

CHINA (PRC)

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2012 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that USTR maintain China on the Priority Watch List in 2012 and that China be monitored under Section 306 of the Trade Act.¹

Executive Summary: The development of the market for creative products in China continues to face significant challenges, notwithstanding some positive developments in 2011. High copyright piracy levels persist in China, from widespread online piracy of music, films, television programming, books and journals, and other copyright materials, to pervasive use of unlicensed software by businesses and pre-installation of unlicensed software and other copyright materials (hard disk loading piracy) at the distribution level, and continued physical piracy, including the online sale of hard goods pirated materials. The Chinese market remains mostly closed to U.S. copyright-based companies, as barriers to creative content remain in place, some of which violate China's WTO commitments. The current state of copyright protection in China not only harms U.S. companies, but has a detrimental impact on Chinese businesses.²

IIPA hopes that in 2012, the Chinese Government will demonstrate greater resolve to address piracy concerns and expeditiously lift restrictions and open the market in China for copyright materials to foreign right holders. Some positive signs emerged in 2011. The Special IPR Enforcement Campaign ("Special Campaign") which ended on June 30, 2011, resulted in closures of some websites responsible for piracy in China. While it has not yet had a demonstrable impact in terms of reducing the availability of pirate materials, the Campaign demonstrated the importance of a high-level political commitment from the Chinese Government in this regard. In November 2011, China's State Council announced a number of new measures aimed at strengthening IP protection, including the establishment of a permanent State Council-level leadership structure, headed by Vice Premier Wang Qishan,³ and an office within the Ministry of Commerce to lead and coordinate IPR enforcement across China. As part of these measures, the Chinese Government also agreed to implement mechanisms to hold local government officials responsible for effectively enforcing IP violations. Further, the 2011 Joint Commission on Commerce and Trade (JCCT) negotiations resulted in some important new commitments by China to: 1) ensure that government agencies at all levels use only legitimate software and that all types of software used by government agencies are licensed; 2) devote increased resources to conducting software license audits and inspections of government agencies and publish the results; 3) complete software legalization by provincial governments by mid-2012 and by municipal and county governments by 2013; 4) promote and conduct enterprise software management pilot projects and publish progress reports, and 5) eliminate by December 1, 2011 catalogues at the provincial, municipal and autonomous region level, or other measures linking innovation policies to government procurement preferences. In terms of cooperative activities, the Chinese Government agreed to "hold government/industry roundtables in China to discuss online copyright protection and enforcement, including library copyright protection," and agreed that an exchange will also be set up to deal with issues related to music "broadcast tariff rates" in China.⁴

IIPA applauds these important developments, but they cannot overshadow the disappointment over failure to address important concerns, including the lack of follow through on many of China's prior JCCT commitments, and

¹For more details on China's Special 301 history, see Additional Appendix available at <http://www.iipa.com/pdf/2012SPEC301HISTORICALSUMMARY.pdf>. Please also see previous years' reports at <http://www.iipa.com/countryreports.html>. Section 306 monitoring is with respect to, among other obligations, those set out in Ministry of Foreign Trade and Economic Cooperation Minister Wu Yi, *People's Republic of China Intellectual Property Rights Memorandum of Understanding—1995 Action Plan*, February 26, 1995.

²The Guangdong Chamber of Audio and Video Distributors ceased its operations in February 2011 because of rampant piracy problem and the lack of Chinese Government support.

³Specifically, China committed to make "permanent the leadership structure under the recent Special IPR Campaign."

⁴See *21st U.S.-China Joint Commission on Commerce and Trade Fact Sheet*, December 2011, at <http://www.commerce.gov/node/12467>.



the issue of Internet infringement liability, through “the early completion of a Judicial Interpretation that will make clear that those who facilitate online infringement will be equally liable for such infringement.” It is also necessary for the Government to sustain enforcement efforts against all kinds of piracy, including online and mobile piracy, through criminal and civil enforcement and the imposition of effective administrative remedies. Other important changes are needed, including: market opening measures in the area of theatrical distribution, by easing the “20 film” quota for revenue-sharing films and opening up theatrical film distribution and renegotiating the master contract; opening the market for the publishing, music, and entertainment software industries in China; and ceasing other discriminatory or market-restricting measures.

The current Copyright Law revision process provides an opportunity to make important improvements in China’s legal system, which will aid authorities and judges in meting out stronger civil and administrative measures and hopefully lead to a stronger criminal response to the massive copyright piracy problem in China.

PRIORITY ACTIONS REQUESTED IN 2012

Enforcement

- Expand on results obtained through the recent Special Campaign with the new State Council-level leadership structure, headed by Vice Premier Wang Qishan, including effective administrative, civil, and criminal enforcement against online and mobile piracy, end-user piracy of business software, and physical piracy.
- Ensure that China implements mechanisms, including transparent performance indicators, to hold local government officials responsible for effectively enforcing IP violations, including Internet and mobile piracy, and enterprise end-user piracy of business software.
- Increase the number and effectiveness of criminal prosecutions, including against online piracy and those services that facilitate piracy, such as *Sohu/Sogou* and *Xunlei*; bring criminal cases against enterprise end-user software piracy; allow specialized IPR judges to hear criminal cases; and move more criminal IPR cases to the intermediate courts.
- Ensure that the State Administration of Radio, Film, and Television (SARFT) is implementing watermarking in theatrical prints and ensure that China Film Group/ exhibitors step up efforts to deter illegal camcording.
- Follow through with JCCT commitment to resolve the longstanding complaint about those engaged in unauthorized copying and distribution of academic, scientific, technical and medical journals. In particular, the Ministry of Education should adopt regulations to ensure that all books and journals acquired by and used at universities (whether by professors, professional staff or students) and by the government are legitimate copies.
- Establish a central authority responsible for compiling statistics of ongoing and completed civil, administrative, or criminal enforcement actions taken against and cases involving copyright infringement.
- Increase actions by SARFT, the General Administration on Press and Publication (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 engage in such activities.
- Enhance “pre-release” administrative enforcement for motion pictures, sound recordings, and other works, e.g., by establishing voluntary government-backed online copyright bulletin boards.
- Combat piracy occurring on mobile networks, such as unauthorized WAP sites and Mobile “Apps” which facilitate users to carry out 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.
- Allow foreign rights holder associations to increase staff and conduct anti-piracy investigations.
- Confirm shorter, more reasonable time limits for civil IP infringement trials, if necessary, through amendments to the Copyright Law or the promulgation of a new judicial interpretation.
- Impose uniform and deterrent penalties upon infringers in civil, administrative, and criminal enforcement actions.

Legislation and Related Matters

- Follow through on JCCT and bilateral commitments to complete a Judicial Interpretation (which is now reportedly in informal drafting stages) that will make clear that those who facilitate online infringement will be liable for such infringement.
- Amend the Copyright Law and subordinate legislation/regulations to ensure full compliance with the Berne Convention, the TRIPS Agreement, the WIPO Copyright Treaty (WCT), and the WIPO Performances and Phonograms Treaty (WPPT), consistent with the recommendations made in this filing.
- Ensure through legislative changes, as necessary, the criminalization of the unauthorized use of software by enterprises (end-user software piracy), hard disk loading of software or other copyright materials, Internet piracy including the communication to the public or the making available of any work or set of works, and the circumvention of technological protection measures (or trafficking in circumvention technologies or providing circumvention services). With respect to criminalization of enterprise end-user piracy of software, the January 2011 Criminal IPR Opinions (cited and discussed below) clarify that “for profit” includes “other situations to make profit by using third parties’ works,” and this idea should be carried forward and made much more explicit with respect to software in a new judicial interpretation, amendments to the Copyright Law, and/or amendments to the Criminal Law (for which a revision process has just started).
- Specify and lower the proof requirements for evidence preservation orders and injunctions in civil copyright infringement actions.
- Make it a violation of law to use, or attempt to use, an audiovisual recording device to make or transmit a copy of a cinematographic work or other audiovisual work, or any part thereof, from a performance of such work in an exhibition facility.
- Allow foreign right holders to commence “incidental civil claims” against those being prosecuted for copyright crimes at the local level courts.
- Lower the threshold for criminal enforcement actions to be taken against infringers, including Internet infringers, and including infringements undertaken for purposes other than commercial gain.

Market Access

- Implement the market access WTO case, in order to provide the publishing, audiovisual, music, and other industries with fair, meaningful, and equitable access to the Chinese markets for their goods and services.
- Relax the 20 film quota, grant rights to other companies to import and distribute motion pictures theatrically, and renegotiate the master contract.
- Cease discriminatory and highly suspect censorship for online distribution of music in China. Remove the exclusive licensee requirement for online music distribution.
- Remove existing prohibitions against participation by foreign enterprises in publishing activities.
- Ensure that no measure in China conditions market access on local ownership or development of a service or product’s intellectual property, or compels transfers of foreign intellectual property and R&D to China, including sales of information security software and cloud computing products.
- Refrain from introducing mandates or preferences favoring the acquisition of Chinese (over foreign) software.
- Ease the ban on the sale and importation of videogame consoles.

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 those submitted in 2010 to the U.S.

⁵International Intellectual Property Alliance, *China’s WTO Compliance - Notification of Intent to Testify and Testimony Re: “Request for Comments and Notice of Public Hearing Concerning China’s Compliance With WTO Commitments”* (76 Fed. Reg. 50286, August 12, 2011), September 21, 2011, at http://www.iipa.com/pdf/2011_Sep21_IIPA_China_WTO_Compliance_Request_to_Testify_and_Testimony.pdf.

⁶International Intellectual Property Alliance, *IIPA Written Submission Re: 2011 Special 301 Out-of-Cycle Review of Notorious Markets: Request for Public Comments*, 76 Fed. Reg. 58854 (September 22, 2011), Docket No. USTR-2011-0012, October 26, 2011, at http://www.iipa.com/pdf/2011_Oct26_IIPA_Notorious_Markets_Submission.PDF.

International Trade Commission (ITC) on identification and quantification of IP infringement in China,⁷ have described in detail the many forms of copyright piracy and enforcement challenges faced by IIPA members in China. Notwithstanding some incremental gains in the past year, piracy of business software, music and recordings (including music services based on providing access to infringing materials), movies, books and journals, and entertainment software, in physical form and in the online environment, continues to dominate the marketplace, causing severe harm to the creative sectors and related industries in the United States. Such piracy activities greatly disadvantage companies that respect copyright, whether they are Chinese or foreign entities. For example, the recording industry estimates that physical music piracy rates are about 90%, and approaching 99% in the online environment—a situation that will hopefully change when *Baidu's* licensed music service becomes fully operational. The Business Software Alliance (BSA) annual Global Software Piracy Study indicates that the piracy rate for software deployed on PCs in China in 2010 was 78%, with the commercial value of this unlicensed software estimated to be a staggering \$7.8 billion.⁸ For the industries as a whole, a May 2011 ITC report found that copyright infringement was the largest category of reported IP infringement in China in 2009 and that overall IP infringement in China costs the U.S. economy as much as \$107 billion and 2.1 million jobs.⁹

The enforcement situation in China remains difficult, with an overall lack of deterrence due to various factors, including difficulty in obtaining effective and deterrent administrative enforcement, lack of transparency, and difficulty in obtaining deterrent criminal prosecutions. These deficiencies exist notwithstanding continued good relationships with China's law enforcement, highlighted by Chinese Government support during the 2010-2011 Special IPR Enforcement Campaign and a greater willingness to cooperate with foreign rights holders. The following highlights some key piracy and enforcement challenges and updates.

Internet and Mobile Piracy: The nature of Internet-based (and mobile) piracy continues to evolve in China with developments in technology and increasingly sophisticated Internet and mobile users. It is estimated that there were 513 million Internet users in China as of the end of 2011, or 38.3% of the entire Chinese population (according to the China Internet Network Information Center (CNNIC). Perhaps more astonishingly, according to the MIIT, total mobile phone subscribers exceeded 975 million by the end of November 2011.¹⁰ China now boasts 356 million Chinese who access the Internet through their mobile devices, roughly 69.3% of all Internet users, almost one-third of whom have high-speed 3G networks.¹¹ Broadband penetration continues to grow, with over 15.5 million broadband connections by the end of 2011. Thus, in addition to the online piracy threat, piracy is now taking place directly on mobile devices over wireless broadband networks (3G), and the pre-loading of infringing files on mobile devices is now a problem for copyright industries. According to CNNIC, in 2011, of all Internet users, 75.2 % used the Internet for "Web music," 63% used the Internet for "Web game," 63% used the Internet for "Web video," and 40% used the Internet for "Network literature."¹² CNNIC reported that by the end of 2011, "online music, online games and entertainment applications such as online literature slightly increased in the number of users, but usage has declined. In contrast, the number of network video users increased 14.6% over the previous year, reaching 325 million people, while the utilization rate increased to 63.4%."¹³

The harm caused by Internet piracy can perhaps be best understood in numbers by comparing the values of China's legitimate market for certain types of creative products with that of other countries. For example, the value of

⁷International 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/IIPACHinaITCWrittenSubmission070910.pdf>.

⁸China's 78 percent software infringement rate means essentially that Chinese enterprises on average pay for about 1 out of 5 copies of software they use and then compete unfairly with U.S. businesses that pay on average for about 4 out of 5 copies of the software they use to run their businesses and improve productivity.

⁹Available at www.usitc.gov/publications/332/pub4226.pdf.

¹⁰Ministry of Industry and Information Technology of the People's Republic of China, *November 2011 Communications Industry Outlook*, December 21, 2011, at <http://www.miit.gov.cn/n11293472/n11293832/n11294132/n12858447/14293382.html>.

¹¹Michael Kan, *China's Internet Users Cross 500 Million*, PCWorld, January 16, 2012, at http://www.pcworld.com/article/248229/chinas_internet_users_cross_500_million.html.

¹²China Internet Network Information Center (CNNIC), *Statistics Report on the Development of Internet in China*, January 2012, at <http://www.cnnic.cn/research/bqsz/tjbg/201201/P020120118512855484817.pdf>, p. 28.

¹³CNNIC, *29th China Internet Development Statistics Report*, January 16, 2012, at http://www.cnnic.cn/dtygg/dtgg/201201/t20120116_23667.html.

total legitimate digital sales for music in 2010 in China was a mere US\$48.8 million, and total revenue (both physical and digital) was a mere US\$64.3 million. This compares to almost \$4.2 billion in the U.S., US\$178.4 million in South Korea and US\$68.9 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 almost US\$1.4 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 well more than US\$1 billion in subsidies to Chinese Internet companies who can provide their users with access to music without negotiating licenses therefor.

The following are some illustrative updates of piracy experienced by sector or type and some enforcement observations. Many of the sites noted below were also mentioned in IIPA’s filing in the USTR’s Special 301 Out-of-Cycle Review on Notorious Markets,¹⁴ by which the Special 301 Subcommittee requested examples of Internet and physical “notorious markets,” i.e., markets where “counterfeit or pirated products are prevalent to such a degree that the market exemplifies the problem of marketplaces that deal in infringing goods and help sustain global piracy and counterfeiting.”

Music Piracy: Online music piracy remains serious as unauthorized music files are still easily accessible via a variety of online music services including **music portal sites, video sites, P2P services, deep linking services, forums/blogs** and **one-click hosting sites** (sometimes referred to as cyberlockers).¹⁵ A wide range of newly released and/or pre-release content is posted at forums/blogs which then direct users to download or stream unauthorized music files saved in one-click hosting sites (cyberlockers). Functionality facilitating one-click sharing to a long list of “social networks” is also not uncommon in China. Micro-blogging sites like *Weibo* (China’s version of Twitter but having nearly 200 million users as of mid-2011, according to CNNIC) are being used for easy and simultaneous sharing of copyright content without authorization.

Deep linking services (like *Sohu/Sogou* and *Gougou*) collect links to infringing content and provide users the ability to engage in piracy through “deep linking,” by which users bypass the homepage of the site where the pirated illegal content resides and link to it directly. Further, *Xunlei* makes available unauthorized music files via a variety of online services including P2P file sharing clients, mobile applications, and a video streaming and download website. *Xunlei 7*, like the previous version *Xunlei 5*, adopts a file indexing technology that facilitates and actively encourages users to connect to peers and links from unauthorized sources for the purpose of downloading infringing music tracks. The search results pages are embedded in *Xunlei 7* and users are allowed to browse and download selected music files which can subsequently be shared/distributed by other *Xunlei* services such as *Xunlei Cyberlocker*, *Xunlei P2P* sharing and *Xunlei Kuai Chuan* (which cooperates with more than 100 social networks). For VIP members, music files can also be downloaded offline by using *Xunlei* offline download. Despite being sued by legitimate record companies, *Xunlei* has expanded its unauthorized online music services from its P2P file sharing client to its music video download and streaming website (*yinyue.xunlei.com*) and mobile applications like *Xunlei Kan Kan HD* (for iPad) and *Xunlei Cyberlocker HD* (for iPad). Court cases brought against *Sohu/Sogou* (an appeal in Beijing) and *Xunlei* (in Shenzhen) remain pending. Many other websites such as *1ting.com*, *xiami.com*, and one-click hosting sites such as *Dbank.com*, *Rayfile.com*, and *Namipan.com* have been implicated in music piracy activities in China. A wide range of recordings have also been found on web “forums,” such as *pt80.com* and *in-corner.com/bbs.5757qq.com*. These forums direct users to download or stream unauthorized sound recordings stored in Chinese hosting sites. 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.

¹⁴See *supra* note 6.

¹⁵The software industry also reports the emergence of cloud pirate lockers, in which pirated software titles are stored by users using “cloud” services and making them available to others, thus harming legitimate software copyright holders.

Mobile piracy through music WAP (wireless application protocol) sites and mobile applications are quickly adding to the seriousness of online music piracy in China, since the number of users of such services has skyrocketed (recall over 350 million Chinese use the Internet on their phones, and well over 100 million have high-speed 3G connections).¹⁶ Mobile applications which provide music top charts, searches, streams, and downloads are common, but only a few of them are licensed. Some of the unauthorized mobile applications are search engines without any listings of music files, cyberlockers, file-sharing applications, or radio channels. The developers' anonymity adds to the difficulties in initiating effective anti-piracy actions. Sharing functions *via* email and social networking multiply the damage caused to the recording industry by unauthorized mobile applications. Examples of infringing WAP sites are *3g.cn* and *easou.com*.

Motion Picture/Television Piracy: China's overall piracy rate (especially Internet piracy) of motion pictures and television programs has seen improvement over the past year due to actions during the Special IPR Enforcement Campaign (October 2010 to June 2011).¹⁷ Nonetheless, Internet piracy (including streaming piracy and sales of hard goods online) remains the largest threat to the U.S. film and television industry in China. Given China's explosive growth of e-commerce, the **online sale of pirated hard goods** has become an increasing problem for the industry, comprising of websites and/or sellers targeting foreign buyers. On a positive note, largely through industry efforts and outreach, several high-profile e-commerce sites banned the sale of optical discs through their sites in 2011 and implemented anti-piracy best practices. **Streaming piracy** remains the most popular way for users to view/download illegal content on the Internet, even after the major government crackdown on sites hosting unauthorized copyrighted content.¹⁸ While major UGC and P2P sites have cleaned up most of their pirated content, P2P streaming applications (e.g., *Xunlei/Speed Thunder* and *QVOD*) have become very popular among Internet users to download illegal content. For example, *Xunlei.com/Kankan.com* (the two share the same URL and server) offers easily accessible links to piracy on its VIP service *via* a scheme called "offline download."¹⁹ Another popular application of streaming illegal content is through the *QVOD* software and P2P network (i.e., *kuaibo* streaming VOD system),²⁰ which makes it extremely difficult to track various sites' sources (some own foreign-based servers). In addition to motion pictures and television programming, other content (e.g., live sports telecasts) suffer from unlicensed programming retransmission, by which users or services on the Internet take protected telecasts and broadcasts and make them freely available, often simultaneously with the television broadcast.

Online Markets (Sale of Hard Goods Pirated Materials): The industries note a proliferation in China in 2011 of online marketplaces distributing and selling illicit copies of copyright material, or other products, such as circumvention tools to bypass technological protection measures used by right holders to protect their works. *TaoBao*, *Eachnet.com*, and others are examples of auction sites, business-to-business (B2B), and business-to-consumer (B2C) sites which allow infringers to operate anonymously and have been found to specialize in certain types of illegal merchandise (in addition to any legitimate offerings). Huge volumes of illegal CDs, DVDs and Blu-ray

¹⁶For example, the total value of recorded music sales and licensing in China in 2010 was US\$64.3million. 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 recording industry notes that a wide range of unauthorized WAP sites and mobile applications, 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.

¹⁷Legitimate online video websites have been adversely affected by the easy availability of pirated content.

¹⁸The Internet in China has been an environment where "anything goes" and huge numbers of foreign motion pictures and television programs have been made available illegally by commercial operators as well as amateurs. Streaming of entire bouquets of Pay TV channels is occurring. There are numerous instances of pirate streaming of U.S.-based channels, including HBO, ESPN, Discovery, CNN, the Disney Channel and Cartoon Network, onto the Internet in China. This programming is also available outside China, and China has become an international center for rebroadcast/retransmission piracy of motion picture and television content.

¹⁹*Xunlei.com* features a proprietary, high speed P2P file sharing system that distributes unauthorized copies of copyright content. The system incorporates the website's own desktop download manager. The format of these files is also uncommon and requires the *Xunlei.com* desktop video player for viewing. Users can also purchase VIP access which allows them to use *Xunlei.com* to automatically download files to *Xunlei.com* servers on their behalf. *Xunlei.com* is currently hosted in China by China Unicom.

²⁰*QVOD* is both an application and a P2P network. It can be used to share, download, and view files directly in the application itself. In addition, many rogue sites use the *QVOD* network to set up content streaming.

Discs are being sold on e-commerce sites such as *TaoBao*.²¹ There is also a significant amount of online book and journal piracy on *TaoBao*, but the industry reports that a number of publishers have been working with *TaoBao* to address the problem, and in December 2010, a ten-day campaign was launched by *TaoBao* to specifically target online book and journal piracy. The industry welcomes this cooperation and hopes this action will be sustained by *TaoBao* and can lead to *TaoBao* addressing piracy of other kinds of copyright materials such as films. In addition to *TaoBao*, sites such as *Alibaba.com*,²² *Aliexpress.com*, *GlobalSources.com*, *Made-in-China.com*, *DHgate.com*, and *Tradetang.com* remain among the top online marketplaces selling videogame circumvention devices, and *TaoBao*, *Alibaba.com*, *DHgate.com*, and *Eachnet* are also noted for B2B and B2C services providing infringing software.²³ These sites all pose enforcement challenges; while many have been receptive to taking down listings of infringing products, it is also important for them to “take down” sale advertisements, e.g., of pirate software, whether for download or for sale as a lookalike counterfeit (many of these advertisements can be found on *TaoBao* and *Alibaba*).

Online Journal Piracy: The existence of unlicensed online journal delivery services continues to plague scientific, technical and medical (STM) publishers. As the result of attention from the industry, some services have become more cautious, keeping a lower profile and shifting their profiles to ‘appear’ more legitimate, but the core issues remain the same. *KJ Med* is an example of a site (operating through a powerful state-run medical library giving it a further air of legitimacy) which provides and delivers unauthorized digital copies of millions of articles from leading academic, scientific, technical and medical journals on an illegal subscription basis to customers in libraries and hospitals throughout China, with neither the consent of, nor payment of subscription fees to, right holders. Despite the issue being a key agenda item in several years’ JCCT dialogues,²⁴ and despite some positive attention by both NCAC and the issuance in 2009 of the *Notice on Enhancing Library Protection of Copyright*,²⁵ the longstanding complaint against sites that provide unauthorized access to STM journal articles (in particular *KJ Med*) has not been resolved. In 2010, the Chinese government recognized the importance of resolving the *KJ Med* and at the November 2010 JCCT IPR Working Group meeting requested that the industry file its case anew with the NCAC. Publishers renewed their complaint against *KJ Med* before the NCAC in May 2011, and the case remains under further investigation. The industry hopes for a positive resolution in 2012 given the harm *KJ Med*’s service is causing STM publishers.

Videogame Piracy: 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 videogame product that can be accessed from home PCs and from Internet cafés. In 2011, China placed third in the world in the number of connections by peers participating in the unauthorized file sharing of select Entertainment Software Association (ESA) member titles on public P2P networks.²⁶

Internet Cafés: While home/business Internet and mobile Internet usage has become the predominant way Chinese access content online, piracy in Internet cafés remains a concern, as such venues make available unauthorized videos and music for viewing, listening or copying by customers onto discs or mobile devices.

Updates on Internet Piracy Enforcement: IIPA was hopeful that high-level commitments in the 2010 JCCT (“to obtain the early completion of a Judicial Interpretation that will make clear that those who facilitate online

²¹*Taobao* has taken some positive steps to deter the sale of counterfeit goods through its e-commerce platform. However, these measures have done little to reduce the widespread availability and popularity of counterfeit DVDs and Blu-rays on their site. Right holders remain concerned that *Taobao* has not yet demonstrated the level of commitment to rid their site of counterfeits shown by other online marketplaces such as *Alibaba.com* and *Aliexpress.com*.

²²*Alibaba* should be commended for its cooperation with videogame right holders in the removal of infringing items.

²³The Business Software Alliance (BSA) notes identifying and reporting for removal more than 108,000 listings of infringing products on these sites.

²⁴The *KJ Med* issue was first raised with Chinese enforcement authorities in 2006. Following a number of transfers among several agencies, the case was lodged with the Beijing Copyright Administration Enforcement Department where it languished.

²⁵The *Notice* notifies libraries of their obligations under the Copyright Law, and 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.

²⁶ESA’s reporting on P2P activity does not take into account downloads of these titles that occur directly from hosted content, such as games found on “cyberlockers” or “one-click” hosting sites, which appear to account each year for progressively greater volumes of infringing downloads.

infringement will be equally liable for such infringement”), the President Obama-President Hu Summit in early 2011, and the issuance of the Criminal IPR Opinions on the handling of criminal cases,²⁷ would lead to significant improvements in overall online protection of copyright. Some infringing websites were closed down during the Special Campaign. Since that Campaign ended in June 2011, there has been less activity, although an enforcement initiative of the NCAC, dubbed “Sword Net Action,” remains ongoing, with the latest action involving NCAC warnings to *UUSee*, *VeryCD* and *Xunlei* because “they failed to supply required copyright documentation for many of the online movies and TV dramas offered on their websites.”²⁸ NCAC reported in August 2011 that 191 websites are under “active supervision,” 75 sites have “been removed,” 18 sites have ceased using a “top 50 list” of videos, and 12 sites have stopped using a “top 50 list” for TV dramas.²⁹ In November 2011 NCAC held a briefing to discuss the maintenance of pressure on these sites, indicating some proactive government-to-industry outreach. In some respects, the increasing pressure appears to have led to some changes in how ISPs cooperate, as the motion picture industry reports more effective notice and takedown mechanisms in place and good compliance and cooperation, typically within a matter of hours following a takedown notice.³⁰

For other industries, needed voluntary cooperation by service providers remains largely inadequate. ISPs in China include major telecommunications companies (e.g., China Telecom, China Unicom, China Mobile), but these companies do not fully cooperate or facilitate strong copyright protection except with respect to websites/subsidiaries directly owned by them. The record industry reports that it regularly provides ISPs with notices and sends infringing services cease and desist letters, however, the takedown rate in 2011 among unauthorized online services dropped to less than 50%.³¹

The lack of voluntary cooperation for most industries is coupled with an incomplete legal and enforcement infrastructure, the failure to issue a promised Judicial Interpretation on online liability, an over-reliance by authorities on administrative enforcement, difficult burdens in civil, administrative and criminal enforcement, overall lack of transparency, and overall lack of deterrence. The current Copyright Law reform effort, and the Criminal Law reform effort that is just commencing, provide opportunities to address some of the gaps in coverage and foster more workable solutions to the myriad piracy issues noted above. Until that time, the Chinese Government must demonstrate the will to effect meaningful change.

With regard to administrative enforcement against Internet and mobile piracy, right holders report providing evidence to local NCAs, local NAPP offices, or local cultural task forces, with mixed results. In some case, the authorities coordinate with ISPs for shutdown of sites that do not have legitimate licenses to operate, or that contain a large amount of illegal content. In other cases, there is inaction and no transparency. For example, in 2011, the music industry reports that more than half of its complaints resulted in no enforcement and no response. As an example, in early 2011, a complaint was filed against an Internet forum *bbs.in-corner.com/bbs.5757qq.com* where

²⁷The JCCT plenary session ending December 15, 2010 and the subsequent summit meeting between President Obama and President Hu on January 19, 2011 resulted in important commitments aimed at addressing massive online piracy in China. As noted, 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* (“Criminal IPR Opinions” or “Opinions”). The Opinions confirm in Article 15 the criminal liability of ISPs knowingly providing internet service to infringers of IP rights, as long as they are deemed to have violated the Criminal Law. The Opinions are an internal document of the Supreme People’s Court, the Supreme People’s Procuratorate, and the Ministry of Public Security, so they should be codified in a new judicial interpretation or in the amendments to the Copyright Law or Criminal Law.

²⁸See *Video Portals Warned Over Illegal Content*, China Daily, January 12, 2012, at http://www.china.org.cn/business/2012-01/11/content_24380184.htm. The article notes that of 1,206 documents submitted by 18 websites including *Xunlei*, *UUSee*, and *VeryCD*, only 282 documents, or 23%, “met the administration’s guidelines for legal content.” *Xunlei* did not initially submit any documentation, citing “careless work” due to staff turnover. NCAC indicated the sites would be “blacklisted and charged if things do not get better in two months.” One of the notable enforcement achievements during the Special IPR Campaign was NCAC’s “copyright non-compliance list” which in January 2011 included *Xunlei*, *UUSee*, *VeryCD*, *Joy.cn*, *PPLive (PPTV)*, *Tudou* (Nasdaq: TUDO), *Baofeng*, *Funshion*, *Shanda Interactive* (Nasdaq: SNDA)’s *Ku6* (Nasdaq: KUTV), *Sina* (Nasdaq: SINA) and *Pipi.cn*. See *Xunlei Receives Warning Over Video Copyrights*, Securities Daily, January 4, 2011, at http://www.marbridgeconsulting.com/marbridgedaily/2012-01-04/article/52658/xunlei_receives_warning_over_video_copyrights.

²⁹See *China Official to Establish Copyright Active Regulatory Mechanism*, <http://www.itnews-blog.com/it78208.html>.

³⁰If suspected criminal activities are found, the industry notifies law enforcement agencies and presses for a criminal investigation.

³¹The industry notes that communications with several ISPs revealed that cease and desist notices sent by copyright owners were regarded as “spam” emails and no one is attending to notices or responsible for taking down infringing content.

newly released and some “pre-release” content was posted for download, causing substantial damage to the industry. The industry provided NCAC with sufficient evidence to act, but there was literally no response from the government despite repeated requests for updates.

Lack of transparency or accountability often leaves copyright owners subject to the whims of local agencies. Enforcement agencies in general do not provide transparent feedback to copyright owners regarding complaints filed and the performance of law enforcement agencies is not subject to scrutiny. Industry reports mixed relationships with the various local copyright administrations, with communications and relationships being good in some and non-existent in others (e.g., the Copyright Bureau in Guangdong is reported to have ignored complaints filed by right owners). Most of the time authorities in China do not take initiative to investigate or take *ex officio* action against online piracy, and when they do, in many instances there is no transparency. It is hoped China’s recent announcement that it is establishing a permanent State Council-level leadership structure and a mechanism to “hold local government officials responsible for effectively enforcing IP violations” may signal a change in the right direction.

Repeated administrative complaints have been filed against unauthorized online services by right holders, and while there have been some sites shut down, by the sheer numbers of sites still available, there appears to be little deterrence. For the purpose of implementing the 2009 Ministry of Culture (MOC) Circular dealing with music sites, MOC issued four enforcement notices to require music operators to take down songs for which content review had not occurred. Of 422 total websites identified by MOC in separate enforcement notices, 268 sites had been closed down (a 63.5% takedown rate).³² The music industry reports that actions were taken against sites such as *1ting.com*, *xiami.com*, and *Yicha.com*, but these did not result in closures (all the services remain in operation despite evidence of infringing activities), and only *1ting.com* was given an administrative fine. Other enforcement obstacles remain in place, including the following: 1) a non-deterrent administrative fine structure (e.g., there is no daily fine for continuing to infringe); 2) inadequate staffing and resources within local administrative agencies responsible for copyright to deal with the task of curbing online infringements;³³ 3) lack of cooperation at some of the provincial levels generally;³⁴ 4) general unwillingness of authorities or service providers to assist in identifying infringers’ locations and identities;³⁵ 5) lack of willingness to administer fines against ISPs which do not comply with takedown requests; 6) 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 7) lack of an effective criminal remedy for online infringement.³⁶

Courts have become more active in the past couple of years in criminal piracy cases involving the Internet. Previously reported cases, such as the *Tomatolei* case, stand out as positive highlights. Another positive highlight from 2011 was a criminal investigation into an infringing music website called *qishi.com* which in January 2011

³²The following is a recounting of MOC Enforcement Notices and the number of sites identified and taken down over time:

MOC Enforcement Notice	Number of Music Sites Identified in the Notice	Number of Music Sites Taken Down (as of January 5, 2012)
April 2010	117	72
December 2010	237	163
March 2011	54	28
April 2011	14	5

³³In 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.

³⁴Local protectionism (e.g., Shanghai, Shenzhen and Hangzhou) 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, MOC, 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 operate in China.

³⁵For 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) would have a positive impact on fighting Internet piracy, including video streaming, e-commerce platforms, music sites and others.

³⁶See *infra* discussion of thresholds issues. One piece of positive news is that the country’s new Criminal Procedural Law stipulates that evidence collected during an investigation by relevant government agencies can be used in a court hearing for prosecution. This is a positive change, given the fact that many of the criminal cases in China start with administrative actions involving evidence collection.

resulted in a sentence of five years imprisonment and a fine of RMB1.5 million (US\$227,000) imposed on the operator, which was upheld on appeal by the Chuzhou Intermediate People's Court in March 2011. According to the Public Security Bureau (PSB) officials handling the case, the judgment against the operator has been meted out. In addition, after several years' pursuit by right owners, in September 2010, the police arrested executives from *OpenV.com*, a "video-on-demand" (VOD) website that attracted a huge volume of traffic among Chinese Internet users and was reportedly backed by overseas funding. After several delays, the case was finally brought to trial in October 2011. This case is highly significant as the first criminal prosecution in China to involve the illegal distribution of copyright content on the Internet or a website through a VOD platform. IIPA praises the authorities for bringing this "first of its kind" criminal prosecution, but is deeply concerned about possible information that there has been political pressure to abandon the prosecution. Tough sentences should be meted out to the defendants for their massive scale copyright violations, and for the deterrent message they will deliver.

The motion picture industry reports supporting greater numbers of criminal investigations/prosecutions against copyright infringers between 2010 and 2011 than during any previous recorded year, including those against Internet streaming sites, Internet café operators, and AV shops selling illegal DVDs and Blu-ray Discs (BDs), and indeed, the increase in administrative actions during the Special Campaign resulted in greater numbers of administrative transfers to the PSBs for criminal prosecution. The *7t7t.com* and *Qishi.com* criminal referrals in 2010 were welcome signs. However, it appears that sentencing was reduced immediately after the Special Campaign, as illustrated by the *51wma.com* case where the operator of an illegal music website was sentenced to 6 months imprisonment with 1 year suspended sentence and a fine of RMB150,000 in August 2011. Other pending cases include the prosecution of the operators of *music98.net*³⁷ and *6621.com*.³⁸ Industry also reports that the typical duration of a criminal case in this area has now shortened to less than a year.

Considering the size and scale of the market in China, the total number of criminal cases remains too small in number to deter piracy, and other cases demonstrate problematic aspects of the Chinese legal system. Civil cases against *xunlei* (filed in 2009), the case against *Baidu* (the parties settled in July 2011), and *sohu.com/sogou.com* (filed in early 2010) have dragged on for years. In a recent administrative action against an unauthorized online service called *Xiami.com*, the Zhejiang Copyright Bureau imposed a "paper" (as opposed to electronic mail) notice requirement. No administrative fine was imposed, and this unauthorized site, which had more than 9.5 million visitors in August 2011, continues to operate. There also remains a lack of transparency in the criminal judicial system, as there is no reliable sources/statistics on court actions brought against copyright infringers in China.³⁹

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.⁴⁰ 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

³⁷The PSB handling the case against *music98.net* informed right holders that transfer of the case to the local People's Procuratorate was pending receipt of proof of copyright ownership.

³⁸The operator of *6621.com* was detained in March 2011 but no update of the case has been made available from the authorities.

³⁹It has been suggested that a website for right holders and authorities could be set up to provide both case status information, including cases for which information was files by right holders as well as other administrative and criminal investigations, with relevant information including contact information. Helpful aggregate statistics regarding completed cases would include: for civil cases, the number of cases filed; injunctions issued; infringing products seized; infringing equipment seized; cases resolved including settlement); and the amount of damages awarded; for administrative cases, injunctions issued; infringing products seized; infringing equipment seized; cases resolved (including settlement); and the amount of damages awarded. Helpful information for criminal cases would include the number of raids; criminal injunctions issued; prosecutions commenced; convictions, and the amount of fines and/or jail terms (including whether the fines were paid and whether the jail term was actually served or was suspended).

⁴⁰BSA's 2011 software piracy statistics will not be available until after the filing deadline for this submission, but will be released in May 2012, at which time piracy rates and U.S. software publishers' share of commercial value of pirated software will be available at www.iipa.com. In 2010, the software piracy rate in China was 78%, representing a commercial value of unlicensed software attributable to U.S. vendors of US\$3.5 billion. These statistics follow the methodology compiled in the Eighth Annual BSA and IDC Global Software Piracy Study (May 2011), <http://portal.bsa.org/globalpiracy2010/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 2012 Special 301 submission at <http://www.iipa.com/pdf/2012spec301methodology.pdf>.

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 criminal remedies against this form of 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. 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 new JI by the 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. One hurdle to bringing criminal end-user cases has been Chinese authorities' narrow interpretation of the "for-profit" requirement in Article 217. 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."

Without a criminal remedy, the only avenues for seeking redress have been the administrative and civil systems, which are under-funded and under-resourced, and which generally result in non-deterrent penalties. First, copyright authorities are reluctant to do raids against businesses suspected of using pirated software. IIPA was deeply disappointed with the lack of concrete results against end-user software piracy coming out of the Special Campaign, and we know of no progress or outcomes arising out of 23 administrative actions filed with NCAC during the Special Campaign against businesses using unlicensed software. Unfortunately, in 2010, software end-user complaints shifted jurisdiction from the local copyright administrations to the Law and Cultural Enforcement Administrations (LCEAs), leading to even fewer administrative actions. In 2011, BSA lodged six complaints against enterprise end-user piracy. Only four administrative raids were conducted in 2011.⁴¹

The situation is not much better with regard to civil enforcement. BSA collected leads for fifteen civil cases in 2011, seven of which were accepted by the courts (with five still pending). The civil system is marred with difficulties when it comes to end-user piracy actions, as the courts set excessively high evidentiary burdens for evidence preservation, and pre-trial evidence preservation order applications or applications for injunctions are normally rejected by the courts.⁴² In addition, where a civil order is issued, right holders and authorities often face on-site resistance against evidence preservation (e.g., deletion of infringing software while enforcement authorities are carrying out an inspection) and have only a limited amount of time to conduct software infringement inspections. Another key hurdle is the accounting method for damages, highlighting the need to significantly increase statutory damages.

Government and Enterprise Legalization of Business Software and Related Issues: The 2011 JCCT negotiations resulted in several specific commitments by the Chinese government pertaining to software legalization that build on commitments made by the Chinese government at the 2010 JCCT, the summit between President Obama and President Hu in January 2011, and the May 2011 Strategic & Economic Dialogue (S&ED). These include commitments by China to: 1) ensure that government agencies at all levels use only legitimate software and that all types of software used by government agencies are licensed; 2) devote increased resources to conducting software license audits and inspections of government agencies and publish the results; 3) complete software legalization by provincial governments by mid-2012 and by municipal and county governments by 2013; and 4) promote and

⁴¹Not all cases resulted in administrative fines, and fines remain generally non-deterrent. In many of these cases, there were no seizures of the unlicensed software and computers employing it. In 2010, BSA lodged 36 complaints against end-users, including 13 with the local authorities, on top of the original 23 complaints filed with NCAC, but only 10 administrative raids resulted.

⁴²The courts require copyright owners to provide preliminary evidence of infringement, which is difficult if not impossible since they are not in a position to check an alleged infringer's computers even for preservation of the evidence. The court has rejected applications for pre-trial evidence preservation orders or injunctions, claiming the preliminary evidence submitted is insufficient to prove infringing use of copyrighted software. This creates an impossible situation.

conduct enterprise software management pilot projects and publish progress reports.⁴³ These bilateral commitments have been accompanied 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 is of critical importance that the Chinese Government now follows through to ensure legal software use by implementing legalization efforts at all levels of government (central, provincial, municipal, and local), providing sufficient budgets for government purchases of legal software, instituting a process involving software asset management (SAM) best practices (including audits of what software government systems are actually running) and targeting all categories of software for legalization (including multimedia software and computer-aided design software, not just operating systems, office and anti-virus software). For SOEs, the government announced plans in 2011 to have the China Copyright Protection Center (CPCC) implement a pilot legalization program, including conducting random audits on a specified percentage of PCs in the enterprises. It is important that CPCC have adequate resources to accomplish this task in terms of funding, manpower and appropriate audit tools and that it utilize SAM best practices so this program can serve as the basis for an expanded SOE legalization effort. 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.

Pre-Installation Piracy (Hard Disk Loading): An increasing problem in China is the sale of hard drives or other devices with pre-installed illegal content in large computer malls or electronic shopping centers (e.g., Hailong and Bainaohui in Beijing). To “sweeten the deal,” merchants provide “value-added” services to download software, illegal films and television programs, or other content (very often the audiovisual content comes from illegal websites offering infringing HD content). The practice is now causing significant losses of revenue from Blu-ray disc sales for motion picture companies and unlicensed use of karaoke videos for the recording industry, in addition to traditional hard-disk loading of software. The practice is clandestine and enforcement authorities are reluctant to prioritize enforcement against it. The Chinese Government should clarify criminal liability for “hard disk loading” and carry out deterrent enforcement efforts including criminal cases. Unfortunately, there have been very few cases, although at least one case is reportedly in the preliminary investigation phase by one local PSB.

Book (Including Textbook) and Journal Piracy: In addition to the online piracy issues described above, the U.S. publishing industry continues to suffer from physical piracy including unauthorized copying of academic textbooks, unauthorized printing of commercial bestsellers, print- or copy-to-order services, and the availability of pirated or counterfeit books through itinerant street vendors. Well-known university presses suffer from trademark infringement as well, with university names and seals reproduced on content bearing no relation to the pertinent university press. Recent indicators suggest the changing nature of textbook piracy in China. Previously centered around “textbook centers” found within university premises, the evidence shows that such centers are now being replaced by smaller, often private “copy shops” on or near university campuses. These shops engage in unauthorized copying of books to order (brought in by customers for copying) to having popular titles pre-printed and available for purchase, to the most serious and sophisticated arrangements where massive catalogues of thousands of titles in digital form are available for immediate printing-to-order. Pirated or counterfeit bestsellers remain available for sale openly on the streets of Beijing in a number of locations. Individual vendors are often mobile and do not carry large stocks. Wholesalers carry larger stocks, but typically the English language titles are only a relatively small proportion of their stocks. Previous attempts to disrupt the supply chain feeding the street and wholesale traders were frustrated by the lack of personnel, e.g., in the Beijing Copyright Bureau, to conduct coordinated or simultaneous raids on multiple targets at different levels of the chain.

⁴³Prior commitments by the Chinese government included: 1) treating software as property and establishing software asset management systems for government agencies, 2) allocating current and future government budgets for legal software purchases and upgrades (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), 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 (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; the latter of course is of critical importance).

The partnership of the Ministry of Education (MOE) with GAPP, NCAC and local authorities remains essential to tackling the ongoing textbook piracy issues. The industry has positive relations with the authorities, but finds their attention is diverted as soon as pressure (e.g., out of the JCCT or the Special Campaign) wanes. The situation is exacerbated by changes in personnel. A complaint to the Beijing Cultural Enforcement Division in late 2010 brought about two raids (on separate dates) against four retail and wholesale vendors of pirate books. Many limitations remain for addressing hard goods book and journal piracy in China, including a lack of resources in the administrative enforcement authorities, inability to react to time-critical information, inability to handle coordinated raids against multiple targets, lack of power and/or willingness to enter unmanned premises without very clear evidence of specific infringing copies being present in the premises at that time. Generally, a lack of technical capability and legal knowledge hampers enforcement efforts.

Illegal Camcording:⁴⁴ The Motion Picture Association of America reported that the number of forensic matches from illegal camcords of its companies' major motion pictures traced to China in 2011 dropped to nine (five audio and four video). While a notable improvement, this progress is due to increased vigilance of cinema operators, not necessarily improved law enforcement. The industry also reports that camcording piracy is a source of pirate films on major Chinese UGC sites and provides source material for infringing DVD masters. SARFT should immediately implement watermarking in theatrical prints and ensure that China Film Group/exhibitors step up efforts to deter illegal camcording. The Copyright Law amendment should be amended to add as a violation of law the use of, or attempt to use, an audiovisual recording device to make or transmit a copy of a cinematographic work or other audiovisual work, or any part thereof, from a performance of such work in an exhibition facility. Anyone committing this act should be subject to civil, administrative, and criminal remedies. There is evidence that such a statute is 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, Circumvention Devices: The industries unfortunately note resurgent physical piracy in China in 2011,⁴⁵ including: the manufacture and distribution of factory optical discs;⁴⁶ the burning of recordable discs either retail or industrial copying using disc drives or towers; production and/or sale of pirate videogames and circumvention devices used for games; the production in China (generally for export) of high-quality counterfeit software packages; the loading of pirate music on karaoke machines; and sales of "media boxes."⁴⁷ The piracy levels for video and audio, as well as for entertainment software in physical formats, continue to range between 90% and 95% of the market.⁴⁸ In May 2011, the recording industry obtained positive forensic examination reports from the "PRC Police Bureau for Disc Production Source Identification Center" implicating three optical disc plants. These reports were submitted to GAPP which reportedly initiated criminal investigations into the plants with the PSB. However, and as has happened so often in the past, the status of these cases is unknown to copyright owners despite repeated requests for updates. China remains a source country for manufactured counterfeit optical

⁴⁴Among 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.

⁴⁵Physical piracy harms the legitimate markets for all IIPA members but in different ways. The recording industry estimated the value of physical pirate product at US\$391 million in 2011, with a 90% physical piracy level; this is not an estimate of total 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 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.

⁴⁶Previous 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").

⁴⁷Media boxes, which can be plugged directly to TVs, facilitate easy access to remote online sources of unauthorized entertainment content including music, movies and TV dramas. Such media boxes are not only sold in China but also in Malaysia, Singapore and Taiwan and are believed to have been manufactured in China.

⁴⁸On December 8, 2011, a shipment of pirate optical discs containing pirate movie and music DVDs was intercepted jointly by the Bureau of Customs and the Optical Media Board at the Port of Manila. The shipment, valued at approximately US\$800,000, was originally declared as "housewares" and "leatherwares," but x-rays revealed pirate optical discs bearing obliterated SID codes. The forensic examination revealed they were purchased in China.

discs (particularly music box sets), harming markets in Hong Kong, Macau, Singapore, the Philippines, Russia, and the United Kingdom, among others.

While some pirate distribution has gone underground, a noted problem remains shops in cosmopolitan areas in Shanghai and Beijing where pirated “AV” shops heavily target expatriate communities in China.⁴⁹ Recidivism is endemic. As an example, an “AV” shop and corner stand inside Beijing’s Silk Street Market to this day openly sells a large quantity of pirated optical discs, even after several “crackdowns” by law enforcement. The U.S. Government and industry have noted in the “Notorious Markets” filing several markets which remain active and open for pirate and counterfeit business, including China Small Commodities Market (Yiwu), Lo Wu Commercial Center (Shenzhen), Buynow PC Mall (a very large personal computer mall chain in China, operating 22 stores across the country, known for selling computers with illegal operating system software and other unlawfully pre-installed software), Silk Market (Beijing), and San Li Tun District (Beijing) (where most shops openly sell infringing movies and television programs). Test purchases made at Guangdong Audio Video Centre in 2011 also indicated that pirate audiovisual products can still be easily found, and the wholesaling centre in Guangzhou is replete with pirate audiovisual materials.

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),⁵⁰ 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.

Pay TV Piracy/Circumvention Devices: While there are instances of Pay TV piracy occurring in China, the more serious problem is China’s role as the manufacturing and export/distribution hub for Pay TV circumvention devices and services. According to the Cable and Satellite Broadcasters Association of Asia (CASBAA), these take two principal forms: 1) “hacked” set-top boxes and smart cards; and 2) control word/encryption key distribution. In the first instance, circumvented devices, when attached to cable systems or satellite antennas, permit the unauthorized reception of Pay TV programs. There are reportedly millions of these boxes installed throughout China. In addition, it is reported that circumvention devices numbering in the hundreds of thousands have been exported to, and are damaging legitimate TV suppliers in, among others, Hong Kong, the Philippines, Malaysia, Vietnam, Indonesia, the Middle East, and Latin America. It is reported that the syndicates selling the boxes often take non-infringing “generic” boxes and load software on them which enables the unauthorized receipt of programming. In the second instance, since the encryption software within many set-top boxes relies on a decryption key (“control word”) which interacts in real time with software in the set top box to enable decryption of the signal, piracy syndicates extract the keys or “control words” from a legitimate box/smart card and use Internet servers to share them in real time with a multitude of other users, enabling those users to view the signal without authorization or remuneration to the broadcaster/content owner. The current Copyright Law and regulations prevent the circumvention of technological measures used by copyright owners to protect their works. The Copyright Law revision process should be used to further modernize protection by including prohibitions on trafficking in such hacking devices (or providing services as to them), the receipt and use of the signal unlawfully decrypted, and the onward distribution of unlawfully decrypted signals or even lawfully decrypted signals when such onward distribution is without authorization and done for commercial advantage.

Criminal Thresholds Issues: IIPA has long complained about the unreasonably high thresholds for criminal liability under the laws, ancillary regulations, and JI. The Criminal IP Opinions clarified many uncertainties and is discussed in greater detail below. Unfortunately, the thresholds remain too high to criminalize all piracy on a commercial scale as required by the TRIPS Agreement, and in practice, the thresholds are not being followed consistently by Chinese Government authorities. As a case in point, many law enforcement agencies in China fail to

⁴⁹The U.S. Embassies have been helpful in spreading the word throughout their Embassy communities and U.S. expatriates not to engage in the purchase of pirated or counterfeit merchandise. Such initiatives by the U.S. and other Embassies should be strengthened, and the Chinese Government can assist by posting notices in airports and ports indicating that the export of pirated or counterfeit material out of China, and the importation of such materials into most countries, is illegal.

⁵⁰In 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.

follow the “500 copy” threshold (as set forth in the April 2007 JI) to prosecute infringing shop owners. According to some in the industry, currently, the Chaoyang District of Beijing is the only judiciary district in China which regularly prosecutes illegal optical disc vendors according to the threshold.⁵¹ Unfortunately, other provinces and districts are not following the threshold.

With respect to Internet cases, it is extremely important that the authorities carry out the Criminal IP Opinions related to thresholds. They provide several criteria upon which the threshold for criminal liability can be met:

- illegal operation costs amount to over RMB50,000 (US\$7,585);
- disseminating over 500 copies of third parties’ works (the “aggregate quantity of others’ works being transmitted is more than 500 pieces”);
- disseminating third parties’ works with the actual number of clicks amounting to over 50,000 (“[w]here others’ works being transmitted has been actually clicked for more than 50,000 times”);
- 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 second prong should be understood such that 500 different songs, tracks, or clips, or 500 copies of the same track or clip, or a combination of the two, will suffice for criminal liability. Thus, for example, 250 songs or copies made of a single song, in combination with 25,000 “clicks” of just one song, would be sufficient under the fifth prong, since “more than half” of the amount for two of the first four categories would have been met. The Copyright Law should specify that “copy” includes a download, so that the Opinions do not become an impediment for right holders in bringing criminal cases against copyright violators on the Internet. In addition, the decision as to whether the threshold is met should be vested with the Procuratorate, rather than with the MPS or PSB, since reports indicate MPS and PSB have refused to accept cases on the basis of onerous evidentiary requirements. MPS and PSB do appear, however, to be investigating the illegal gains of website operators and collecting evidence directly from advertising platforms and agencies, which is a positive sign.

The entertainment software industry registers its frustration in the failure of the Chinese Government to bring criminal actions against manufacturers and distributors of pirated entertainment software and circumvention devices. 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 seizures 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 was 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.

Procedural Hurdles Against Foreign Right Holders in Civil, Administrative, and Criminal Proceedings: Some in industry have complained about discrimination between foreign and Chinese right holders. Hurdles involving notarization and legalization requirements for documents and powers of attorney, proving ownership or subsistence of copyright, and verifying documents created outside China, are extremely costly and burdensome. In China, the foreign copyright owner is required to submit not only the notarized and legalized power of attorney, but also a notarized and legalized copyright registration certificate and certificate of legal representative. All of these documents have to be translated by a qualified translation organization. Further, in some legal actions, the

⁵¹The motion picture industry regularly helps the authorities from this District with “title verifications” in order to prosecute such cases. The industry indicates an average of 10 prison sentences have been meted out annually against illegal audiovisual shop owners.

Chinese authorities are requiring software owners to obtain a certification of copyright in the software from the local copyright authority. In one case, a member publisher of the Association of American Publishers (AAP) brought suit against three different entities in China that were systematically republishing information from the publisher's proprietary database and related publications on a daily basis, and in direct competition with the publisher's own information service. Meeting the evidentiary burdens to prove the legitimate publisher's ownership of the infringed materials cost hundreds of thousands of dollars in legal fees. Unfortunately, the damages recovered were so small as to be non-deterrent, and represented only a fraction of the costs incurred by the publisher in bringing the actions.

Unavailability of Concurrent "Civil Claim" to a Criminal Prosecution: It has also been reported that there is a jurisdictional bar limiting foreign right holders from commencing a private "civil claim" against those being prosecuted for copyright crimes in local district courts. In the *51wma.com* case, despite the fact that the prosecutor initially invited sound recordings right holders to commence "incidental civil claims" against the defendant (the operator of an illegal music website) in the local district court, the Jiangsu Higher People's Court and the Suzhou Intermediate Court advised that jurisdiction to hear the civil claim rests with the Suzhou Intermediate Court because foreign right holders were involved. Therefore, it appears that foreign right holders cannot commence "incidental civil actions" (running together with the criminal proceedings) against a defendant at the local court level in practice. The law should be amended to allow foreign right holders to commence "incidental civil claims" against copyright offenders at the local level court.

COPYRIGHT LAW, REGULATIONS UPDATES

The Copyright Law of the People's Republic of China, subordinate regulations, judicial interpretations, various rules, and "opinions," provide the basis for copyright protection in China.⁵² In 2011, the Chinese Government launched a process to amend the Copyright Law, by which several groups, including two major universities (Renmin University and Zhongnan University) and the Chinese Academy for Social Sciences (CASS), have been asked to prepare drafts for NCAC to consider. IIPA views this process as an opportunity for the Government of China to take a leadership position throughout Asia and the world by adopting modern norms tailored to the challenges faced today by copyright creators, including Internet-based infringements (by addressing the proper role and responsibility of intermediaries or those indirectly involved with infringing activities), end-user piracy of business software, illegal

⁵²Currently, copyright is governed by the basic law, the Copyright Law of the People's Republic of China (as last amended in 2010) ("Copyright Law"). In October 2001, the Standing Committee of the National People's Congress adopted the "Decision to Amend Copyright Law of the People's Republic of China," thereby amending the 1990 Copyright Law of the People's Republic of China. Copyright Law of the People's Republic of China, Adopted at the Fifteenth Session of the Standing Committee of the Seventh National People's Congress on September 7, 1990, Amended in Accordance with "Decision to Amend Copyright Law of the People's Republic of China," Adopted at the Twenty-fourth Session of the Standing Committee of the Ninth National People's Congress on October 27, 2001. The Copyright Law was further amended in 2010 to make minor changes to come into compliance with a decision of a World Trade Organization Panel. See "The Decision of the Standing Committee of the National People's Congress on Amending the Copyright Law of the People's Republic of China, adopted at the 13th Meeting of the Standing Committee of the Eleventh National People's Congress on February 26, 2010, is hereby promulgated and shall go into effect as of April 1, 2010," in Order of the President of the People's Republic of China No. 26. Implementing Regulations were issued on August 2, 2002 (effective September 15, 2002). Implementing Regulations of The Copyright Law of the People's Republic of China Issued by Premier Zhu Rongji on August 2, 2002, effective as of September 15, 2002. The 1991 Implementing Regulations were thereby abolished. Since the 2001 revision, very few changes have been made to the basic law (the Copyright Law) and no changes have been made to the Implementing Regulations. The Copyright Law was amended by, among other changes, replacing the original Article 4 with the following: "Copyright owners should not exercise their copyrights in a manner that violates the Constitution or relevant laws, or harms the public interests. The country will supervise publication and distribution of the works in accordance with law." Copyright protection in China cannot be understood fully, however, without reference to other basic laws, and a web of ancillary regulations, rules, judicial interpretations, and opinions, all of which inform Chinese Government agencies having purview over various aspects of the copyright system in China, and the courts. Copyright protection in China has evolved since 2001 through the passage of other basic laws, such as the Criminal Law of the People's Republic of China (1997), which established crimes of copyright infringement in Articles 217 and 218, and through the issuance of other regulations, judicial interpretations, rules, and opinions. Among the most important of the ancillary laws for interpretation and understanding of the current Copyright Law are: 1) State Council Regulations for the Protection of the Right of Communication through Information Network (effective July 1, 2006) ("Network Regulations"); 2) Supreme People's Court Interpretation Concerning Some Issues Concerning Application of Law in Cases Involving Computer Network Copyright Disputes (Second Revision) (2006) ("Network JIs"); 3) NCAC Copyright Administrative Punishment Implementation Rules (effective June 15, 2009); and 4) Interpretations of the Supreme People's Court concerning the Application of Laws in the Trial of Civil Disputes over Copyright (2002). Criminal copyright protection has also evolved through the issuance of ancillary regulations, judicial interpretations, and opinions, including: 1) Interpretation by the Supreme People's Court and the Supreme People's Procuratorate on Several Issues of Concrete Application of Law in Handling Criminal Cases of Infringing Intellectual Property Rights (I) (2004); 2) Interpretation by the Supreme People's Court and the Supreme People's Procuratorate on Several Issues of Concrete Application of Law in Handling Criminal Cases of Infringing Intellectual Property Rights (II) (2007); 3) Supreme People's Court, Supreme People's Procuratorate and Ministry of Public Security Opinions on Certain Issues Concerning the Application of Laws for Handling Criminal Cases of Infringement of Intellectual Property Rights (issued January 11, 2011) ("2011 Criminal Opinions"); and 4) Opinions on the Timely Transfer of Suspected Criminal Cases Encountered in the Course of Administrative Law Enforcement.

camcording, and others. The following is a summary of IIPA's recommendations for changes to the Copyright Law of the People's Republic of China:

- **Technological Protection Measures (TPMs):** The structure of the Network Regulations should be carried into the Copyright Law of the People's Republic of China, with
 - 1) express prohibition of trafficking in (and servicing in) circumvention "technologies, devices, or components" as in Article 4 of the Network Regulations;⁵³
 - 2) coverage of all access controls and copy controls;
 - 3) adoption of objective criteria for proving the improper purpose of a device or service;
 - 4) ensuring exceptions are narrowly tailored;
 - 5) deleting the "knowingly" or "intentionally" standard of proof; and
 - 6) creating a structure by which circumvention or trafficking in (or servicing in) circumvention devices, technologies, or components can lead to criminal liability.

- **Internet Liability Including Liability of Intermediaries:** The legal principles in the Civil Law for joint tort liability or "contributory infringement liability" should be carried forward into the Copyright Law, with express clarification that the applicable knowledge standard includes constructive knowledge (notice and/or "red flag" knowledge),⁵⁴ as well as actual knowledge. The notice and takedown provisions from the 2006 State Council Network Regulations and the 2006 Supreme People's Court Network JI should be adopted in the Copyright Law, with certain improvements and clarifications.⁵⁵ Finally, the law should provide for effective and fair provisions related to ISPs regarding non-hosted infringements and dealing with repeat infringers. For example, there should be:
 - 1) confirmation that ISPs are liable for searching or linking activities under Article 23 if they know or have constructive knowledge (notice and/or "red flag" knowledge) of such linking activities, and clarification that the mere fact that an ISP takes down a specific URL or link to a work or other subject matter should not exempt it from liability for other instances of infringement of the same work or subject matter of which the ISP has actual or constructive knowledge (notice and/or "red flag" knowledge), about the occurrence on its network/platform;
 - 2) confirmation that ISPs are liable for network storage activities under Article 22 if they know or have constructive knowledge (notice and/or "red flag" knowledge), of such network storage activities;
 - 3) confirmation, in adopting Articles 22 and 23 of the Network Regulations, that knowledge or constructive knowledge (notice and/or "red flag" knowledge) on the part of an ISP with respect to linked material or hosted/"network stored" is an independent basis for liability (from a notice and failure to comply);⁵⁶
 - 4) confirmation of the criteria on knowledge (other evidence apart from the notice and failure to comply) or constructive knowledge (e.g., notice and/or "red flag" knowledge);
 - 5) confirmation that takedowns following notices⁵⁷ must be at longest within 24 hours,⁵⁸ but should be taken "immediately," consistent with the Beijing Copyright Bureau's Guiding Framework on the Protection of Copyright for Network Dissemination, and the law should provide that where the notice indicates the infringing work is being made available illegally in advance of its legitimate release (i.e., pre-release), the takedown window should be no longer than two hours from receipt of the notice;

⁵³Devices are covered in the Network Regulations, as are services ("[n]o organization or no person shall intentionally ... provide for other persons technological services designed for the purpose of circumventing or sabotaging technological measures"). However, this coverage apparently only applies to the extent a TPM protects the exclusive right of "transmission via information network." The Network Regulations broadly cover circumvention "technologies, devices, or components." These improvements should be carried over into the Copyright Law. See *State Council Regulations for the Protection of the Right of Communication through Information Network* (effective July 1, 2006), Art. 4 ("Network Regulations").

⁵⁴"Red flag" knowledge should be understood as having awareness of facts or circumstances from which infringing activity is apparent.

⁵⁵Industry reports that the "safe harbor" in China, established by Article 23(4) of the Network Regulations, and under which an ISP is immune from liability if it removes the links to the infringing work, performance, and audio or video products upon receiving notice from the right owner, creates a huge loophole for online infringers, and should not be carried into the new Copyright Law without improvements.

⁵⁶For 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.

⁵⁷It is also of critical importance to clarify that electronic mail notices are adequate.

⁵⁸The January 20, 2010 *Declaration on Content Protection* contains the principle that takedowns should be accomplished within 24 hours.

- 6) confirmation that ISPs that fail to immediately take down sites following compliant notices from rights holders are subject to administrative fines;
- 7) NCAC easing of the onerous evidentiary requirements necessary to provide a compliant notice;⁵⁹
- 8) either the swift issuance of a JI, or the clarification through amendments to the Copyright Law, to follow through on the commitment to “make clear that those who facilitate online infringement will be equally liable for such infringement.”

- **Temporary Copies:** The amendments to the Copyright Law should confirm that the reproduction right includes the right to control temporary digital storage of works and other subject matter, and that such transient reproductions are covered under the reproduction right. This could be accomplished, for example, by interpreting the term “reproduction” in Article 10(5) (or in a separate definition) to include copying of works and other subject matter “in any manner or form,” by “digital or non-digital means” (as was originally contemplated), and by adding the critical language “whether temporary or permanent.”⁶⁰ It should also be confirmed that this reference to reproduction will be applied in Article 38 (for performers) and 42 (for producers of sound recordings), *mutatis mutandis*.
- **Broad Right of Communication to the Public, Including Broadcasting, Making Available Right:** Articles 10(12), 38(6) and 42 should be amended to provide a full “communication to the public” right including the “broadcasting”, “public performance” and “making available” right for works, performances, and sound recordings.
- **Provide Adequate Rights in Broadcasts, Including Sporting Events:** 1) The current Copyright Law, in Article 3(6), should be amended to add the clause, “and other audiovisual works, including sporting events.” Certain conforming changes would also need to be made, e.g., to Articles 10(7) and 10(10). 2) Article 44 should be added to include a full communication to the public right, including a right of making available (i.e., a right to control broadcasts “over information networks”). In addition, a right to prohibit the unauthorized simultaneous retransmission of broadcasts over the Internet should be added, e.g., by including the language “any radio station, television station shall have the right to prohibit re-broadcasting or retransmission of any radio or television programs it broadcasts on the Internet without its consent.”⁶¹
- **Compensatory Damages:** Article 49(1) of the Copyright Law should be amended to include the possibility for “additional damages” to be awarded by the court, taking into account all relevant factors, including the defendant’s willfulness and recidivism, and multipliers for damages (e.g., treble damages) in case of recidivists.
- **Statutory Damages:** Article 49(2) should be amended to raise the maximum statutory damages to at least RMB1 million, with an “intentional” or “repeat” infringer subject to double or triple this amount or all losses of right holders, whichever is higher, as a maximum. In addition, a minimum of 10,000 Yuan should be specifically

⁵⁹Unfortunately, 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.

⁶⁰The regulations should also refer to copies “in any manner or form” and “in whole or in part.” To the extent the drafters are considering what exception or limitation may be appropriate as regards certain temporary copies, reference can be made to Article 5.1 of the European Union Information Society Directive, which provides in relevant part,

Temporary acts of reproduction ... which are transient or incidental and an integral and essential part of a technological process and whose sole purpose is to enable [either] a [lawful] transmission in a network between third parties by an intermediary, or ... a lawful use of a work or other subject-matter to be made, and which have no independent economic significance, shall be exempted from the reproduction right.[brackets added]

⁶¹ Article 44 should be amended as follows:

Article 44 A radio station or television station that broadcasts a sound recording may do so without the authorisation from, but shall pay remuneration to, the copyright owner, the performer and the producer. The right to receive remuneration enjoyed by copyright owners and performers may not be waived, and the rights shall be exercised by collective management organizations entrusted by the copyright owners and performers, or producers of sound recordings or video recordings.

The State Council or the administrative department of the State Council may formulate the specific measures for payment of remuneration if it is absolutely necessary.

provided per work, or preferably, per copy. Statutory damages should be available upon the election of the right holder. The law should provide that the market price of the work or other subject matter should be taken into account when determining pre-established damages.

- **Repertoire-wide Injunctions Should Be Available:** The Copyright Law should provide repertoire-wide injunctions to right holders as an effective remedy against large scale copyright infringement.
- **Criminal Liability Against Copyright Infringement Prejudicially Affecting Right holders:** The Copyright Law should be amended to clarify that copyright infringement which affects prejudicially the interests of copyright holders should be subject to criminal liability under Article 217 and 218 of the Criminal Law even if it is not for a profit-making purpose.
- **Prohibit Camcording of Audiovisual Works in Cinemas:** The Copyright Law should be amended to add as a violation of law the use of, or attempt to use, an audiovisual recording device to make or transmit a copy of a cinematographic work or other audiovisual work, or any part thereof, from a performance of such work in an exhibition facility. Anyone committing this act should be subject to civil, administrative, and criminal remedies.
- **Protection of Computer Programs:** 1) The State Council Regulations on the Protection of Computer Software should be fully integrated into the Copyright Law, so that software is protected fully under the Copyright Law and to avoid the need in the future for judges and administrative agencies to refer to both the basic law and ancillary regulations; and 2) The definition of computer program should be modernized so it is consistent with international treaties and best practices.
- **Functional Use of Computer Program:** The amendments to the Copyright Law should confirm that the functional use of a computer program should be deemed as a type of reproduction and thus unauthorized functional use of a computer program constitutes infringement of copyright, which may give rise to administrative, civil, or criminal liability. The Judicial Interpretation on Trial of Cases over Copyright Dispute issued in 2002 has confirmed the civil liability of unauthorized functional use of copyrighted computer program.
- **Provide Civil, Administrative, and Criminal Liability Against Unlicensed Use of Business Software:** 1) The Copyright Law should be amended to include confirmation that unlicensed use of software is the equivalent of unlawful reproduction under the Copyright Law, and therefore subject to civil and administrative liability under Article 48 of the Copyright Law, and criminal liability under Articles 217 and 218 of the Criminal Law, including the pre-installation by the distributors or use by any end users; infringement “for profit” should be clarified to include both direct and indirect economic benefit from the unlicensed use. 2) The SPC and SPP should issue a JI clarifying that end-user piracy of software is subject to criminal penalties and make corresponding amendments to the Criminal Code and the Copyright Law and case referral rules for the MPS and SPP as needed.
- **Provide Criminal Liability Against Pre-Installation of Unlicensed Software, Sound Recordings, or Other Copyright Material (Hard-Disk Loading):** The unauthorized loading of software, sound recordings, or other copyright material onto a computer should explicitly be made subject to criminal liability under Articles 217 and 218 of the Criminal Law.
- **Provide for a Reasonable Standard for Issuance of Ex Parte Orders, a 48-Hour Order Decision from “Receipt” of an Application, and Penalties for Refusal to Follow Such an Order:** 1) The evidentiary threshold for the acceptance of petitions for *ex parte* evidence preservation actions should be a “reasonable likelihood of infringement” standard, and petitions for evidence preservation should be reviewed and conducted by the same tribunal, preferably by the IP tribunal of handling courts, and it is critically important that case acceptance tribunals not serve complaints on defendants prior to the execution of evidence preservation measures. 2) Article 51 of the Copyright Law should be amended to provide that “the People’s Courts must decide on an application for evidence conservation within 48 hours after *its receipt*” [emphasis added], and

should be required to “issue formal written decisions or orders for rejection or approval of the applications.” In case of rejection, the applicants should be entitled to an appeal or petition against the court’s decision through a formal and timely proceeding. 3) The Copyright Law and Civil Procedure Law should ensure that defendants who refuse or resist cooperating in evidence collection and conservation shall be liable with availability at least of administrative and civil remedies. 4) Article 15 of the Copyright Administrative Punishment Implementation Rules should be amended to provide that “a respondent shall not resist or obstruct enforcement officials from entering the premises and evidence inspection,” on penalty of administrative remedies, or where such resistance is a crime, criminal procedures.

- **Extend Term of Protection:** Copyright protection in China in works and other subject matter should be extended to life of the author plus 70 years, or 95 years for works whose term is calculated from publication (or 120 years from creation, whichever is shorter).⁶²
- **Administrative Enforcement Issues:** 1) NCAC’s authority to prevent copyright infringement should be paramount and not limited by the “prejudices the public interests” or “serious” thresholds as set forth in Article 48 of the Copyright Law, Articles 36 and 37 of the 2002 Implementing Regulations, and as interpreted in the Administrative Punishment Rules. In the least, the thresholds should be significantly relaxed. Confiscation of “the materials, tools and instruments mainly used” to produce infringing copies should not be subject to the threshold for “serious” infringements as interpreted in the Administrative Punishment Rules. 2) The Copyright Law should be amended to expressly provide that during the handling of cases involving copyright infringement, evidence collected by the copyright administrative authority shall have equal effect with respect to evidence obtained under notarization. Article 2 (validity of evidence collected and acquired by the administrative enforcement authority during the handling of criminal cases involving infringement upon intellectual property rights) of the Opinions of the Supreme People’s Court, the Supreme People’s Procuratorate and the Ministry of Public Security on Some Issues concerning the Application of Law for Handling Criminal Cases of Infringement upon Intellectual Property Rights, should be added as an article under the Copyright Law. 3) Administrative enforcement of copyright should be headed by NCAC but with the resources of all the other agencies at its disposal. 4) The Copyright Law revision should be used as an opportunity to ensure right holders have a right to information and appeal of decisions (or non-decisions) related to right holder complaints seeking administrative enforcement, and to set a clear time limit for administrative enforcement after the filing of a complaint by a right holder. 5) Administrative remedies should be restructured so they can act as a deterrent, including by increasing the amounts of administrative fines, providing minimum fines, doubling fines for intentional infringements and recidivism, and providing transparency and accountability in law enforcement through publishing administrative penalty decisions, e.g., on a website, as well as clarifying the liabilities of law enforcement authorities for nonfeasance and misconduct. 6) Administrative punishment decisions against those who infringe copyright should be published and accessible to the public, such as publication via the website of the administrative authorities.
- **Provide a Berne-Compatible Presumption of Ownership and Subsistence of Copyright:** Article 11(4) of the Copyright Law should be amended to provide that “in the absence of evidence to the contrary, the citizen, legal person or other organization that puts his or its name to a work, as well as the producer explicitly listed in a film and television work, shall be deemed to be the author thereof, and copyright-related manuscripts, master copies, lawful publications, work registry certificates, copyright contract registry certificates, proof provided by authentication organs, contracts of acquisition of rights, as well as infringing reproductions obtained by way of

⁶²Extending term of protection will be good for China since: 1) it will avoid older Chinese works from entering the public domain; 2) it will help economically legitimate distributors, local businesses, cinemas, video retailers and other stores associated with the distribution of copyright works, as well as creators who depend on copyright protection for their livelihoods, and who could lose market share due to shorter copyright terms; 3) it will also avoid the unfortunate situation in which Chinese works and other subject matter would be discriminated against in the future, since those Chinese works falling out of protection in China might also fall out of protection in other countries by virtue of the “Rule of the Shorter Term” (while foreign works from countries enjoying longer terms would remain in protection in those countries). Finally, studies have shown that term extension correlates with greater creative activity, e.g., in the audiovisual area. In other words, longer terms may contribute to greater local creation of works, leading to more economic activity related to such works, and greater cultural diversity. We strongly believe copyright term extension is in China’s economic and cultural interests.

ordering, buying on the spot etc., by the parties or their entrusted persons and acquired objects, invoices etc, will constitute evidence of authorship.”

- **Apply the “Presumption of Fault” (Article 52) to Infringements Involving Communication to the Public, Making Available (i.e., Over Information Networks):** Article 52 helpfully indicates that for most infringements, if the one alleged to have infringed cannot show that there is a legal license to engage in the act, legal liability will result. Article 52 should be amended to add a provision that any person who fails to prove that his communication to the public or making available of works or other subject (e.g., by an information network) is duly authorized by the copyright owner shall be liable for any and all legal liability thereof.
- **Costs and Attorney’s Fees:** The Copyright Law should be amended to ensure that Articles 47 through 56 of the Copyright Law provide that costs of litigation and attorney’s fees are fully recoverable in addition to adequate compensation to redress the damage suffered by the right holder. In particular the law should clearly provide that such recoverable costs should be calculated separately from the damages. This will ensure that China can meet its requirements under Article 45.2 of the TRIPS Agreement (“The judicial authorities shall also have the authority to order the infringer to pay the right holder expenses, which may include appropriate attorney’s fees”).
- **Statutory Licenses, Including Article 23 of the Copyright Law and Article 9 of the Network Regulations, and Exceptions and Limitations:** 1) China should delete the Article 23 compulsory license provision or at least it must be confirmed in the amendments that Article 23 does not apply to foreign works or foreign subject matter. 2) Certain unclear or overbroad aspects of Article 9 of the Network Regulations should be clarified or further amended, particularly, coverage should be clarified such that it does not to apply to any copyrighted material of foreign origin (even if the rights are held by a Chinese entity), to avoid TRIPS incompatibility. 3) Exceptions and limitations (e.g., in Article 22 of the Copyright Law and Articles 6 and 7 of the Network Regulations) should be re-examined to ensure they fully meet TRIPS Article 13 and the Berne three-step test, and the three-step test should be expressly provided for in the revision to the Copyright Law, to ensure that blatant piracy activities (e.g., large, scale commercial operations involved in medical journal piracy, or state-run libraries offering document delivery services) cannot pass as acceptable under any existing exception in the law. Also, it should be confirmed that Article 22 cannot be relied upon to shield television producers who use long portions of films or TV shows on their programs or on the Internet without permission of the right holders.
- **Rights Management Information:** China should carry into the Copyright Law the RMI protections found in the Network Regulations (*cf.* Network Regulations, Articles 5, 18), adding the third prong for liability (for “distributing or importing for distribution RMI knowing or having reasonable grounds to know that the rights management information has been removed or altered without authority”), and providing for the possibility of criminal liability, e.g., under Article 225 of the Criminal Law for “illegal business operations.”
- **Confirm Remedies Against Signal Theft:** The Copyright Law revision should also include the prohibition (including civil, criminal, and where applicable, administrative remedies) against: 1) the trafficking or servicing in a tangible or intangible technology, device, or system, knowing (or having constructive knowledge) that the device or system is primarily of assistance in decoding an encrypted program-carrying satellite or cable signal without the authorization of the lawful distributor of such signal; 2) the receipt and use of (including viewing of the signal, whether private or commercial) a program-carrying signal that originated as an encrypted satellite or cable signal knowing or having reason to know that it has been decoded without the authorization of the lawful distributor of the signal; and 3) the further distribution (including to the public and in public places, or over the Internet) of a program-carrying signal that originated as an encrypted satellite or cable signal knowing (or having constructive knowledge) that it has been decoded without the authorization of the lawful distributor of the signal, or if decoded with authorization, the further unauthorized distribution (including to the public and in public places, or over the Internet) of the signal for purposes of commercial advantage.

Criminal Law and Related Ancillary Regulations, Etc.: IIPA has contended for many years that a credible criminal remedy in China (under Articles 217 and 218 of the Criminal Law and accompanying Judicial Interpretations)

is needed to effectively curtail piracy and related violations in all their forms. Remaining gaps include thresholds that are too high (in the case of illegal income) or unclear (e.g., in the case of the copy threshold), proof requirements that may leave some critical commercial scale infringements without a remedy (e.g., the requirement to show that the infringement is carried out “for the purpose of making profits” which is undefined and in certain circumstances it is difficult for law enforcement authorities or right holders to prove that the infringer is operating for the purpose of making profits), the failure to cover all piracy on a commercial scale as required by TRIPS Article 61, the failure to separately define criminal violations related to the WCT and WPPT (e.g., violations involving TPMs), the limited criminal accomplice liability with respect to imports and exports (with lower penalties available), and uncertainties with respect to repeat offenders (the 1998 JIs included repeat infringers but were inadvertently not included in the 2004 JIs). The January 2011 *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* set out some important elements for Internet and related criminal cases and help clarify and address other ongoing issues related to criminal liability in China.⁶³ 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 one-click hosting sites 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 deep links, and that the Opinions can address 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 (“[o]ther circumstances that make profits by taking advantage of others’ works”) will be interpreted. It is important to note that

⁶³IIPA 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/>. See also 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.watsonband.com.cn/news/detail?id=182&language=en_US. 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 [“binding a third party’s works with other person’s works”];
 - Directly or indirectly charging fees for transmitting [“disseminating”] 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 transmitting [“disseminating”] others’ works via an information network to members; and
 - Other circumstances that make profits by taking advantage of others’ works [“Other circumstances that make profits by taking advantage of other’s works”].
- 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....”
- 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 (US\$7,585);
 - disseminating over 500 copies of third parties’ works [“aggregate quantity of others’ works being transmitted is more than 500 pieces”]; (NOTE: The recording industry indicates 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 [“[w]here others’ works being transmitted has been actually clicked for more than 50,000 times”];
 - 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.

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 of 25,000 downloads, for criminal liability, or as another example, in the case of a membership site, proof of 500 members combined with proof of dissemination of "250 copies."

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.

TRIPS/Berne Obligation to Pay for Broadcasts of Musical Compositions: China has long been in violation of its TRIPS/Berne Convention obligation to compensate copyright owners for the broadcast of musical compositions.⁶⁴ 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 2008.⁶⁵ 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.

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 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;⁶⁶ a discriminatory and lengthy censorship system (which further opens the door to illegal content); restrictions on the ability to engage fully

⁶⁴The recording industry 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.

⁶⁵*On Screen Asia, China in Focus*, April 1, 2009, at <http://www.onscreenasia.com/article-4897-chinainfocus-onscreenasia.html>.

⁶⁶For example, Hong Kong and foreign companies may not invest in any publishing or importing businesses for audio-visual products in mainland China.

in the development, creation, production, distribution, and promotion of music and sound recordings;⁶⁷ and the continued inability to fully engage in the import and export, distribution, and marketing online of published materials in China. Furthermore, Chinese law continues to prohibit foreign enterprises and foreign-invested enterprises (FIEs) from participating in publishing activities 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,⁶⁸ the inability to import (except through a Chinese-controlled monopoly) and distribute (except through a two Chinese-controlled duopoly) films for theatrical release, a screen-time quota for foreign theatrical distribution and foreign satellite and television programming, an onerous master contract imposing terms for foreign film distributors, blackout periods for films, local print requirements, foreign investment restrictions, restrictions on retransmission of foreign TV satellite channels, broadcast quota limitations, and onerous import duties, among many other barriers,⁶⁹ all of which close off the market for U.S. produced films and programming. An onerous ban on the manufacture, sale and importation of videogame consoles remains a major barrier. 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. 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 software and other technology 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.

The WTO case decision in 2009 will hopefully help address some issues with respect to access to the Chinese market for U.S. music, movies, and books, but other fundamental issues as to these products, and many issues for other industries (several of which are discussed below), remain unresolved.

WTO Case Implementation Needed Urgently: 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.⁷⁰ This landmark WTO case requires 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 a WTO Panel 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 books and periodicals, electronic publications, audiovisual materials and sound recordings, including through sound recording distribution services and electronic distribution products in China.⁷¹

⁶⁷For 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 very few 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.

⁶⁸The impact of the “quota system” in China on the independent segment of the film and television industry is particularly damaging because most often the independent film producers 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.

⁶⁹See Motion Picture Association of America, *Trade Barriers to Exports of U.S. Filmed Entertainment, China*, October 2011.

⁷⁰*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.org>. 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).

⁷¹Specifically, 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.

- discard discriminatory commercial hurdles for imported reading materials, sound recordings intended for electronic distribution, and films for theatrical release.⁷²

In ongoing consultations over implementation of the WTO decision, the United States should seek to ascertain what the Chinese Government is doing to address WTO-incompatible restrictions and take other market-opening steps, specifically including:

1) how Chinese laws have been changed 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, and in particular, any steps being taken to amend the Foreign Investment Catalogue to eliminate the prohibition on foreign investment in the import of films for theatrical release, DVDs, sound recordings, and books, newspapers, and periodicals;

2) steps being taken to provide a simple process for foreign enterprises to notify and exercise their publication importation rights, and confirm that certain parts of the Regulations on Administration of Publishing (for example, Article 42) do not create new requirements on foreign enterprises to exercise their importation rights as to publications;

3) how Chinese laws provide market access to, and do not discriminate against, foreign companies wishing to engage in wholesale, master distribution (exclusive sale) of books and periodicals, as well as electronic publications, and allow the participation of foreign capital in a contractual joint venture engaged in the distribution of reading materials or audiovisual home entertainment products;

4) how Chinese laws allow foreign-invested enterprises to engage in the distribution of imported reading materials;

5) how Chinese laws ease commercial presence requirements for the distribution of DVDs; and do away with China's 15-year operating term limitation on foreign joint ventures;

6) how Chinese laws discard discriminatory commercial hurdles for imported reading materials, sound recordings intended for electronic distribution, and films for theatrical release, and in particular, how the laws avoid: improperly and discriminatorily limiting distribution for imported newspapers and periodicals to "subscriptions"; limiting such materials and other reading materials to Chinese wholly state-owned enterprises; and limiting the distributor of such reading materials to a State-owned publication import entity particularly designated by a Government agency; and

7) how the recently-revised GAPP rules on imported subscription publications ease the ability for persons in China to subscribe to imported publications, including those in the so-called "non-limited category," and how an individual wanting to subscribe to an imported publication may submit a subscription application to the publisher or distributor directly.

It is well past the time for the market access WTO decisions to be meaningfully implemented, in order to provide redress to the publishing, audiovisual, music, and other industries, and open access to the Chinese markets for their goods and services. Specifically, the March 19, 2011 deadline for full implementation has long passed. IIPA views it as critical that the U.S. Government urgently take proactive steps to ensure full Chinese Government implementation of its commitments, as well as ceasing discrimination of foreigners in the distribution of music online

⁷²For 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. China may also not prohibit foreign-invested enterprises from engaging in the distribution of imported reading materials.

and lifting the restrictive monopoly/duopoly for foreign theatrical film importation into and distribution in China (both discussed below).

Discriminatory Censorship Practice With Respect to Sound Recordings (and AV Works): For several years, IIPA has complained that U.S. (and other foreign) right holders in music have to go through a different, and discriminatory, censorship review process from Chinese right holders with respect to online music. While the WTO Panel and Appellate Body, in a technical finding, concluded that they lacked sufficient information to determine whether this discriminatory censorship regime with respect to online music violated China's GATS commitments, this was not a "green light" for the Chinese Government to continue its discriminatory censorship practices. China's discriminatory regime is unfair and highly suspect under WTO rules. Promulgation of the September 2009 Circular on Strengthening and Improving Online Music Content Examination only exacerbated and complicated the issue by putting into place a censorship review process premised on an architecture ruled to be in violation of China's GATS commitments, namely, that only wholly-owned Chinese digital distribution enterprises may apply for censorship approval.⁷³ The Circular violates China's WTO commitments under the General Agreement on Trade in Services (GATS) to provide nondiscriminatory market access for foreign suppliers of sound recording distribution services; it violates China's commitments on trade in goods under the General Agreement on Tariffs and Trade 1994 (GATT); and it violates China's Accession Protocol commitment to authorize trade in goods by any entity or individual. China must revoke or modify the Circular to avoid making the country subject to an immediate challenge at the WTO. A set of newly amended *Measures on the Administration of Importation of AV Products* (2011), introduced a new definition for the term "publication of audio-video product" to include dissemination via Information Network. As a result, the *Measures* impose an additional, duplicative, and possibly confusing layer of censorship on online music.

Import Monopoly and Distribution Duopoly for Films/Master Contract: While the WTO Panel and Appellate Body concluded that the China Film Group duopoly did not constitute a "measure," and cited the lack of evidence that a third distributor had been denied upon an application from operating in the Chinese market, the decisions equally make clear that if a *de facto* duopoly exists as to foreign films only, China would be in violation of its WTO obligations. The decisions confirm that, to be consistent with WTO rules, China must approve legitimate applications for other theatrical film importers and distributors in China, a key step that 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. Furthermore, such approval of other importers and distributors of foreign films in China along with the corresponding importation rules and processes should be applied in a transparent, timely, non-discretionary and non-discriminatory manner.

Indigenous Innovation Policy: 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 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 shares these concerns and strongly believes that the best ways for China to further enhance its innovative capacity are to: further open its market 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. The latest developments include the Chinese Government's announcement that they would be investing US\$1.7 trillion over the next five years in what are being dubbed "Strategic Emerging Industries" (SEIs). This initiative, on top of a Supreme People's Court Opinion on IP released in mid-December 2011 which seems to instruct lower courts to make decisions that assist domestic "cultural" industries, once again raise the specter of discriminatory policies.

⁷³The Circular also contains the discriminatory requirement of having an "exclusive license" for foreign sound recordings. This onerous and discriminatory requirement should be removed to allow foreign record companies to freely choose their licensees and the scope of their licenses in China.

The 2011 JCCT outcomes included a commitment by the Chinese Government to eliminate by December 1, 2011 any catalogues or other measures by provincial and municipal governments and autonomous regions linking innovation policies to government procurement preferences. This follows 2010 JCCT, 2011 Obama-Hu Summit, and May 2011 S&ED statements and commitments by the Chinese government to “delink” innovation policies from government procurement, including a clear commitment in the recent S&ED to “eliminate all of its government procurement indigenous innovation products catalogues.” We are hopeful that these developments will be permanent.

Software Procurement Preferences: The business software industry remains concerned that China’s efforts to legalize software use in government agencies and SOEs may be accompanied by mandates or preferences favoring the acquisition of Chinese software over non-Chinese software. This is inconsistent both with China’s efforts to join the WTO’s Government Procurement Agreement and with China’s commitment in its WTO working party report that the government “would not influence, directly or indirectly, commercial decisions on the part of state-owned or state-invested enterprises, including the quantity, value or country of origin of any goods purchased or sold” The Chinese government should, consistent with its WTO and JCCT obligations, refrain from instructing or encouraging government agencies or SOEs to implement preferences for Chinese software in carrying out its legalization efforts, and should communicate this policy to relevant government agencies at the central, provincial and local levels.

Local IP Ownership Requirements for Information Security Products Including Software: The Business Software Alliance reports that the “Multi-level Protection Scheme on Information System Security” (MLPS) sets major restrictions on procurements of software and other information security products for an overly broad range of information systems the government considers sensitive. Among other requirements, procurements of such products are limited to those with IP rights owned in China. This applies to procurements by the government and increasingly to procurements by SOEs and others in the public sector. IIPA is concerned that this Scheme defines “critical infrastructure” in too broad a way, thus restricting foreign cyber-security products from the Chinese market based on nationality of the owner of the IP.

Delays in Content Review of Entertainment Software Products/Ban on Consoles: The entertainment software industry continues to face lengthy delays of weeks or sometimes even months in the GAPP censorship approval process, wiping out the already-short window for legitimate distribution of entertainment software products. The Chinese Government also fails to immediately seize infringing copies of titles intended for release while they are still undergoing censorship review, resulting in inadequate protection and enforcement. In addition, an onerous ban on the sale and importation of videogame consoles remains a major barrier. The current ban on the 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 and denies Chinese consumers the benefits of these technologies, including use of parental controls. The ban has also been extended 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.

Barriers for the Independent Film Industry: The independent film industry continues to experience limited access to the Chinese marketplace, especially for theatrical distribution since independent product is virtually never accepted for revenue-sharing under the existing 20 foreign film quota system. Nevertheless, even when films are imported and theatrically distributed in China (on a flat-fee distribution basis), both the financial return and the license fees for the underlying films are massively eroded by the lack of qualified theatrical distributors who can adequately support a nationwide theatrical release and the imposition of non-negotiable license terms which do not reflect a truly competitive marketplace with fair access for U.S.-based licensors. Additionally, China’s nontransparent censorship process for films creates uncertainty with commercial transactions and poses a significant market access barrier to independent film companies. Local distributors have reported the inability to obtain official written responses from the censorship authorities and have used a film’s censorship rejection as a way to avoid payment of license fees.

TRAINING AND PUBLIC AWARENESS

Once again in 2011, MPA and BSA were active in training and awareness programs throughout China. MPA China offers and/or participates in approximately 10 training sessions each year involving various government agencies and trade associations, which in this year included: 1) Annual Greater China Law Enforcement Seminar; 2) Judges Training on Internet Content Protection; 3) Training for Cultural Law Enforcement Agencies in Beijing and Shanghai; 4) Anti-Camcording Trainings for Theater Owners organized by CFDEA, and many other government and industry events, including a year-end training in November 2011 to alert theater professionals of the high risk for camcording during the year-end holiday movie season. Overall the industry reached over 300 Chinese Government officials throughout the year.

BSA conducted: 1) “audit tool trainings” in Shenzhen (for five judges from the local court in April 2011) and Qingdao (for ten officials from the Qingdao Copyright Administration at the end of October 2011), to promote the use of such tools in administrative and civil actions involving end-user piracy of business software; 2) the “Create Genuine Hub” program to promote legal software usage; 3) the launch of the Software Asset Management (SAM) Advantage Program; 4) a BSA-organized training for the Computer Program Centre of China (CPCC) on “SAM ISO Standard and SAM Processes” for the “NCAC SAM Pilot Program for 30 companies”; 5) a direct marketing campaign to educate enterprises on the legal risk of using pirated software; 6) assistance to five companies in Kunshan to successfully implement a pilot SAM program; and 7) an IDC program to launch the white paper, “Security Risks of Pirated Software.” In 2010 and again in 2011, BSA also organized over 300 enterprise legalization and SAM trainings in Beijing, Shanghai, Guangzhou, Shenzhen, Qingdao, and Nanjing, SAM training for 100 central SOEs and 80 financial companies in Shanghai, and provided SAM tools for a free trial for 10 financial companies.

Four training seminars were organized or co-organized by the recording industry and foreign copyright owners in Beijing, Fujian, Hubei and Shandong. More than 300 attendees included judges, prosecutors, law enforcement, academics, and Internet service providers, on a variety of topics such as criminal punishment of Internet piracy cases, copyright protection in the P2P environment, and the proposed copyright law amendments.