertising revenue or pay RMB0.3 (US\$0.05) per minute for music played on the radio or RMB1.5 (US\$0.23) for TV. Advertising revenue for Chinese broadcasting was reported to be US\$10.16 billion in 2008.⁴⁰ Since music performing rights payments in most countries are calculated as a percentage of such revenue, and it is estimated that 15% of music heard on Chinese broadcasting is U.S. music, the payment scheme is clearly tens of millions of dollars below what would be a fair rate. IIPA has urged that the new tariff be retroactive, at least to the date of China’s joining the WTO, but the new tariff is prospective only.

Pay TV Piracy: There were a few incidents of unauthorized use of copyright content during 2010 by broadcast and pay-TV networks in China. While SARFT is normally cooperative in assisting rights owners in responding to complaints filed, more stringent copyright compliance checks should be conducted by SARFT on a regular basis in 2011.

COPYRIGHT LAW, REGULATIONS UPDATES

The 2001 Copyright Law of the People’s Republic of China,⁴¹ subordinate regulations, judicial interpretations, or “opinions,” provide a sound basis for effective copyright protection on paper. Some of the laws still require clarification or changes to fully meet China’s treaty obligations.⁴² With the adoption of the Internet Regulations in July 2006 and the entry into force of the WCT and WPPT on June 9, 2007, the legal infrastructure for effective protection of content online was significantly enhanced. One area of weakness has always been the Criminal Law, including

³⁸ In November 2010, the China Audio-Video Copyright Association brought more than 100 karaoke bar operators in Beijing to court, claiming they supplied unauthorized music to customers.

³⁹ The recording also notes the desirability of a workable remuneration system for the public performance or other communication/broadcast of their recordings. With the increase in playing of recorded music in commercial premises as a primary form of commercial exploitation of music, public performance, communication to the public and broadcasting income is becoming a major potential source of revenue for record producers.

⁴⁰ On Screen Asia, *China in Focus*, April 1, 2009, at <http://www.onscreenasia.com/article-4897-chinainfocus-onscreenasia.html>.

⁴¹ Previous IIPA Special 301 reports have gone through the legislative landscape in China in detail. This report is intended only to provide a summary of the key legislative and regulatory deficiencies and an update on new developments.

⁴² It is worth noting that a Chinese official has acknowledged that further amendments to the Copyright Law are needed. *Interview with NCAC Vice Minister Yan Xiaohong*, June 13, 2007, BBC (republishing and translation of original Xinhua text), June 9, 2007. This view has also been expressed by Chinese experts at a number of recent seminars held in China on protection of copyrights on the Internet.

Articles 217 and 218 of the Criminal Law of the People's Republic of China (1997) and accompanying Judicial Interpretations.⁴³

New Criminal IPR Opinions: On January 11, 2011, the "Supreme People's Court, Supreme People's Procuratorate and Ministry of Public Security Promulgated Opinions on Certain Issues Concerning the Application of Laws for Handling Criminal Cases of Infringement of Intellectual Property Rights" were issued.⁴⁴ These Opinions set out some important elements for Internet and related criminal cases and may help clarify and address other ongoing issues related to criminal liability in China. Salient features of the Opinions include:

- Article 10 of the Opinions reportedly provides that in addition to sale, "for the purpose of making profits" includes any of the following circumstances,
 - Directly or indirectly charging fees through such means as publishing non-free advertisements in a work or bundling third parties' works;⁴⁵
 - Directly or indirectly charging fees for transmitting⁴⁶ third parties' works via an information network or providing services such as publishing non-free advertisements on the site using infringing works uploaded by third parties;
 - Charging membership registration fees or other fees for transmitting⁴⁷ others' works via an information network to members; and
 - Other circumstances that make profits by taking advantage of others' works.⁴⁸
- Article 15 expands the scope of criminal liability by including as subject to accomplice liability "providing such services as Internet access, server co-location, network storage space, [and] communication and transmit channels...."⁴⁹
- The Opinions provide specificity on the thresholds for criminal liability in the online environment. Specifically, Article 13 provides that "[d]issemination of third parties' written works, music, movies, art, photographs, videos, audio visual products, computer software and other works without copyright owners' permission for profit, in the presence of any one of the following conditions, shall be regarded as "other serious circumstances" under Article 217 of the Criminal Law:"
 - illegal operation costs amount to over RMB50,000 (US7,585);
 - disseminating over 500 copies of third parties' works;⁵⁰

⁴³ Among other things, the laws contained thresholds that are too high (in the case of illegal income) or unclear (in the case of the copy threshold), require proof that the infringement is carried out "for the purpose of making profits" which was left undefined, fail to cover all piracy on a commercial scale as required by TRIPS Article 61, fail to take into account the WCT and WPPT, only provide accomplice liability as to the criminalization of imports and exports (penalties available are much lower and generally non-deterrent), and leave uncertain the penalties for repeat offenders (the 1998 JIs included repeat infringers but were inadvertently not included in the 2004 JIs).

⁴⁴ IIPA does not at present possess a full English translation of the Opinions, but we have received summaries and refer to these herein. In addition to internal summaries, we draw points from Richard Wigley, *New Guidelines for Criminal Prosecutions of Online Copyright Infringement Provide Aid in Fight against Online Piracy*, China Law Insight, January 19, 2011, at <http://www.chinalawinsight.com/2011/01/articles/intellectual-property/new-guidelines-for-criminal-prosecutions-of-online-copyright-infringement-provide-aid-in-fight-against-online-piracy/>.

⁴⁵ This last phrase has been alternatively translated as "binding a third party's works with other person's works." See *id.*

⁴⁶ This has been alternatively translated as "disseminating."

⁴⁷ This has been alternatively translated as "disseminating."

⁴⁸ This has been alternatively translated as "Other circumstances that make profits by taking advantage of other's works."

⁴⁹ See Wigley, *supra* note 44.

⁵⁰ This has been alternatively translated as "aggregate quantity of others' works being transmitted is more than 500 pieces." See *id.* The recording industry notes that differing interpretations have emerged over time and in different provinces with respect to the "500 copy" threshold. It is hoped that the Opinions will confirm that 500 different tracks or clips (or 500 copies of the same track or clip, or a combination) will suffice.

- disseminating third parties' works with the actual number of clicks amounting to over 50,000;⁵¹
 - disseminating third parties' works in a membership system with the number of members amounting to over 1,000;
 - if the amount or quantities listed in 1 to 4 categories above are not met, but more than half of the amount or quantities in two of the above categories are met;
 - in case of other serious circumstances.
- The Opinions reportedly also clarify that the crime of IPR infringement takes places where 1) the infringing product is produced, stored, transported and sold, 2) the place where the server of the website which distributes and sells the infringing product is located, 3) the place of Internet access, 4) the place where the founder or manager of the website is located, 5) the place where the uploader of infringing works is located and 6) the place where the rightful owner actually suffered from the crime. This reported listing provides extremely helpful guidance to the courts, as it would include the point of transmission, the point of receipt, the location of the server, the location of the key defendants, and any place where onward infringement causes harm to the right holder.⁵²

Importantly, the Opinions appear to confirm criminal liability against a web service which does not directly receive revenues from the dissemination of copyright material, but which charges fees indirectly through "non-free advertisements." This clearer understanding of "for the purpose of making profits" in the Criminal Law is welcome. What remains to be seen is how various hosted or non-hosted piracy situations will be regarded under Article 10 or 15 of the Opinions. For example, the second prong of Article 10 seems clearly aimed at infringements over user-generated content sites on which there is paid advertising. Article 15 would appear to reach cyberlockers over which infringement takes place ("network storage space"), infringing streaming sites ("communication and transmit channels"), web-hosting services, ISPs and payment processing companies. It is hoped the Opinions will also address IPR violations on auction websites dealing in hard goods piracy targeted toward foreign markets and services providing access to infringing content through deeplinks, and that they will assist in addressing repeat infringers. To the extent they do not, coverage of such should be confirmed in other laws or regulations. It also remains to be seen how Article 10 ("Other circumstances that make profits by taking advantage of others' works") will be interpreted. It is important to note that the Opinions are not limited to the online environment (dealing with other IPR crimes), and it is hoped that, for example, enterprise end-user piracy of software, which is clearly a circumstance which results in increased profits for an enterprise by taking advantage of others' works, may be regarded as a crime under these Opinions. In the very least, the language lays the groundwork for such liability.

The Opinions also set out important clarifications with regard to thresholds for criminal liability. While it is yet to be seen how these new thresholds will be interpreted in practice, they appear to provide some flexibility and it is hoped they will ease the evidentiary burden to prove criminal liability in the online space. For example, whereas the previous numerical threshold was "500 copies" it now appears possible to prove a combination of elements, e.g., proof of "250 copies" combined with proof that there were 25,000 downloads appears to be sufficient under the Opinions, or as another example, in the case of a membership site, proof of 500 members combined with proof that "250 copies" were disseminated should now suffice for criminal liability. Moreover, it is hoped that the decision as to whether the threshold is met will be vested with the Procuratorate rather than the MPS or PSB. This is because the MPS or PSB, as they have in the past, may claim that the evidence provided by the right holders does not meet the criminal threshold such that they refuse to accept the case at the outset. In fact, it is necessary to require the

⁵¹ This has been alternatively translated as "[w]here others' works being transmitted has been actually clicked for more than 50,000 times."

⁵² See *Supreme People's Court, Supreme People's Procuratorate and Ministry of Public Security Promulgated Opinions on Certain Issues Concerning the Application of Laws for Handling Criminal Cases of Infringement of Intellectual Property Rights*, Watson & Band, January 13, 2011, at http://www.watson-band.com.cn/news/detail?id=182&language=en_US.

MPS/PSB to conduct further investigation, e.g. the advertising revenue, membership detail, etc. as part of determining whether the threshold requirement is met.

Copyright Law – Some Remaining Issues: The following name just a few remaining issues in need of reconsideration, with mention of any relevant international treaties:

- Temporary Copies (WCT and WPPT): Copyright protection in China should extend to reproductions regardless of their duration (e.g., as long as they can be further reproduced, communicated, or perceived). Neither the Copyright Law nor subordinate laws or regulations (e.g., the July 2006 Information Networks Regulations) confirms such coverage.
- Scope of Coverage of July 2006 Regulations: Although SCLAO's Director General Zhang has taken the position that all rights (and not just "communication to the public") are covered directly by Article 47 of the Copyright Law, and therefore the July 2006 Regulations), language to remove ambiguity would be helpful.
- Service Provider Liability Under the July 2006 Regulations: While the July 2006 Regulations provide for notice and takedown, preserve injunctive relief, and preserve liability in the case of knowledge or constructive knowledge, there are some issues that need to be clarified, especially in light of recent court decisions.⁵³ For example, under Article 23 of the July 2006 Regulations, it appears clear that ISPs are liable for linking to infringing materials, and Article 23 has been interpreted as such by the Court in the *Yahoo!CN* decision. But the *Baidu* decision casts doubt on whether Article 23 applies to deeplinking in the absence of actual knowledge. It is also important to clarify 1) the adequacy of electronic mail notices, and 2) the requirement that takedowns must occur within 24 hours subject to penalties imposed for non-compliance of right holders' notices⁵⁴ and the proviso that ISPs failing to take down sites following compliant notices will be deemed infringers and subject to administrative fines.⁵⁵ In addition, the current law does not, but should, provide a fair and effective mechanism to address repeat infringers.
- Compulsory License Under the 2006 Regulations (Berne/TRIPS): Article 9 of the 2006 Regulations sets forth a statutory license, which Director General Zhang has confirmed applies to foreign works which are owned by a Chinese legal entity. Unfortunately, such a compulsory or statutory license would appear to be inconsistent with China's Berne Convention and TRIPS obligations.
- Other Exceptions and Limitations in the 2006 Regulations (Berne/TRIPS): IIPA remains concerned about: (a) potentially overbroad exception as to teachers, researchers and government organs in Article 6; (b) the reference in Article 7 to "similar institutions" which leaves open who may avail themselves of the exception, and the failure to limit Article 7 to "non-profit" entities; and (c) lack of express exclusion of Article 8 to foreign works.⁵⁶
- Communication to the Public for Related Rights (WPPT): The Chinese Government should confirm a full communication to the public right, including public performance, broadcast, simulcast and cable transmission rights for sound recordings as well as works.

⁵³ IIPA notes that a new China Tort Liability Law was enacted and passed by the Standing Committee of the National People's Congress of PRC on December 26, 2009. It came into effect on July 1, 2010. Under Article 36 of the Law, Network Users and Network Service Providers will be held jointly liable for an act of infringement if the Network Service Provider "knows" that a network user is using the network service to infringe others' civil rights but has not taken any necessary measures with respect to such practices. However, a Judicial Interpretation is needed to clarify that the word "knows" under Article 36 of the Tort Liability Law should mean "knows or ought to know" so that it becomes consistent with Article 23 of the Regulation on the Protection of the Right to Disseminate via Information Network.

⁵⁴ The January 20, 2010 Declaration on Content Protection contains the principle that takedowns should be accomplished within 24 hours.

⁵⁵ The NCAC should clarify and reform the evidentiary requirements necessary to provide a compliant notice. Unfortunately, Article 14 of the Internet Regulations arguably appears to require detailed evidence, including detailed copyright verification reports, and, if so, that Article should be amended.

⁵⁶ Director General Zhang also confirmed that Article 8, which affects publishers, would not apply to foreign works but this should be confirmed in writing and a notice made widely available.

- Civil Pre-Established Damages, and Maximum Administrative Fines: Statutory damages under the Copyright Law (Article 48) should be increased to RMB1 million (US\$151,680, as in the patent law), made per work, and permitted at the election of the copyright owner. In addition, maximum administrative fines should be increased and assessed for each day an infringement persists in order to foster deterrence.
- Protection for Live Sporting Events: The law should be amended to ensure that live sporting events are protected either as works or under neighboring rights (i.e., such that unauthorized retransmission of copyright broadcasts is clearly forbidden).
- Presumptions of Subsistence and Ownership: The Law should be amended to establish clear presumptions of copyright subsistence and ownership.
- Term of Protection: China should take the opportunity while modernizing its law to extend the term of protection to life plus 70 years for works, and to 95 years for sound recordings and other subject matter where the term is calculated other than on the life of the author. Extending term will ensure China is following the international trend and that it will receive the benefit of reciprocal protection in other countries which provide longer term of protection.

Other Regulations – Administrative-Criminal Transfer Regulations: The amended Criminal Transfer Regulations leave unclear whether transfers are required upon “reasonable suspicion” that the criminal thresholds had been met, and thus, some enforcement authorities believe “reasonable suspicion” is insufficient to result in a transfer, requiring proof of illegal proceeds; yet, administrative authorities do not employ investigative powers to ascertain such proof. The “reasonable suspicion” rule should be expressly included in amended transfer regulations.

MARKET ACCESS AND RELATED ISSUES

IIPA has consistently stressed the direct relationship between the fight against infringement and the need for liberalized market access to supply legitimate product (both foreign and local) to Chinese consumers. Unfortunately, there are a range of restrictions, affecting most of the copyright industries. Some of these must be eliminated as a result of a recent successful WTO case brought by the United States against China (as discussed below). All of them stifle the ability of U.S. rights holders to do business effectively in China.

Chinese market access restrictions include ownership and investment restrictions,⁵⁷ a discriminatory and lengthy censorship system (which further opens the door to illegal content), restrictions on the ability to fully engage in the development, creation, production, distribution, and promotion of music and sound recordings,⁵⁸ and the continued inability to engage in the import and export, distribution, publishing, and marketing online of published materials in China. They also include the maintenance of a quota of 20 foreign films for which revenue sharing of the box office receipts between the producers and the importer and distributor is possible,⁵⁹ the inability to import and distribute films except through the two main Chinese film companies (the duopoly), a screen-time quota for foreign theatrical distribution and foreign satellite and television programming, blackout periods for films, local print requirements, and onerous import duties, all of which close off the market for U.S. produced films and programming.

⁵⁷ For example, Hong Kong and foreign companies may not invest in any publishing or importing businesses for audio-visual products in mainland China.

⁵⁸ For example, the recording industry notes that the MOC Circular dealing with online music contains a restriction on “exclusive licenses” of online music services. Currently, there are less than 20 licensed services in China providing repertoire from non-local record companies. There should not be any problem for MOC to regulate these services and conduct anti-piracy actions against other infringing sites. Record companies should be free to choose their licensees.

⁵⁹ The impact of the “quota system” in China on the independent segment of the film and television industry is particularly damaging because most often the independents do not have access to legitimate distribution in China. For example, the recent WTO decision on intellectual property rights said that China could not solely extend copyright protection to works that are approved for distribution in China (i.e., pass censorship) as this inherently damages rights holders who cannot access “approved” distribution in China and whose works are simply not protectable under current Chinese Copyright Law. Similarly, the nontransparent censorship process in China and its multiple levels poses a significant market access barrier to the independents. Local distributors have reported the inability to obtain an official notice of denial from the censorship authorities.

An onerous ban on the manufacture, sale and importation of videogame consoles remains a major barrier.⁶⁰ Entertainment software companies also continue to face lengthy delays in the censorship approval process, wiping out the very short viable window for legitimate distribution of entertainment software products. The recently concluded WTO case will hopefully help address some, but not all, and in many cases, not the fundamental issues with respect to access to the Chinese market for U.S. music, movies, and books, and leave untouched many issues for the other industries. IIPA also notes a range of policies that China has developed under the banner of promoting “indigenous innovation” that have the effect of discriminating against foreign products or compelling transfers of technology and intellectual property to China in order to access the market. These policies limit market access for software and other IIPA member products and undermine the IP development of U.S. and other foreign copyright industries.

Previous IIPA filings, including that to the United States International Trade Commission in July 2010, raised the litany of market access issues of concern to the copyright industries.⁶¹ The following provides an update on several significant issues.

WTO Case Implementation Update: On December 21, 2009, the WTO Appellate Body issued its decision on the appeal by China of the WTO Panel’s report on certain Chinese market access barriers to the motion picture, recording and publishing industries.⁶² This landmark WTO case will require China to open up its market for these industries in significant ways and hopefully begin the process of undoing the vast web of restrictions which hamper these industries not only from doing business in China, but in engaging effectively in the fight against infringement there. Specifically, the Appellate Body affirmed the Panel’s ruling that requires China to:

- allow U.S. companies to import freely into China (without going through the government monopoly) films for theatrical release, DVDs, sound recordings, and books, newspapers, and periodicals. This is a significant market opening result.
- provide market access to, and not discriminate against, foreign companies wishing to distribute their products in China.⁶³
- discard discriminatory commercial hurdles for imported reading materials, sound recordings intended for electronic distribution, and films for theatrical release.⁶⁴

Related to this last point, the WTO Panel and Appellate Body, in a technical finding, concluded that they lacked sufficient information to determine whether China’s discriminatory censorship regime for online music violated China’s WTO commitments. However, this was not a “green light” for the Chinese to continue their discriminatory censorship practices. China’s discriminatory regime is both unfair and highly suspect under WTO rules. China further complicated an already unsatisfactory situation by issuing the September 2009 Circular on Strengthening and

⁶⁰ The current ban on the manufacture, sale and importation of electronic gaming devices (i.e., video game consoles), in effect since a 2000 *Opinion on the Special Administration of Electronic Gaming Operating Venues*, stymies the growth of the entertainment software sector in China. The ban even extends to development kits used in the creations and development of video games. The ban impacts not only foreign game publishers, but also domestic Chinese developers, who are unable to obtain such kits given the prohibition on their importation.

⁶¹ See *supra* note 7.

⁶² *China – Measures Affecting Trading Rights And Distribution Services For Certain Publications And Audiovisual Entertainment Products*, WT/DS363/AB/R, December 21, 2009, at <http://www.wto.int>. The U.S. Government requested consultations in this case on April 10, 2007, supported by the China Copyright Alliance (a coalition consisting of MPA, IFTA, RIAA, IFPI and AAP).

⁶³ Specifically, China must fix its measures in ways which will: open its market to wholesale, master distribution (exclusive sale) of books and periodicals, as well as electronic publications, by foreign-invested companies including U.S. companies; permit sound recording distribution services, including electronic distribution, by Chinese-foreign contractual joint ventures, including majority foreign-owned joint ventures; allow the participation of foreign capital in a contractual joint venture engaged in the distribution of reading materials or audiovisual home entertainment products; ease commercial presence requirements for the distribution of DVDs; and do away with China’s 15-year operating term limitation on foreign joint ventures.

⁶⁴ For example, China must not improperly and discriminatorily limit distribution for imported newspapers and periodicals to “subscriptions,” and must not limit such materials and other reading materials to Chinese wholly state-owned enterprises, and may not limit the distributor of such reading materials to a State-owned publication import entity particularly designated by a government agency. Finally, China may not prohibit foreign-invested enterprises from engaging in the distribution of imported reading materials.

Improving Online Music Content Examination (issued while the WTO case was being adjudicated and therefore not the direct subject of any Panel ruling). This Circular puts into place a censorship review process premised on an architecture already determined to violate China's GATS commitments—by allowing only wholly-owned Chinese digital distribution enterprises to submit recordings for required censorship approval. When China joined the WTO, it agreed to allow foreign investment in *all* music distribution ventures on a non-discriminatory basis. That includes online music distribution. By excluding foreign-invested enterprises (FIEs) from submitting imported music for censorship review, the Circular denies bargained-for market access and discriminates against FIEs thereby violating China's national treatment obligations. It violates China's accession commitments under the General Agreement on Trade in Services (GATS) and the General Agreement on Tariffs and Trade 1994 (GATT); it also violates China's Accession Protocol commitment to authorize trade in goods by any entity or individual. China must revoke or modify the Circular to fix these problems relating to the rights of FIE's to distribute music online, and the discriminatory censorship processes for treating foreign as opposed to local content.

While the U.S. had also alleged that certain Chinese measures indicated that imported films for theatrical release can only be distributed by two state-controlled enterprises (China Film and Huaxia), whereas domestic films for theatrical release can be distributed by other distributors in China, the WTO Panel (upheld by the Appellate Body) concluded that the duopoly did not constitute a "measure," and cited the lack of any evidence that a third distributor had been denied upon an application from operating in the Chinese market. Were there to be a *de facto* duopoly as to foreign films only that was enforceable by a measure, the Panel and AB reports confirm that China would be in violation of its WTO obligations. The industries view this decision as confirming that, to be consistent with what the Panel and AB reports have said, China must approve applications for other theatrical film distributors in China, a step which would significantly open up this market to competition, and additionally, would open up to competition and negotiation the underlying agreements upon which foreign films are now distributed in China.

The Appellate Body report was adopted by the Dispute Settlement Body on January 19, 2010, and the parties in consultation came to an agreement of 14 months for implementation of the report, so the expiration date for China to implement the market access decision is March 19, 2011. IIPA views it as critical for the U.S. Government to take an active approach to pressing the Chinese Government to implement its commitments arising from the market access case, and to address the two very important issues noted above related to discrimination of foreigners in the distribution of music online and breaking the duopoly for foreign theatrical film distribution in China. Intensive engagement with the Chinese Government is essential to achieving meaningful implementation of the WTO ruling, and thereby make possible broad gains in bringing U.S. creative industries' products to market in China.

Indigenous Innovation: Over the past several years, China has been rolling out a series of policies aimed at promoting "indigenous innovation." The apparent goal of many of these policies is to develop national champions by discriminating against foreign companies and compelling transfers of technology. Of particular concern are policies that condition market access (including the provision of government procurement preferences) based on local ownership or development of a service or product's intellectual property or aim to compel transfers of foreign intellectual property and research and development to China. A broad array of U.S. and international industry groups have raised serious concerns that these policies will effectively shut them out of the rapidly growing Chinese market and are out of step with international best practices for promoting innovation. IIPA has shared its concerns as well and strongly believes that the best ways for China to further enhance its innovative capacity are to: further open its markets to foreign investment; provide incentives to innovate by ensuring full respect for intellectual property rights including patents, copyrights and trademarks; avoid policies which establish preferences based on nationality of the owners of the intellectual property rights; and act forcefully and promptly to prevent misappropriation of such rights.

In this regard, it is noteworthy that following the summit between President Obama and President Hu, the joint statement issued on January 19, 2011 indicated that "China will not link its innovation policies to the provision of government procurement preferences." The accompanying the White House "Fact Sheet" on "U.S.-China Economic Issues" issued the same day indicated that:

The United States and China committed that 1) government procurement decisions will not be made based on where the goods' or services' intellectual property is developed or maintained, 2) that there will be no discrimination against innovative products made by foreign suppliers operating in China, and 3) China will delink its innovation policies from its government procurement preferences.

These are all welcome commitments, and follow on JCCT commitments regarding "IPR and Non-Discrimination," and "Government Procurement." They should be communicated to all levels of the Chinese Government and should be effectively enforced to avoid both express and implicit means of discriminating against U.S. and other foreign products in government procurement based on ownership or development of IP.

TRAINING AND PUBLIC AWARENESS

MPA, IFPI and BSA undertook a number of training and awareness programs throughout China in 2010. The trainings have involved police, prosecutors, judges, customs officials, and administrative agency enforcement personnel. For example, BSA provided Software Asset Management (SAM) training for over 300 enterprises in Beijing, Nanjing, Kunshan, and Guangzhou, facilitated SAM Training for 100 central SOEs and 80 financial companies in Shanghai, and provided SAM tools for a free trial in Shanghai for 10 financial companies. The recording industry group, IFPI, through its Asian Regional Office and its Beijing Representative Office, conducted 14 Internet Training Workshops for NAPP, NCAC, MOC, PSB officials and for Judges between September 2009 and December 2010.

Throughout 2010, MPA continued to engage the local government in trainings and seminars in hopes of raising awareness of piracy and its harm toward developing the creative industry. These efforts included participation in: a seminar in early 2010 for officials from Beijing, Tianjin and Shanghai specifically to promote awareness of the Criminal Law, and discuss the 500 copy threshold;⁶⁵ other seminars for government law enforcement officials to highlight the need for judicial protection in China's copyright protection regime; trainings for theater owners to raise the awareness of illegal camcording and consequent harm to the film industry; judges' trainings to highlight Internet piracy issues and share experiences from overseas markets; various industry events (e.g., China Digital TV Summit, China Telecom Business Value Chain Seminar, Beijing Cultural and Creative Industry Expo, and film festivals) to leverage platforms for building anti-piracy alliances and to seek support from relevant parties; copyright verification and online piracy investigation technical trainings for local law enforcement officials; various industry trade shows/film festival forums and the annual copyright expo to highlight the need for copyright protection as necessary in developing the value chain for China's creative industry.

⁶⁵ MPA reports that only Beijing (Chaoyang District) and Shenzhen have implemented the threshold in practice.