INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE®

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June 3, 2010

Submitted via EDIS
Marilyn Abbott
Secretary to the Commission
United States International Trade Commission
500 E Street, NW
Washington, DC 20436

Re: China: Intellectual Property Infringement, Indigenous Innovation Policies, and Frameworks for Measuring the Effects on the U.S. Economy, Pre-Hearing Brief and Statement, Investigation No. 332-514, 75 Fed. Reg. 25883 (May 10, 2010)

Re: China: Effects of Intellectual Property Infringement and Indigenous Innovation Policies on the U.S. Economy, Pre-Hearing Brief and Statement, Investigation No. 332-519, 75 Fed. Reg. 30060 (May 28, 2010)

Dear Ms. Abbott:

The International Intellectual Property Alliance (IIPA) hereby submits this Pre-Hearing Brief/Statement in furtherance of our Request to Appear at the Public Hearing regarding the above-referenced ITC Investigations.

Please let us know if you have any questions, and we look forward to participating in this proceeding. Thank you in advance.

Sincerely,

Michael Schlesinger

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Pre-Hearing Brief/Statement of Michael Schlesinger International Intellectual Property Alliance (IIPA)

China: Intellectual Property Infringement, Indigenous Innovation Policies, and Frameworks for Measuring the Effects on the U.S. Economy

Investigation No. 332-514, 75 Fed. Reg. 25883 (May 10, 2010)

China: Effects of Intellectual Property Infringement and Indigenous Innovation Policies on the U.S. Economy

Investigation No. 332-519, 75 Fed. Reg. 30060 (May 28, 2010)

Before the International Trade Commission June 15, 2010 (Submitted June 3, 2010)

Good morning. My name is Michael Schlesinger, and I am appearing today on behalf of the International Intellectual Property Alliance (IIPA), a coalition of seven trade associations representing the U.S. copyright industries.[1] I am pleased to have this opportunity to share with you the perspectives of the U.S. creative industries on the two investigations being undertaken by the ITC regarding the effects of intellectual property infringement and indigenous innovation policy in China. Following these hearings and in connection therewith, IIPA will be submitting more comprehensive information regarding these issues in our post-hearing brief and other subsequent filings.

[1] According to the latest economic reporting, the core copyright industries represented over 6.4% of U.S. GDP and over 4% of U.S. employment, and contributed over 22% to total real U.S. economic growth in 2007.

SUMMARY

IIPA members experience many kinds of copyright infringement in China which cause severe harm to the creative sectors and related industries in the United States. On top of this, they face severe and growing restrictions on market access which also negatively impact these industries and erect barriers that prevent U.S. companies from developing meaningful commercial relationships and opportunities within China. In combination, the size and scope of infringing activities in China and the increasing restrictions on market access are effectively denying U.S. creators adequate access to the Chinese market. A concerted effort on behalf of the Chinese government is an absolute necessity in order to permit legitimate U.S. goods and services into China while also strictly enforcing laws against copyright infringements.

With regard to China's so-called "indigenous innovation" policies, a specific area of focus of the ITC's investigation, IIPA shares concerns that have been expressed by other industry groups from the United States and abroad over the extent to which China's indigenous innovation policies constitute an unfair trade practice and retard innovation in China by discriminating against foreign rights holders. It is our view that enhancing innovation through policies that restrict competition is a poor policy choice, and must be avoided. The most effective ways of encouraging innovation and creativity are through open markets and robust and effective IP protection that will enhance investment in innovative technologies and creative products, and by maintaining an investment structure that encourages investment in creativity. Reducing competition and failing to safeguard the integrity of intellectual property are, in fact, recipes for undermining innovation. China must implement its current international obligations with respect to market

access to creative industries, and should be encouraged to go even further in opening up opportunities for foreign investment in creative industries. China should also ensure full respect for copyright, avoid policies which establish preferences based on nationality of the owners of the intellectual property rights, and act forcefully and promptly to deter infringement of such rights.

Finally, IIPA has undertaken the task of estimating losses to U.S. creative companies due to copyright infringement for well over twenty years. Over the same period we have documented denial of market access in countries around the world, including in China. We have responsibly endeavored to develop methodologies to measure what is essentially clandestine infringing activity and have produced conservative estimates which for most industry sectors do not yet fully account for Internet infringements, and which do not take proper account of lost business opportunities resulting from restrictions on market access. Nonetheless, our conservative data indicates that U.S. copyright sectors have suffered billions of U.S. dollars annually in trade losses due to copyright infringements and other barriers in China. This, in turn, has caused a much broader negative impact on the U.S. economy.

SEVERAL KEY POINTS RESPONDING TO THE ITC REQUEST

Let me share with you a few main points to respond to the subject matter of the ITC investigations. Our post-hearing brief will address these points in greater depth.

COPYRIGHT INFRINGEMENT IN CHINA

Copyright owners are subject to many types of copyright infringing activity in China. Copyright infringement as we know it today increasingly occurs in ways more sophisticated than the mere duplication and sale of content on physical media at retail outlets or on the streets. These range from pervasive use of unlicensed software by businesses (so called "enterprise end-user piracy"), which is estimated at a staggering 79% of all software installed in 2009 in China, to widespread infringement of music, films, entertainment software, books and other copyrighted materials through online and mobile networks, optical disc infringements (including the manufacture and export of high quality counterfeits and special boxed sets), wholesale and retail infringements, hard-disk loading of software onto computers, illegal camcording, unauthorized use of copyright materials in Internet cafés, unauthorized public performances, and infringements of books, journals, and other published materials. In addition, the government of China imposes market access barriers and restrictions, affecting most of the copyright industries, some of which must be eliminated as a result of a recent WTO case, and all of which stifle the ability of U.S. rights holders to do business effectively in China.

Internet Infringements in China

China's online population is now by far the largest in the world, estimated at 384 million Internet users, almost all of whom have high-speed, broadband connections. China is, as a result, a major safe haven for infringements occurring over the Internet and mobile services. The online and mobile markets have become overrun with illegal materials via an array of "deeplinking" search engines

(which connect users directly to infringing websites or infringing material), websites, "cyberlockers," and user-generated content sites.

The music industry estimates that ninety-nine (99%) percent of all music files downloaded or streamed in China are infringing, and China has become one of the biggest sources of illegal downloads in the world. The music industry's biggest problem today consists of the "MP3 search engines" which offer "deeplinks" to thousands of infringing song files and derive significant advertising revenue from doing so. Baidu, which operates the largest deeplinking service, is on its own responsible for an estimated 40% of all illegal music downloads in China. Other deeplinking sites like Sohu, P2P filesharing services such as Xunlei and verycd.com, and over 100 cyberlocker sites, like Rayfile, Namipan, and 91files, are also problematic by respectively providing links to, inducement of, or storage of, illegal content. As a result of stifling piracy and onerous and discriminatory market access barriers, legitimate sales of recorded music in China – at just $75 million in 2009 – are far below what would be expected in a market as large as China's. This compares to $4.6 billion in the U.S., $145 million in South Korea and $69 million in Thailand — a country with less than 5% of China's population and with a roughly equivalent per capita GDP.

Internet infringement is a top enforcement priority for the motion picture industry. User generated content – UGC – sites, where users post films and TV programs on the site for stable streamed viewing, is the most damaging problem. Tudou.com and Youku.com are examples, and so-called "leech sites" make the content on the UGC available by linking to it from the leech site. P2P filesharing sites and IPTV webcasting channels are also problematic and provide an efficient

environment for infringement to occur. Sites that offer filesharing software and services in China include BTpig, Kugoo, Xunlei, VeryCD and others.

The Business Software Alliance (BSA) reports Internet infringement of business and consumer software as a growing problem in China. P2P filesharing makes up an estimated 90% of that infringement, with sales of infringing software on websites comprising most of the remainder. Auction sites also offer infringing software, as 338 such sites were taken down in 2009. A landmark development in the area of online criminal enforcement was the conviction of the owners of the Tomato Garden website, tomatolei.com, on August 20, 2009 by the Suzhou Huqui District Court. Tomatolei.com had, since 2003, offered free downloads of a modified version of Windows XP to an estimated 10 million users and the program was copied and resold extensively by software dealers around the country. This case was the first criminal conviction for major online infringement of software in China.

The entertainment software industry reports P2P downloading of illegal copies of videogame files as well as websites offering infringing videogame product, accessed from home PCs and from Internet cafés. The Entertainment Software Association (ESA) estimated 549,111 completed downloads of select member titles by Internet users in China during December 2009, placing China in the top five nations in terms of infringing game downloads during this period. These figures do not account for downloads that occur directly from hosted content, such as games found on "cyberlockers" or "one-click" hosting sites, which continue to account each year for progressively greater volumes of infringing downloads.

The book and journal publishing industry reports that Internet infringements significantly impact the market for academic, scientific, technical and medical text books and trade books. In many instances, books, notably commercial bestsellers, are scanned and traded, sold or otherwise offered for download in PDF form through online market places such as Taobao, while online journal infringement also occurs through intermediaries that operate commercial sites. IIPA has also highlighted in its reports the continuing problem involving the massive sharing of electronic copies of academic journals with commercial entities in violation of site licenses, Chinese copyright law, and international norms. Kangjian Shixun is an example of a company providing electronic files of millions of medical and scientific journal articles on a subscription basis to customers in libraries and hospitals throughout China, without permission or payment to right holders. Many of the articles illegally downloaded continue to be provided by a well-known, powerful state-run medical library. Despite a government notice intended to curb this infringing activity, copy-cat sites are now also employing the Kangjian Shixun model.

Another growing phenomenon in China includes infringements using mobile devices. China has by far the largest population in the world using mobile devices – 747 million, and it is reported that 233 million people access the Internet from their mobile phones, providing instant access to infringing copyrighted material, not only music, but also video, books, software and videogames.

End-User Piracy of Business Software

A second major kind of infringement occurring in China is enterprise end-user piracy, which, for the business software industry, causes the vast majority of

losses in China. The rate of illegal software use in China has remained excessively high and has barely declined for the past several years. The most recent BSA Global Software Piracy Study, prepared by research firm IDC, estimates the PC software piracy rate in China to be 79%, meaning nearly 8 out of 10 pieces of software installed in 2009 were not paid for. The Study estimates the commercial value of this unlicensed software to be $7.6 billion, with $3.5 billion attributable to U.S.-based software developers. This denies revenues to the producers and distributors of genuine software and also gives Chinese enterprises using unlicensed software an unfair competitive advantage over their U.S. and other foreign competitors that are paying for similar software. Administrative enforcement against this form of piracy has not served as a meaningful deterrent and enterprise end-user piracy is not viewed by the authorities as a crime in China, so there is no criminal enforcement against end-users. The end result is that software piracy in China continues at clearly unacceptable levels.

Optical Disc Infringement in China

Manufacturing of infringing optical discs, for both domestic consumption and export, continues as a major problem in China. As of 2007, we reported 92 optical disc plants in China, with 1,482 total lines, and having a disc production capacity of about 5 billion discs per year. While there have been a few closures and some significant raids, a considerable number of very high quality infringing Chinese ODs continue to be exported to foreign markets. The infringement levels for video and audio in OD formats continue to range between 90% and 95% of the market. Attempts to bring criminal actions against known plants have failed due to Chinese government unwillingness and inaction.

Wholesale and Retail Infringements, Including Hard-Disk Loading in China

Infringement of physical product, or "hard goods," remains rampant in China. In addition to wholesale and retail sales of pirate optical discs containing unauthorized copies of software, movies, games, music and books, "hard disk loading" of unlicensed software on computers for sale, remains a significant problem in China. China continues to run raids and seizures at the wholesale, warehouse, and distribution level, revealing massive quantities of infringing product, from music, movies to videogames (ODs and cartridge-based). While these actions provide attractive photo opportunities for the authorities, they have made very little impact on the availability of infringing product in the marketplace.

Infringement of Books, Academic Journals, and Other Published Materials

U.S. book and journal publishers continue to be subject to the following forms of infringing activity: illegal printing of academic books and commercial bestsellers; unauthorized commercial-scale photocopying of academic textbooks, principally on and around university campuses; Internet piracy comprised of unauthorized copies of online scientific, technical, medical, and professional journals, and sites offering scanned books for download; and trademark infringement or the use of a publisher's name and/or seal on domestically produced business books that the rights holder did not publish. Libraries in China have also been known to stock copies of illegally reproduced textbooks and reference books for use by patrons, similar in quality to those reproduced by textbook centers in China.

Illegal Camcording in China

Unauthorized camcording of movies in Chinese cinemas has resulted in infringing copies of films appearing the earliest in the release pattern and is the most damaging as it acts as a source of infringing material for widespread and illegal distribution online and for infringing DVDs. The first camcording case in China (of a Chinese film) was reported in November 2008 but since China has no camcording law, the three suspects were released by the police. Since then, camcording in China has increased and it is growing as a source of illegal copies of movies distributed globally.

Internet Cafés, Unauthorized Public Performances, and Signal Theft in China

Infringement in Internet cafés remains a major concern in China. Cyber cafés in China regularly make available unauthorized videos and music for viewing, listening or copying by customers onto discs or mobile devices. Another abiding problem in China involves the unauthorized public performance of U.S. motion pictures and music videos, which occurs mostly unchecked in hotels, clubs, mini-theaters (like KTV rooms), and karaoke establishments. Unauthorized reception of encrypted television signals, particularly at the city level, and of cable signals continue to harm the U.S. and Chinese industries.

Music Royalty Rate Issue in China

China has long been in violation of its Berne Convention and TRIPS obligations to compensate copyright owners for the broadcast of musical compositions. 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. However, such payments are wholly inadequate and the tariff would result in one of the lowest payment rates in the world – essentially, a very low percentage of a station's advertising revenue, or RMB0.3 (US$0.04) per minute for music played on the radio or RMB1.5 (US$0.22) per minute for TV. Advertising revenue for Chinese broadcasting was reported to be US$10.16 billion in 2008. 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.

Indigenous Innovation Policies and other Market Access Restrictions in China

Time does not permit me to go into great detail regarding China's market access restrictions, but we will address these in depth in the post-hearing brief. IIPA has consistently stressed the direct relationship between the fight against infringement and the need for liberalized market access to supply legitimate product (both foreign and local) to Chinese consumers. Unfortunately, there are a range of restrictions, affecting most of the copyright industries. Some of these must be eliminated as a result of a recent 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, a discriminatory and lengthy censorship system (which further opens the door to illegal content), restrictions on the ability to fully engage in the development, creation, production, distribution, and promotion of music and sound

recordings, and the continued inability to engage in the import and export, distribution, publishing, and marketing online of published materials in China. They also include the maintenance of a quota of only 20 films for which revenue sharing of the box office receipts between the producers and the importer and distributor is possible, the inability to import and distribute films except through the two main Chinese film companies (the duopoly), the screen-time quota the restrictions on market access for foreign satellite programming, television broadcast quotas, blackout periods for films, local print requirements, and onerous import duties, all of which close off the market for U.S. produced films and programming. An onerous ban on the manufacture, sale and importation of videogame consoles is also a major barrier. Finally, entertainment software companies continue to face lengthy delays in the censorship approval process, wiping out the very short viable window for legitimate distribution of entertainment software products.

While the recently concluded WTO case will hopefully help address some issues with respect to music, movies, and books, restrictions on market access for all the industries continue to keep creative companies and their content and services out of China, further fuelling the market for infringing material.

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 markets to foreign investment; provide incentives to innovate by ensuring full respect for intellectual property rights including patents, copyrights and trademarks; avoid policies which establish preferences based on nationality of the owners of the intellectual property rights; and act forcefully and promptly to prevent misappropriation of such rights.

EFFORTS TO QUANTIFY THE EFFECTS OF COPYRIGHT INFRINGEMENT ON CREATIVE INDUSTRIES

It was this Commission that undertook the first modern-day accounting of losses due to copyright infringement in 1984. Since then, and over the years, government and private sector reports have demonstrated how copyright infringement undermines the revenues and profitability of the entire copyright sector, and inflicts broader harm on the U.S. economy as a whole. As these reports have consistently noted, copyright infringement – especially on a large scale – is usually a clandestine activity, so exact data on the costs of copyright infringement to the U.S. economy are difficult to produce.

A number of recent studies have put forth good methodologies for quantifying this harm, both for individual copyright industry sectors, and, in one case, across four leading sectors. These include studies by Stephen Siwek, PhD, as well as piracy studies commissioned by BSA. All these studies measure not only the direct impact of piracy on the particular industry sector or sectors involved, but

also the "ripple effects" on jobs, tax receipts, and overall economic activity, by estimating the increases in these categories that would be expected in the absence of copyright infringement or with a decrease in infringement levels. It is evident that the United States economy is losing tens of thousands of jobs, billions of dollars in tax revenue for governments at all levels and billions of dollars in overall economic activity, because of copyright piracy, including the damaging levels of such piracy in China.

IIPA has consistently provided to the U.S. government estimates of trade losses due to copyright infringement in specific countries, as well as estimated piracy rates in many countries, particularly those that appear on the Special 301 lists. These estimates, along with details on the methodology used, can be found in IIPA's annual Special 301 submissions beginning with 1985 through to the present. For many years, global losses to the U.S. copyright sectors were estimated by IIPA at around $18-20 billion per year. Those numbers now run significantly higher and were largely derived without accounting for the major impact of infringements occurring over the Internet. As noted above, the most recent BSA Global Software Piracy Study estimates the commercial value of unlicensed software globally in 2009 to be over $51 billion ($7.6 billion for China), with more than $30 billion attributable to U.S.-based software publishers ($3.5 billion for China). Losses for IIPA members in China well exceeded $3.5 billion for the past three years (loss numbers for 2009 only included business software and music and sound recording industries, and as noted, except for business software losses, do not include any estimates for massive Internet infringements).

Methodologies to estimate the losses to the U.S. economy deriving from infringements occurring over the Internet or through mobile networks are not yet

fully developed, so across-the-board estimates have not been produced. IIPA firmly believes those losses far exceed those that have been estimated to date for copyright infringement of hard goods products.

IIPA believes that in order to track the true significance of the harm caused by copyright infringement and denial of market access in China to the U.S. economy, the ITC should consider several factors:

* Economists should take into account all forms of infringement, many of which were described in my testimony today.
* A more complete estimate of the harm to the U.S. economy due to copyright infringement in China should take into account Internet infringements, since this represents a massive and growing problem in China. Devising an Internet infringement methodology for measuring harm has proven extremely difficult. IIPA looks forward to working with the U.S. government to devise ways to measure the full impact of infringements in China on jobs and revenues in the U.S.
* Copyright infringement in China can have a detrimental impact on many U.S. industries beyond the one whose product was pirated. For example, enterprises in a wide array of U.S. industries suffer from software license infringement in China when they must compete against Chinese firms that produce goods and services using unlicensed software. Similarly, U.S. and other foreign licensed digital music service providers face unfair competition from Chinese services that rely on providing access to infringing materials.
* Finally, the ITC should not ignore the negative and broader impacts to U.S. copyright companies, and the U.S. economy as a whole, from severe restrictions on the ability of U.S. creators to access the Chinese market with their creative industry products and services.

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Thank you for giving me the opportunity to share the copyright industries' experiences in China. I would be pleased to answer any questions.

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APPENDIX
INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE
2010 SPECIAL 301 REPORT
CHINA

PEOPLE'S REPUBLIC OF CHINA (PRC)

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)
2010 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that USTR maintain China on the Priority Watch List in 2010.

Executive Summary: China continues to have some of the highest piracy rates in the world, while representing one of the largest and most rapidly growing markets for the copyright industries. Copyright infringement concerns range from pervasive use of unlicensed software by businesses to widespread digital piracy and piracy of hard goods. As the new global leader in Internet, broadband and mobile device penetration, China remains a major safe haven for digital pirates. Addressing Internet piracy is a critical priority for many copyright sectors. The Chinese government has stood by while the online and mobile markets have become overrun with pirated materials via an array of illegal websites, "cyber lockers," user-generated content sites and "deeplinking" search engines which connect users directly to infringing websites. Ninety-nine percent of music files downloaded or streamed in China are pirate and China has become one of the biggest sources of illegal downloads in the world. While recently a number of prominent websites have been taken down, the Chinese government continues to make many public assurances that it is committed to combating copyright piracy, but has chosen not to take truly effective action to reduce the levels of online piracy, just as it has not for years taken effective and deterrent actions against physical piracy.

China appears to have adopted an industrial policy in which such theft is a component driving Chinese competitiveness, or at a minimum, permitting free access to American content through unapproved pirate channels which simply ignore censorship controls but to which legitimate rights holders must adhere.

With the PC software piracy rate remaining at 80 percent, Chinese enterprises continue to use unlicensed software at excessive levels. This denies revenues to the producers and distributors of genuine software and also gives the Chinese enterprises using unlicensed software an unfair competitive advantage over U.S. and other foreign businesses that are paying for similar software.

2009 marked some positive developments, with Chinese rights holders taking more of a lead with their own government in calling for improved IPR protection. However, a Chinese court recently found the leading source of unauthorized music downloads in China not liable for the massive infringement occurring over its facilities, infringement from which it draws huge profits. While there have been some welcome court decisions with deterrent penalties, deterrence, as a general matter, remains absent from the enforcement system, both online and in the market for physical products. The administrative enforcement system remains understaffed and does not pose a deterrent to piracy. China's many publicly announced enforcement campaigns have not had a demonstrable effect on the levels of retail piracy. Criminal actions against copyright piracy, while growing in number, need to be significantly increased. Manpower, financial resources and stronger enforcement authority must be made available to the NCAC and local copyright bureaus, which are primarily responsible for Internet enforcement and enforcement against enterprises using unlicensed software, as well as to the Law and Culture Enforcement Administration (LECAs), which are increasingly being tasked with copyright enforcement. More and better trained enforcement personnel are required at every level, along with effective and well-publicized actions, if piracy is to be slowed. Enforcement machinery, especially in the online environment, continues to be cumbersome and agency jurisdiction and cooperation remain overlapping and often muddled. More progress must be made in 2010 in dealing with the huge losses suffered by the U.S. and Chinese software industries from enterprise end-user piracy and in legalizing

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government and SOE use of software, as promised in the JCCT. Progress in addressing book piracy at university textbook centers continued as well. IIPA hopes that the Notice to libraries to strengthen copyright protection will result in concrete actions being undertaken by the relevant Chinese agencies to address piracy occurring at university libraries, such unauthorized access to online journals or the presence of pirated textbooks on library shelves.

China has begun the process to amend its copyright law in compliance with its WIPO Internet treaties' obligations, but this should be done on a fast tracked timetable instead of the three years contemplated by some government officials. It is also hoped that the amendment process will be transparent to allow interested parties an opportunity to provide input into draft legislation. Unfortunately, it appears that necessary changes to the criminal law are apparently not even on the drawing board and new judicial interpretations need to be considered as a stop gap measure. China should also promptly and fully implement the WTO panel's recent decision holding many of China's market access restrictions on the motion picture, music and publishing industry violative of its WTO obligations and remove other market access restrictions. Inadequate market access for most industries and barriers to establishing a meaningful commercial presence with authorized product continue to fuel the market for pirated material.

Finally, it should be noted that China has promulgated a series of "indigenous innovation" policies that attempt to compel transfers of foreign intellectual property to Chinese ownership using access to China's market as leverage. These policies undermine the intellectual property development of U.S. and other foreign copyright industries.

Priority actions requested to be taken in 2010: IIPA requests the following actions by the government of China, which, if taken, would result in the most significant commercial benefits to the copyright industries:

Enforcement

- Significantly increase criminal prosecutions and effective administrative actions against online and mobile service piracy, corporate end-user and hard disk loading software piracy and other piracy of hard goods including textbooks, trade books and scholarly journals; clarify that corporate end-user software piracy is a criminal offense and bring prosecutions;
- Significantly increase the manpower, financial resources and skill training available to NCAC, the local Copyright Administrations (CA's) and Law and Cultural Enforcement Administration's (LCEA's) so that they may take effective enforcement action with deterrent penalties against software corporate end-user piracy, and online and hard goods piracy;
- Increase actions by SARFT and MIIT to revoke the business licenses and terminate Internet access of online services that deal in infringing material, or whose business models depend upon providing access to infringing materials;
- Enhance pre-release administrative enforcement for motion pictures, sound recordings and other works;
- Mandate the use of legitimate books and journals on university campuses and in government institutions and libraries, including fully implementing the *Notice on Enhancing Library Protection of Copyright* as promised in the 2009 JCCT outcomes; legalize practices of textbook centers and on campus reproduction facilities;
- Allow increases in staff for, and anti-piracy investigations by, foreign rights holder associations where so desired;
- Assign specialized IPR judges to hear criminal cases, and move more criminal IPR cases to the intermediate courts.

Legislation and Related Matters

- Amend the Copyright Law to bring it into full compliance with the WTO panel decision and the WCT/WPPT;

- Amend the Criminal law or issue a new SPC Judicial Interpretation (JI) to establish, at a minimum, appropriate thresholds for criminal prosecution of corporate end-user piracy of software and Internet infringements of all copyright material;
- Review the SPC Judicial Interpretation to ensure that the thresholds comply with the WTO IPR case panel decision's definition of "commercial scale";
- Increase punitive damages against copyright infringers in civil cases to deter piracy;
- Clarify and/or make amendments on Article 24 of the SPC's 2002 JI "Several Law Application Explanation about Trying Copyright Civil Dispute Case " to change "unit profit" to "unit reasonable market price";
- Significantly increase maximum statutory damages of RMB500,000 (US$73,160) in the Copyright Law and related laws to ensure deterrence in the new technological environment;
- Review and clarify the 2006 Internet Regulations to ensure their effectiveness and implement them with more aggressive administrative and criminal enforcement;
- Issue an SPC JI to clarify whether Article 36 of the new China Tort Liability Law is consistent with Article 23 of the "Internet Regulation" in relation to the "reasonable grounds to know" element of the knowledge requirement, and to clarify the exact requirements under Article 14 of the "Internet Regulation";
- Ensure use of legal software by the government, SOEs and other enterprises in accordance with China's commitments in the JCCT, including directing government agencies and SOEs to conduct annual inspections for software legalization and implement Software Asset Management (SAM) as a tool for ensuring software license compliance;
- Amend the Copyright Law to grant to producers of sound recordings rights to authorize or prohibit the communication to the public of their sound recordings, including by way of broadcasting, simulcasting, cable transmission and public performance, subject to appropriate exceptions or limitations.

Market Access

- Amend all relevant laws, regulations, circulars and interpretations promptly and fully to bring them into full compliance with the WTO panel's decision on market access, including the withdrawal of the recently implemented Ministry of Culture "Circular" *on Strengthening and Improving Online Music Content Examination* which contains several provisions that will disrupt the development of a healthy, legitimate and competitive online music market including (1) an increase in the already burdensome procedures for digital distribution of sound recordings; (2) new inequitable censorship procedures that will delay the legal marketing of sound recordings online; and (3) WTO-inconsistent restrictions on the ability of foreign-invested enterprises to engage in the importation and distribution of online music.
- Provide meaningful and effective market access for all copyright materials;
- Suspend the November 2009 indigenous innovation product accreditation program and related policies that would provide procurement preferences for products based on whether the embedded intellectual property is owned and developed in China.

For more details on China's Special 301 history, see IIPA's "History" Appendix to this filing at http://www.iipa.com/pdf/2010SPEC301HISTORICALSUMMARY.pdf, as well as the previous years' country reports, at http://www.iipa.com/countryreports.html.

UPDATE ON COPYRIGHT PIRACY AND ENFORCEMENT IN CHINA

All forms of piracy infect and damage the Chinese market. With the largest Internet, broadband and mobile phone use in the world, China's digital piracy has in the last two or three years become the principal concern of most of the creative industries. For the business software industry, the vast majority of the losses suffered continue to result from enterprise end-user piracy which remain its highest priority and "hard" goods piracy continues to deserve increased attention from the enforcement authorities.

Internet and mobile service piracy: China is one of the world's largest potential markets for Internet and mobile delivery of copyright content, but piracy continues to inhibit the growth of this market. With China increasingly seeking to move its economy up the value chain by its increasing focus on developing the "creative industries," it is becoming even more critical that China complement its effort to develop those industries with a far more robust and committed effort to build out an enforcement infrastructure that can deal with massive online piracy. There were some signs in 2009 that this message may be getting through, but so much remains to be done. It is a welcome sign that Chinese rights holders in the "creative industries" are becoming much more aggressive in urging their own government to more effectively deal with the problem.

China's Internet population is now by far the largest in the world. The China Internet Network Information Center (CNNIC), reports[1] that the online population became the largest in the world in mid-2008 and at the end of 2009 is estimated at 384 million, larger than the population of the U.S. This is a spectacular 28.9% increase over the previous year (the figure was 298 million at the end of 2008). It was estimated that 346 million people used high-speed broadband interconnections (representing 90.1% of all users), allowing for download of larger files including feature movies, TV programs and videogames. China's Internet penetration rate is still only 25.5% (as of July, 2009); it was 22.6% at the end of 2008) so there is much room for continued growth (and piracy losses to rights holders).

According to CNNIC, 83.5% of Internet users accessed music on the Internet in December 2009, higher than any other use. The recording industry estimates that a staggering 99% of the music accessed was unlicensed. The fifth and sixth largest uses were for online gaming and online video at 68.9% and 62.6%. IIPA reported in its 2009 submission that the CNNIC acknowledged that music is one of the most important "drives for promoting the increase in netizens."

China also has by far the largest population in the world using mobile devices – 747 million.[2] It is reported that 233 million[3] people access the Internet from their mobile phones, providing instant access to pirate copyrighted material, not only music, but also video, books, software and videogames. Piracy on mobile devices, and the pre-loading of music files on mobile devices, is a massive problem for the recording industry, and has now become a problem for the motion picture and other copyright industries as the new mobile 3G networks are built out. 3G licenses were granted in mid-January 2009 to the three largest mobile services (China Mobile, China Telecom and China Unicom). WAP (Wireless Application Protocol) portals now allow 192 million mobile phone users to access copyright materials on the Internet with the mobile services generating revenue both through advertising and data fees.[4] By the end of 2010, it is estimated that China will have 170 million users accessing the Internet through broadband 3G networks, posing a huge challenge for the content industries.[5]

The recording industry has reported that China is now one of the biggest sources of illegal downloads in the world, both over the Internet and now over mobile devices. The biggest problem today are the "MP3 search engines" which offer "deeplinks" to thousands of infringing song files and derive significant advertising revenue from doing so. Baidu, which operates the largest deeplinking service, is responsible for an estimated 50%-75% of all illegal downloads in China. Another 29% is provided by pirate websites, 22% via P2P filesharing over services such as Xunlei and verycd.com[6] and 1% from over 100 cyberlockers sites, like Rayfile, Namipan, and 91files. While Baidu has been sued by the local and international record companies, a Beijing court has very recently ruled that its

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[1] Statistical Survey Report on the Internet Development in China (July 2009) ; http://www.cnnic.net.cn/uploadfiles/pdf/2009/10/13/94556.pdf
[2] http://en.c114.net/583/a479298.html
[3] http://www.miit.gov.cn/n11293472/n11293832/n11293907/n11368223/13008363.html
[4] http://en.c114.net/583/a463731.html
[5] http://en.c114.net/583/a479042.html
[6] VeryCD.com, China's largest eMule site, was taken down by SARFT in early December 2009. See discussion below.

deep linking service was not infringing – an unexpected development given prior court decisions. Unless immediate remedial action is taken, this will significantly exacerbate the music piracy problem in China. Baidu's deeplinking service also continues to infect neighboring markets like Hong Kong and Taiwan and is also accessible worldwide.

The piracy problem for the music industry is made even worse by censorship and market barriers, discussed further below, that discriminate against foreign record companies. The industry has been fighting these onerous restrictions, first codified in the Ministry of Culture's (MOC) *Several Opinions on the Development and Administration of Internet Music*. A new MOC *Circular on Strengthening and Improving Online Music Content Examination* was released in September and, while easing a few of the procedures for obtaining censorship approval, continues to blatantly discriminate against foreign record companies.

Internet piracy also remains the top enforcement priority for the motion picture industry. User generated content (UGC) sites, where users post films and TV programs on the site for stable streamed viewing, is the most damaging problem, followed by P2P filesharing and IPTV (webcasting) piracy. The impact of the UGC sites, such as Tudou.com and Youku.com, is multiplied by "leech sites" where the content on the UGC site is available by linking to it from the leech site. MPA continues to report that close to half of the content available on the world's "topsites" is sourced from UGC sites in China. P2P filesharing is also a problem. There are P2PTV streaming sites, like PPLive and PPStream, and sites that offer enabling filesharing software and services, BTpig, Kugoo, Xunlei, VeryCD and others.[7] Internet cafés also offer the ability to download movies in their facilities.

While end-user software piracy (and unauthorized use of software by government ministries) is by far the business software industry's most significant piracy problem, the Business Software Alliance (BSA) continues to report that Internet piracy of business and consumer software is a growing problem. P2P filesharing makes up an estimated 90% of that piracy but offers of pirate software on websites have also been a problem. In IIPA's 2009 submission, we highlighted a criminal case brought against the tomatolei.com website which since 2003 had been offering pirate copies of Windows XP and other U.S. software products. In a major positive and deterrent development, that case (discussed below) – the first criminal conviction for online software piracy – has now concluded.

The entertainment software industry continues to report steadily growing Internet piracy of videogames. P2P downloads of infringing video game files is fast becoming the predominant form of piracy along with websites that offer infringing video game product, accessed from home PCs and from Internet cafés. The Entertainment Software Association (ESA) estimates 549,111 completed downloads[8] of select member titles by Internet users in China during December, 2009, placing China in the top five nations in terms of infringing game downloads during this period. These figures do not account for downloads that occur directly from hosted content, such as games found on "cyberlockers" or "one-click" hosting sites, which continue to account each year for progressively greater volumes of infringing downloads.

The book and journal publishing industry reports that Internet infringements continued unabated over the past year, affecting academic books and commercial bestsellers or trade books scanned and traded or offered for download in PDF form,[9] and online journal piracy occurring through intermediaries that operate commercial sites. In its 2009 submission, IIPA highlighted a new and disturbing development involving the massive sharing of

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[7] In a major positive enforcement development, as described further below, SARFT has closed two of the largest P2P filesharing sites in early December, 2009. In IIPA's 2008 and 2009 submission, it was reported that Xunlei was sued by MPA in February 2008 after having, a few days earlier, lost a civil case to a Shanghai company and ordered to pay damages of RMB150,000 (US$21,947) for assisting in copyright infringement.

[8] This figure is representative only of the number of downloads of a small selection of game titles. Consequently, this figure is under-representative of the overall number of infringing downloads of entertainment software made during the period.

[9] The industry reports a high number of noncompliant ISPs, including ChinaNet, chinamobile.com and gddc.com.cn. Famous sites include ebookee.com.cn, ebookshare.net and vista-server.com.

electronic copies of journals with commercial entities in violation of site licenses, Chinese copyright law and international norms. The commercial enterprises then sell the journals in direct competition with legitimate companies. Publishers brought to the attention of the enforcement authorities on numerous occasions that a company called Kangjian Shixun, was providing electronic files of millions of medical and scientific journal articles on a subscription basis to customers in libraries and hospitals throughout China, without the permission of nor payment to the rights holders. Many of these articles continue to be provided by a well-known, powerful state-run medical library. Given the lack of action against the site, copy-cat sites arose in the country following the Kangjian Shixun model. This matter was raised at the 2009 Joint Commission on Commerce and Trade (JCCT) dialogue, and as one of its commitments to the U.S. under this process, the Chinese agencies[10] issued on October 28, 2009 a *Notice on Enhancing Library Protection of Copyright* notifying libraries of their obligations under the copyright law. The Notice calls for regular random inspections by NCAC and the local copyright administrations, and as appropriate, the imposition of administrative sanctions upon libraries found to have been engaged in unauthorized copying and dissemination of copyrighted works. IIPA and AAP call for aggressive enforcement of this Notice and the imposition of deterrent sanctions, as appropriate, against institutions found to be in violation of the Notice.

Update on Internet Piracy Enforcement: With the adoption of the Internet Regulations in July 2006 and the entry into force of the WIPO "Internet" treaties on June 9, 2007, the legal infrastructure for effective protection of content on the Internet in principle was significantly enhanced, and, while not perfect, provided the major elements of an effective legal regime for combating online piracy. We continue to commend China for taking both these steps.

There were some positive developments in the enforcement area in 2009, and more than a few significant disappointments. The whole picture must be seen against a backdrop of very high levels of online piracy and an enforcement system that remains fundamentally ill-equipped to deal with increasing levels of digital infringements.

On the positive side, and as detailed below, a number of coalitions consisting of U.S. and Chinese rights holders were established. Chinese rights holders, particularly in the video and TV area, began a series of significant lawsuits and began putting increased pressure on government ministries. SARFT, the agency regulating the audio visual industry, began shuttering pirate websites, including some of the largest sites in China, for their failure to acquire required licenses to operate. The NCAC completed another annual Internet piracy campaign in November 2009 with what appear to be improved results, including referral of 25 cases to the criminal authorities.[11] This campaign was also marked by some improved transparency, both at the national and provincial level, with NCAC informing the representatives of certain industries of the actions taken on the formal complaints they filed as part of the campaign.

Despite these positive developments, however, many problems remain and the overall picture continues to remain bleak with respect to the overall level of Internet and mobile device infringements nationwide. These problems have been detailed at length in previous IIPA submissions. For example:

- Administrative enforcement remains inadequate to the task and the copyright enforcement agencies continue to be woefully understaffed and the penalties they impose remain non-deterrent. The number of trained personnel is far too small given the size of the problem; the number of enforcement actions pale in comparison to the scale of both hard goods and online piracy. Too few cases are referred to the criminal authorities where real deterrence could be achieved.

[10]The Notice was issued by NCAC, MOC, the Ministry of Education and the National Anti-Piracy and Anti-Pornography Working Group of GAPP (NAPP).

[11] http://english.ipr.gov.cn/news/headlines/602441.shtml. NCAC reported that 558 cases were investigated, 375 websites were shut down. Fines totaled RMB1.3 million (US$196,000) and 163 servers were confiscated.

- In the online environment, there are major technical barriers to identifying infringers' locations and identities; ISPs and website registration information is often incorrect and unenforced, and the notice and takedown system is overly technical and burdensome.
- Administrative enforcement is plagued by lack of cooperation among provincial authorities, and Internet piracy is generally not limited to provincial boundaries.[12] Jurisdictional battles hamper overall enforcement and more central government direction is essential.
- While the underlying legal framework is generally adequate[13] and ISPs who do not cooperate with rights holders can be deemed to be infringers, NCAC has yet to levy an administrative fine against any ISP. Compliance with takedown requests still remains far too low in China.
- The deficiencies in China's criminal enforcement regime are more severe with regard to online piracy. The application of the criminal thresholds to online piracy is unclear, and the "for-profit" precondition to establishing a crime results in a huge loophole in the P2P environment. Criminal authorities remain insufficiently trained and regularly demand that rights holders must go first to the administrative authorities, which lack the investigative authority to police this kind of piracy adequately.
- Internet cafés, which are widespread in China and where piracy is rampant, are very closely monitored (and punished) for politically subversive activities, but not at all for piracy.

Chinese leaders' statements on the importance of strong IPR protection to China's own development, including online, have yet to be translated into practice in such a way as to significantly deter online infringements. One must question whether the development of Internet and mobile communications technology and infrastructure takes precedence over the protection of content and the development of legitimate commerce in the online environment, given the extent to which piracy continues to fuel the growth of these technologies. It even appears that the Chinese government may have adopted an industrial policy in which copyright theft is a component driving Chinese competitiveness, or at a minimum, permitting free access to American content through unapproved channels while ignoring China's sensitive content-based controls censorship controls.

Motion Picture Industry: MPA continued in 2009 to focus its Internet anti-piracy program on the large UGC sites, like Tudou.com and Yukou.com. In April 2008, MPA signed an MOU with the biggest such sites and sought their agreement to take down infringing material upon notice by the rights holder. This program has been generally successful; takedown requests are being honored for the most part and most have participated in two filtering trials, with one site having already provided MPA member companies with automated takedown tools. Illegal downloads in China increased in 2009. The independent motion picture industry reports that local distributors are paying lower license fees and sometimes violating the terms of license agreements due to the impact of piracy.

A number of other developments are likely to have a positive impact on reducing the level of online video piracy and in legitimizing the online marketplace. On September 15, 2009, led by Sohu.com, the Online Video Anti-Piracy Alliance was launched. Claiming 110 Chinese company members (MPA is supporting but is not a member), the Alliance's purpose is to bring high-profile litigation against sites and portals that engage in piracy, as well as their advertisers. Sohu and Joy.com and Voole Technology Co., the leaders of the Alliance, have been licensing Chinese TV and film product for some time and seek to legitimize the market. On September 22, 2009, the three companies sued the infamous UGC site, Youku.com, in the Beijing Haidan District Court for infringing 111 titles (Chinese presumably). Compensation of US$7 to 21 million was being sought and the case concluded on November 26 with a judgment against Youku and a damage award of RMB450,000 (US$65,843). Voole also sued the Coca-Cola Co. for an ad it placed in connection with the unauthorized use of a popular domestic TV series.

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[12] Witness the Kangjian Shixun case, which has been passed among four administrative agencies in China, without resolution.

[13] The recent decision in the Baidu case, where the People's Intermediate Court found that BAIDU did not have "reason to know" that the named sites to which it linked contained infringing material, casts significant doubt on whether Article 23 of the Internet Regulations is broad enough to cover deep linking infringements. IIPA and the recording industry have not yet had the opportunity to thoroughly analyze this key and disappointing decision.

This new Alliance was enthusiastically supported by the Beijing Copyright Bureau. The participation of so many domestic Chinese companies representing domestic rights holders is the kind of development that hopefully will accelerate the legalization of the market and help in creating the kind of effective enforcement infrastructure that has to date been absent in China.

In a subsequent major and undoubtedly related development, NCAC, the PSB and MIIT held a press conference on January 20, 2010 to announce the signing of the *China Internet Industry Declaration on Content Protection* by 101 Chinese websites, through which they pledged to facilitate the protection of online IP rights by preventing the upload and sharing of infringing materials on the Internet. The Declaration was signed by filesharing video and music services like Youku.com, Sina.com, Baidu.com, Xinhuanet, China.com, Tencent and many other powerful legitimate, and even some illegitimate, operations. In addition to promising to protect content, they commit to adopt "industry standard technical measures" to prevent infringement which "restrict users from uploading movies which are still being screened in cinemas and poplar TV shows which are still on the air." They also commit to adopt a "graduated response" regime to terminate recidivist infringers. Finally, they commit to adopt takedown measures within 24 hours of receiving a notice from a rights holder. While clearly a positive development, time will tell if the signatories are truly serious. The leader the Online Video Anti-Piracy Alliance, Sohu.com, voiced concern that this may be just another failed commitment similar to many signed over the last few years.[14]

Other developments occurred as recently as late November 2009. On November 26, CCTV.com, the website of Chinese largest state-owned broadcaster, launched two trial versions of legitimate online video websites one modeled on the Hulu model, the other on the YouTube model. As a powerful state-owned entity, the entry of CCTV into the legitimate online video market, like the developments above, bode well for the expanded legalization of the market. In addition, towards the end of December 2009, Shenda, China's huge online videogame developer (and an aggressive enforcer of its IP rights), announced its acquisition of Ku6.com (through its subsidiary Hurray!), a pirate UGC site mentioned in our 2009 submission, and its plans to legalize it.

MPA has filed an average of 40 complaints per year from 2005-2008 with NCAC against some of the largest pirate sites in connection with NCAC's "Special Campaigns Against Internet Piracy." The 2009 MPA-led campaign commenced in August and ended in November 2009. Until this year, MPA had faced complete non-transparency with respect to these complaints, receiving no information on their disposition. Following lobbying efforts, this year NCAC provided increased transparency on the 13 priority complaints filed by MPA in September. MPA learned that four of these cases were referred to the criminal authorities, and are able now to follow up. One site was shut down in Jiangsu Province. In an unrelated development noted above, the notorious eMule site, VeryCD.com, the subject of one of MPA's complaints, was taken down by SARFT for failure to secure an operating license but was back online a few days later and is rumored to be awaiting the receipt of a SARFT license. Unfortunately, seven other cases, including against some very notorious pirate sites, were dismissed with little or no explanation of the reasons behind those decisions. Other IIPA members have also reported welcome increased transparency by some provincial copyright bureaus.

It is hoped that this Declaration will provide cover for NCAC to begin to fine ISPs that fail to respond to takedown notices promptly. NCAC has such authority under the 2006 Internet regulations; IIPA and its members have been pressing for these actions and this result since that time.

Also, on September 15, 2009, SARFT supplemented its earlier 2008 regulations in a *Notice on Management for License of Internet Audio-Visual Programs Service*, essentially notifying all concerned that it would take down websites, filesharing and other services that did not have a SARFT license. By December 3, 2009, SARFT had closed 539 unlicensed (and pirate) websites and on December 4 sealed the fate of the biggest

[14] http://english.ipr.gov.cn/news/headlines/602441.shtml

BitTorrent site in China, BTChina, by closing it down as well. A special inspection mechanism is to be put into place by March 1, 2010.

MPA has had considerable success in its civil litigation program as well. In 2007, MPA filed complaints in the Shanghai Intermediate Court against a number of defendants for unauthorized offering of 20 representative MPA titles, as part of a subscription and downloading service made available in Internet cafés. These cases were settled in 2008; the terms of the settlement included the defendant's promise not to infringe any MPA member company titles (beyond the 20 that were the subject of litigation), a remedy that likely could not have been obtained had the cases come to judgment. In February 2008, following Xunlei.com's conviction in a Shanghai court, litigation was initiated by MPA member companies for the unauthorized availability of 32 representative films. The case has since been settled to the satisfaction of the plaintiffs.[15]

Another encouraging development is the recent compliance shown by Chinese auction site Alibaba in response to takedown notices requesting the deletion of unauthorized listings offering the sale of pirated optical media, typically in large commercial quantities. Compliance rates have averaged at around 80% during the fourth quarter of 2009, with a 98% compliance rate noted in December. Such cooperation bodes well for the improvement of effective protection of content on the Internet.

Recording Industry: As detailed in previous submissions, the recording industry was the first victim of global Internet piracy, especially in China. To combat the problem, the industry has sought, and continues to seek, administrative enforcement through NCAC, MOC, NAPP and SARFT and the local copyright bureaus. But as is the case with other industries, these agencies' action have consistently generated little deterrence, and fines are low and rarely imposed. About half of the infringing websites included in administrative complaints filed in 2009 became inaccessible. It was, however, difficult to evaluate the results due to the lack of transparency on the part of administrative authorities in disclosing information to the recording industry. Practices at a few provinces to terminate Internet access of the complained domain names appeared to be helpful in preventing resumption of infringing service in other provinces, although such actions are rare. Although some websites of smaller scale have been taken down, such actions have had had little impact since the major source of online piracy has been Baidu and other large and powerful services that generate huge profits from advertising and from increased traffic for providing access to infringing materials.

In its 2009 submission, IIPA detailed the tortured history, dating as far back as 2005, of the international record industries' civil litigation against Baidu.[16] On January 20, 2010, the Beijing No. 1 Intermediate People's Court found that Baidu's MP3 deeplinking search service did not infringe the rights of Chinese and international record companies. While the decision remains to be fully analyzed, the court apparently decided that Baidu did not have "reason to know" that the tracks to which it was linking were infringing under Article 23 of the Internet regulations, despite the fact that it actively provided full indexes of popular songs, and knew that the sites being linked to were not those of the only legitimate licensees of the plaintiffs. However, it did hold that Sohu/Sogou (in a companion case) did infringe a few tracks that were part of a notice & takedown request made by the plaintiffs, although the damages awarded were a dismal RMB1000 (US$146) per track.

These cases dealt a devastating blow to both the Chinese and international music industry and permit Baidu and other services in China to continue to dominate the online music market in the country without paying one renminbi in compensation to the creators who drove the growth of this service in the first place, allowing it to be

[15] Chinese film and TV producers have also been using civil remedies against UGC sites in China. Huayi Brothers, producers of a Chinese film still in theaters, has sued Youku.com and Tudou.com and others for copyright infringement. Huayi had earlier won another case against Youku.com and obtained a damage aware of RMB70,000 (US$10,237). http://transasialawyers.com/newsletter/prc-telecoms-media-technology-law-newsletter/14-january-2009.

[16] http://www.iipa.com/countryreports.html at 89

listed on major stock exchanges around the world. These decisions are not in line with the decisions of previous Chinese courts.

The recording industry filed administrative complaints with NCAC, MOC, SARFT and NAPP, however, only 53% of the sites became inaccessible. It is unknown whether the sites were ordered taken down by the administrative bodies since no official results were received by the industry. More deterrent administrative actions are needed before its enforcement can be said to be effective. The recording industry also sent over 9,000 takedown notices to ISPs and content providers in 2009, with only about half of them taking down infringing content.

The Software Industry: In an effort to reduce growing Internet piracy, BSA significantly increased the number of notices sent to ISPs in 2009 -- over 258,000 notices, up 440% from 2008. Auctions sites are also a big problem and 338 such sites were taken down in 2009.

Most significant, however, and a landmark development in the area of online criminal enforcement, is the conviction of the owners of the Tomato Garden website, tomatolei.com, on August 20, 2009 by the Suzhou Huqui District Court. The operator of the site and the founders and managers of the company were sentenced to 3.5 years in prison (for the founders) and two years (for the others) and fined RMB 1 million and RMB100,000 each, respectively. The company itself was fined RMB8.77 million (US$1.28 million) and illegal income of RMB2.92 million (US$427,412) was confiscated. The complaint was filed by BSA with the NCAC/MPS in June 2008 and the case was then transferred to the PSB.

Tomatolei.com was one of the country's most popular websites dealing in pirated software. The owners offered free downloads of a modified version of Windows XP to an estimated 10 million users and the program was coped and resold extensively by software dealers around the country.

This case is the first criminal conviction for major online piracy of software, and IIPA and BSA commend NCAC, MPS and the PSB in Suzhou (that made the case a priority during the 2008 online piracy campaign) and the courts for pressing a case which will have a significant deterrent impact throughout China.

The Publishing Industry: The Kangjian Shixun case mentioned above has been pending for over three years, and remains one of the publishing industry's most pressing problem in China. AAP has met on numerous occasions with authorities and provided whatever information was requested. This is a blatant case of piracy, resulting in substantial damages to publishers that it needs to be acted on expeditiously. Unfortunately, the matter remains stalled at the administrative level. It is hoped, and expectations are high, that the new Library Notice will result in action on this matter (and similar cases) and serve to end infringing conduct of this nature. It will only result, however, if deterrent penalties are imposed on infringers. The case is serious enough to warrant criminal prosecution[17] and the authorities should cease delaying taking such action.[18]

In 2008, the publishing industry discovered and conducted an investigation into another Internet operation that facilitated access to online journals in a manner similar to the entity KJ Shixun. In mid-2009, the industry initiated an administrative complaint with the NCAC against the entity, which was providing unauthorized access to over 17,000 online journal articles published by foreign publishers to universities and other organizations. The case remains pending, and publishers will continue to pursue the action in 2010.

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[17] The authorites have brought criminal cases against book piracy. In 2008, a book posting and download case involving just over 1,300 titles on an ad-supported website was concluded with a conviction and a 1 ½ years imprisonment sentence.

[18] AAP reported in IIPA's 2008 submission that its complaint against www.fixdown.com and related sites received good attention from NCAC and the Guangdong copyright authorities, and the site was taken down soon after it was listed as one of China's "Top 50" Internet priorities.

Other barriers to effective Internet enforcement: Below we list some of the other procedural barriers that stand in the way of China building an effective and deterrent enforcement system.

Non-deterrent civil damage awards: The recording industry's civil cases against Baidu, Sohu/Sogou and Yahoo! CN illustrate a critical problem faced by copyright owners in China's civil court system. In the Yahoo and Sohu/Sogou cases, the damages were *de minimis,* limited to a few tracks, and provided little deterrence to the defendant. In the Yahoo! CN case, US$25,000 in damages was awarded for 229 tracks infringed, an average of about US$50 per song; in Sohu/Sogou an average of US$145 per song. The average awards in civil cases in China do not come close to compensating rights holders for the injury suffered as a result of the infringement. For example, the average damages awarded in the recording industry's cases[19] through 2007 were about RMB3,500 (US$512) per title, which does not cover legal fees and expenses, much less compensate the rights holder for its loss. These paltry sums fell further to an average of about RMB400 (US$58.50) per title in 2008 and averaged about RMB1,000 (US$145) per title in 2009.

Ineffective regulations on the transfer of cases from the administrative to the criminal system: NCAC is obligated to transfer cases involving criminal infringement to the PSB (police) and SPP (prosecutors' office), as set forth in the revised March 2006 Criminal Transfer Regulations.[20] However, with a few exceptions (some of which are mention in this submission), these Regulations have been ineffective in securing more criminal cases against Internet piracy. First, it is unclear how the thresholds established in the 2004 and 2007 SPC SPP Judicial Interpretations (JIs) apply in the Internet environment. A clarification of how such thresholds apply should issue and be widely circulated throughout all the agencies responsible for enforcement.[21] Second, as discussed further below, the PSB demands that rights holders prove that in effect the thresholds have been met before they will investigate a case, instead of requiring a "reasonable suspicion" that a crime may have been committed.

Procedural rules covering take down notices to ISPs: In June 2007, NCAC released a final version of a "recommended" "standard form" to be used when filing takedown notices for ISP action under the new Regulations. This form could be read as requiring rights holders to provide detailed and unworkable information and documents in warning notices to be sent by mail to the ISPs. After a meeting with industry, NCAC issued a letter clarifying that these were just recommendations and that rights holders may continue to send notices via email and in its own format. This position seems to be accepted by a majority of the ISPs (though takedown compliance rates remain too low) and rights holders are monitoring the situation to ensure that it continues working. However, in the Baidu and Sohu/Sogou decisions, the Court's interpretation of Article 14 of the Internet Regulation requires rights holders to attach a "copyright verification report" to the notice, which makes it even more burdensome for rights holders to notify ISPs or other entities of the infringing content or activities.

Onerous evidentiary rules in civil and criminal cases: Documentation requirements to prove copyright ownership and status of the plaintiff are overly burdensome in China, and, in the Internet environment, ascertaining information regarding defendants sufficient to succeed in these actions is difficult, as the domain name or other

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[19] In 2006, the record industry began to shift the focus of its civil cases to Internet piracy, filing at least 105 civil cases against Internet infringers since 2003. As of January 2006, 96 cases have been concluded, 79 successfully, while another 10 cases remain pending, 7 of which were filed in February 2008. In 2007, the motion picture industry filed more than twenty complaints against retail outlets, all of which received favourable judgments. The Internet cases which settled in 2008 are discussed in the text below.

[20] *Opinions on the Timely Transfer of Suspected Criminal Cases Encountered in the Course of Administrative Law Enforcement* (Issued by the Supreme People's Procuratorate, the National Office of Rectification and Standardization of Market Economic Order, the Ministry of Public Security and the Ministry of Supervision, March 2, 2006.) ("Criminal Transfer Regulations").

[21] In November 2007, the SPP issued "Guidelines" to prosecutors on how to apply the 2007 SPC SPP Judicial Interpretations which, among other things, lowered the copy threshold under Article 217 to 500 copies for the less serious piracy offense. In October 2007, IIPA met with an SPP official and noted that it was unclear whether the thresholds were intended to count each track posted (or downloaded), or each CD posted (or downloaded) (and whether the thresholds apply to 500 infringing "links" to infringing files in the search engine context) and asked the SPP to clarify these issues with an amended JI or other mechanism. Unfortunately, the SPP did not take up IIPA's request, nor has it, or the SPC, done so since then, despite repeated requests from industry. "Guidelines" are on file at IIPA.

registration information for these Internet operators is usually inaccurate or incomplete. Additional burdens are imposed by the Chinese courts' requirement on who may act as the "legal representative" of a party. Under these provisions, courts have on occasion even required the chief executives of major multinational corporations to appear in person to prove, for example, copyright ownership and subsistence.

The civil system should be reformed to provide clear evidentiary and procedural rules, such as (a) providing clear guidance for application of statutory damages provisions and reasonable compensation for legal fees and expenses; (b) introducing a presumption of subsistence and ownership of copyright; (c) allowing organizations that are authorized by rights holders to conduct anti-piracy cases on their behalf to sue in their own name; (d) allowing repertoire or title-wide injunctions and e) formalizing the release of information obtained in the course of conducting administrative and/or criminal enforcement actions to facilitate civil litigation. These are serious deficiencies in the civil system that will affect Internet cases and have affected hard goods cases already.

Difficulties in obtaining accurate IP addresses and subscriber identities: Another significant barrier to effective enforcement against the infringing activities of the more than 1,000 Chinese ISPs is the absence of stringent, and enforced, rules from MIIT and NCAC requiring ISPs to maintain accurate, up-to-date contact information. This information should be provided on the MIIT and NCAC websites, so that notices may be timely served to the right entity. This is still not the case today and such a list is urgently needed Even worse, search engines or other deeplinking services often deeplinked to unauthorized song files on some unknown IP addresses which did not appear to have a website and thus their owners' or operators' identities are unascertainable. This has also greatly hampered enforcement actions.

Another hindrance that NCAC and the Internet division of the PSB had reported to IIPA and its members is the difficulty of getting infringers' IP addresses and identifying rights holders. As early as 2006, IIPA informed both offices that the associations stood ready to assist in this endeavor and that cooperation between enforcement authorities and rights holder organizations was severely hampered by outmoded rules, and that reforms would need to be made before Chinese enforcement could begin to resemble that in other countries, where such cooperation was a regular feature.

Criminal enforcement generally: Before turning to piracy of "hard goods," end-user piracy of software and other non-online piracy and enforcement matters, IIPA must repeat what it has emphasized in every submission it has filed on China – namely, the critical need for a significant increase in criminal prosecutions for copyright piracy to create deterrence in its enforcement system, including against Internet piracy. Chinese leaders have repeatedly said that criminal enforcement is a necessary component of its enforcement system. However, attempts by industry to obtain it have been met with great resistance both as a matter of political will and as a result of legal and procedural barriers. Unfortunately, the reality remains that copyright piracy is still viewed by most government policy-makers as a problem to be dealt with through administrative means or private civil actions rather than criminal means. China has yet to fulfil its promises in the JCCT to increase significantly the number of criminal prosecutions for copyright piracy, though this submission details some very significant criminal decisions in 2009 which IIPA commends.

In its 2009 submission, IIPA summarized its review and analysis of criminal cases reported on in Chinese news reports. Through 2008, that record was improving, but continued to fall far short of what would be required to reduce the continuing high piracy levels in China.[22] Without significant increases in criminal prosecutions resulting

[22] See discussion at http://www.iipa.com/countryreports.html at 92-93. IIPA has not formally updated that research for this submission but as of February 2009, we counted 27 criminal convictions in 2008 alone for copyright infringement compared to only six convictions in piror years. Six of the total number of cases involved only the retail sale of pirate product, with two involving street vendors, which was a noteworthy advance. The major *Summer Solstice* case involving pirated software and an international piracy ring was concluded with deterrent penalties imposed. Six of these cases involved Internet crimes and this year we report on a major software infringement criminal case (see below).

in deterrent penalties and a willingness (a) to devote the necessary resources to such prosecutions, (b) to jointly develop criminal investigations with copyright owners who may have more market intelligence (c)to seek assistance from rights holders with respect to training etc., and (d) to announce publicly throughout China that criminal prosecutions for piracy will be a primary feature of its enforcement system, we do not believe that China can make a meaningful dent in Internet and hard goods piracy levels. Other countries/territories that have significantly reduced piracy levels have done so only through the aggressive use of deterrent criminal prosecutions.[23] China must do the same. IIPA hopes that criminal cases reported in this year's filing, for both Internet as well as for hard goods piracy, may be a signal that more resources will be devoted to criminal enforcement in 2010.

Hard Goods Piracy: Piracy of physical product, or "hard goods," remains rampant in China. This type of piracy consists of the manufacture of optical discs (ODs) in factories (or burned in CD-R drives or towers), their distribution through the wholesale chain and their export or sale at the retail level. It also includes the "hard disk loading" of software, without a license, on computers for sale, the loading of pirate music on karaoke machines and on mobile devices and the commercial reprinting and photocopying of books and journals. In addition, camcording piracy has become source of pirate films on UGC sites and as masters for pirate DVDs. The first camcording case in China (of a Chinese film) was reported in November 2008 but since China has no camcording law, the three suspects were release by the police. This continues to this day.

The piracy levels for video, audio and entertainment software in OD formats continue to range between 90% and 95% of the market. The piracy rate for PC software (primarily unauthorized use of software by enterprises, in government and SOE's and by consumers) remains at 80% of the market, the same level as in 2008.

Optical disc factory piracy: OD piracy at the manufacturing/factory level continues as a major problem. In IIPA's 2007 submission, we reported that there were approximately 92 optical disc plants in China, with 1,482 total lines, which brought total disc capacity, based on IIPA's conservative methodology, to a staggering 5.187 billion discs per year. Most of the production lines are interchangeable, switching easily between audio CD, VCD, DVD, CD-R or DVD-R production. With minor expense, pirate high definition DVDs can also be produced.[24] A considerable amount of very high quality pirate Chinese OD production continues to be exported. Infringing product from China continues to be found in many other countries.

Considerable effort was made during 2006 and in early 2007 by the recording and motion picture industries, as well as the U.S. government in bilateral meetings, to persuade the Chinese government to cooperate effectively with industry to forensically identify infringing CDs and DVDs produced by Chinese OD factories. They specifically proposed that Chinese authorities collect and maintain "exemplars," (samples), from each production line and make them available to these two industries for use in forensic analysis of pirated product, as is done by many governments around the world. In exchange, these industries would, at the request of the Chinese government, use their international exemplar database to help the Chinese government determine the source of infringing product that the Chinese government has reason to believe was manufactured outside of China. This would facilitate greater regional and global cooperation in the fight against piracy. Despite China's call in the 2007 IPR Action Plan and the 2008 National Intellectual Property Strategy for greater international cooperation to fight piracy. However, the Chinese government was unwilling to cooperate with rights holders or governments in such an endeavor.

Four of the cases involved convictions for video piracy. To the best of our knowledge, none of these criminal cases involved the prosecution of an OD factory, something industry has sought for over 15 years, as far as we know, without success.

[23] South Korea, Singapore, Taiwan and Hong Kong are examples of countries where criminal enforcement has been able to significantly reduce piracy levels.

[24] MPA reports that HD disks are being fraudulently sold in China as Blue-ray disks. There are also reports that plants are manufacturing pirate blue-ray disks for export and seizures have occurred throughout Asia and elsewhere.

IIPA and the U.S. government have repeatedly urged the Chinese government to bring criminal actions against OD factories engaging in piratical activities. In its 2007 submission, IIPA reported on administrative actions taken against 14 OD factories in 2006, most of which were identified by industry. Chinese authorities had reported that six of these plants were allegedly closed (although it still is unclear whether such closures were permanent); that the licenses of eight of the plants were "temporarily" suspended (reportedly most of these licenses were restored); and that one or two of the 14 plants were under "criminal investigation."

When it became apparent that criminal actions would not be commenced in these cases, industry brought evidence of piracy exceeding the then-existing thresholds against 17 OD plants directly to the PSB and formally requested, in writing, criminal prosecutions against them. Industry also asked the PSB to bring criminal actions against three other plants among the original 14 identified by the Chinese government, for a total of 20 requested criminal cases. Unfortunately, these referrals did not result in any criminal prosecutions. The PSB offered a variety of explanations for its failure to pursue criminal prosecutions based on the referrals: claiming that the cases had to be brought initially to administrative authorities, or that the evidence presented did not "prove" that the thresholds were met. With respect to the first reason Chinese law expressly permits citizens and rights holders to bring criminal cases *directly* to the PSB,[25] and with respect to the second reason, China stands alone in the world in apparently requiring more than "reasonable suspicion" of a crime before commencing an investigation. IIPA understands the "reasonable suspicion" criterion is under study but no formal change has yet occurred. Until China criminally prosecutes factory owners engaged in pirate production, there is little hope that levels of piracy in this area can be significantly reduced.

Piracy at the wholesale and retail level: Raids and seizures at the wholesale/warehouse/distribution level continue to turn up massive quantities of pirate product. On April 22, 2009, the Chinese authorities launched another of their annual "campaigns" in 31 provinces all over China. The authorities reported seizing 46.85 million units of pirated audiovisual product, pirated business and entertainment software and pirated publications. This was down from the seizures reported from January-November 2008, when 76.85 million "illegal publications" which included 69.71 million "pirated audiovisual products," 12 million pirated books and 2.58 million copies of pirated software and "electronic publications" were seized.

Unfortunately, these annual "campaigns," while always involving significant seizures of pirate product at both the wholesale and retail level, have not resulted in any meaningful improvement in the market for legitimate product. This is due to the lack of deterrent penalties being imposed at the administrative level on establishments dealing in pirate product, and the failure of its criminal system to bring such effective deterrence. In its 2007 submission, IIPA reported on the result of outside surveys on the impact of the 2006 "100 Day Campaign," directed primarily at retail piracy, on the availability of pirate product in the marketplace. While seizure statistics were very high (and continued to be high through 2009), those studies concluded that pirate product remained available throughout the 2006 campaign in virtually the same quantities as before the campaign commenced. While pirate product tended to become less visible in retail establishments and was made available clandestinely from catalogues and stocks hidden at the rear of stores or down back alleyways, this did not substantially reduce the piracy rate at the retail level and pirate activities tended to return to normal when the campaign concluded.

Unfortunately, and despite the repeat of these campaigns in 2007-2009, including during the Olympics, industry still cannot report any meaningful improvement in the retail marketplace. Reports are that retail and street

[25] Taking cases through the administrative machinery slows the case down, risks that evidence will not be preserved and under applicable criminal rules is not necessary. Indeed, the PSB is obligated to take cases directly where criminal conduct is demonstrated. *See* Article 84 of the *Criminal Procedure Law of the People's Republic of China* (adopted at the Second Session of the Fifth National People's Congress on July 1, 1979, and revised in accordance with the *Decision on Amendments of the Criminal Procedure Law of the People's Republic of China*, adopted at the Fourth Session of the Eighth National People's Congress on March 17, 1996). *See also*, Article 18 of the *Rules of Public Security Authority on the Procedure of Handling Criminal Cases* (promulgated by the Ministry of Public Security under Decree No.35 on May 14, 1998).

vendor piracy overall has not significantly diminished, and piracy rates remain as high as ever. Annual legitimate sales recorded by the Guangdong Audio and Video Distribution Centre in Guangzhou in 2009 fell 97% compared to 2003. What is needed, of course, is the imposition of fines and other sanctions at the administrative level which truly deter pirates from continuing in this business, not just seizure of their pirate product available at that time and low fines which amount to the "cost of doing business." This will in turn require that the NCAC and local copyright bureaus be given significantly more manpower and resources than they now have. In addition, there needs to be significantly greater criminal enforcement against the distribution and sale of pirate product, through lowering the thresholds or, at a very minimum, calculating them through reference to prices of legitimate product. The PSB and SPP must devote greater resources to bringing high profile, well-publicized cases with real deterrent sanctions. In 2008 and 2009, there appears to have been an uptick in criminal enforcement against retailers. For the situation to improve, this must continue at a far higher rate.

There were a number of important civil cases decided in 2009 involving software piracy:

In July 2009, Microsoft won a few significant civil judgments for corporate end-user piracy. This included the case in Shanghai against Dare Information Industry Ltd. Co., a subsidiary of a listed company, in which the disclosure rules on IP infringement litigation were applied to the parent company for the first time in a case involving software piracy. There was also the case against Guangdong Huaxing Glass Co., Ltd. in Fuoshan where the court mediated the case and defendant paid RMB500,000 (US$73,180)in compensation and RMB1,000,000 (US$146,320) for software legalization. Also in July, Microsoft, Adobe and Altium brought a civil action in Shenzhen against CRS Electronic Co for end-user piracy. The court granted an evidence preservation order for the first time in a software end-user piracy case and the defendant paid the plaintiffs RMB780,000 (US$114,129) in compensation.

In July 2009, Microsoft won a significant civil judgment for "hard disk loading" against Beijing Strongwell Technology & Development, one of the larger custom PC dealers in Beijing. In another "hard disk loading" case brought in Shanghai, Microsoft sued the Shanghai HISAP Department Store, the court awarded a total of RMB700,000 (US$102,430) in damages and costs. Compensation in this case reportedly followed the SPC's July 2009 announcement requesting civil judges to award damages on the "full compensation" principle.[26] Microsoft also won an important "hard disk loading" case against Beijing Sichuangweilai Technology & Development, one of the larger custom PC dealers in Beijing with RMB460,000 (US$67,310) in damages.

In a case involving infringement of the Graduate Management Admission Test (GMAC), the Beijing No. 1 Intermediate People's Court found that Beijing Passion Consultancy Ltd. infringed and awarded the plaintiff RMB 520,000 (US$76,087) in damages. All these cases are welcome developments and IIPA hopes that damage awards continue to increase.

Enterprise End-User Piracy and Government Legalization of Business Software: Chinese authorities have not been successful in their efforts to address the pervasive use of unlicensed software by enterprise end-users. Such piracy accounts for the largest proportion of losses suffered by the U.S. software industry in 2009 – an estimated **$3.078 billion**. Because of the lack of real deterrence in the Chinese market, the software piracy rate remains the same as it was in 2008 – **80%** of the market.

Enterprise end-user piracy is not viewed by the authorities as a crime in China, so there is no criminal enforcement against end-users (as distinguished from commercial counterfeiters where the thresholds are met). Systemic change in addressing enterprise end-user piracy will require criminal enforcement. In April 2007, the Supreme People's Court (SPC) finally made clear that, under Article 217 of the criminal law, unauthorized

[26] http://www.chinaipr.gov.cn/news/government/283006.shtml

reproduction or distribution of protected software and other copyrighted materials qualifies as a crime. Clearly, the unauthorized use of software in enterprises (or under-licensing) involves reproduction. But the SPC has not clarified, and the enforcement authorities will not agree to take the position that such infringement meets the "for-profit" criterion in Article 217, even though income received through advertising meets this test. Other countries with this same test have been able to conclude that the conscious lowering of the business cost of licensing legitimate software contributes directly to the profit-making purpose of any enterprise. IIPA and BSA urge the SPC and/or the PSB and SPP to clarify the law and commence criminal prosecutions for end-user software piracy.

Administrative and civil enforcement remain very weak and ineffective against the massive scale of the problem. NCAC and the local copyright bureaus are woefully understaffed. They conduct some end-user raids, but cannot, even with the best of intentions, undertake meaningful enforcement with deterrent impact without significantly more manpower. In 2009, BSA lodged 23 complaints against end-users with CAs and LECAs and 19 raids were undertaken. Thirteen cases were settled and only three cases were closed with administrative fines. The maximum fine was only RMB20,000 (US$2,926), hardly deterrent and of little consequence for other companies that continue to use unauthorized software. It is patently obvious that this level of deterrence remains woefully insufficient against the scale of the problem. In addition to adding significant staff and resources at NCAC, CAs and LECAs, more political will must be demonstrated to take action against enterprise end-user piracy and more administrative fines of greater severity must be issued. Failure to confiscate equipment in many cases is also a problem. BSA also brought three civil cases in 2009 against end-users, a drop from 7 in 2008. Six civil cases were settled in 2009.

The civil and administrative cases cited above have been welcome but have not yet had a sufficient deterrent impact to serve as an impetus for enterprises to legalize. Plans for a "blacklist" of enterprises have been announced but not yet implemented. In addition, steps have not been taken to ensure that all companies bidding on government contracts certify the software they use is legally licensed, subject to audit. In short, while overall there has been gradual progress on enterprise legalization, much remains to be done on this issue.

Unauthorized use of software within government offices and SOEs in China is another significant cause of piracy losses faced by the business software industry.[27] With respect to government legalization, China made a commitment in the 2005 and 2006 Joint Commission on Commerce and Trade (JCCT) meetings to complete legalization within all government agencies, including provincial and local level government offices, by the end of 2005, and to ensure legalization in SOEs and Chinese enterprises. There has been little transparency on what has been done to meet these important commitments. Moreover, they need to be implemented on an ongoing (not one-time) bases, utilizing tools such as Software Asset Management (SAM) to ensure compliance.

An implementation plan was issued in April 2006, but unfortunately, the responsibility for compliance and oversight seems to lie on each agency and not on any central authority to enforce the commitment. Software asset management has been the subject of endless discussions but still no permanent plan is in place. Toward the end of 2007, NCAC announced a list of model enterprises for software legalization. However, as of 2009, it still does not appear that the selected enterprises had complete software asset management programs in place or had undergone a review of their software license histories.

Among the most notable and far reaching commitments emanating from the 2006 JCCT was the commitment to prohibit sale of computers both manufactured in China and imported without legal operating systems. This commitment is particularly important as China is now the second largest computer market in the world measured in new PC shipments annually, and will be the world's largest in several years. Implementation of

[27] The business software industry also loses revenue due to retail hard-disk loading and the production in China (generally for export) of high-quality counterfeit software packages. The 2008 conviction of 11 defendants in the Operation Summer Solstice case (discussed above), involving the largest organized criminal counterfeit ring ever prosecuted, is a clear illustration of the dimension of the counterfeit problem.

this commitment resulted in a significant increase in software sales in the initial year, but progress since has been small and the percentage of PCs used by end-users without licensed operating systems may be well over 50 percent. The problem is two-fold: smaller computer makers comprising up to a quarter of all of China's new PC shipments are not captured by the Chinese government's mandatory annual reporting requirements. These smaller computer makers comprise somewhere between 20 to 25 percent of the market and there are thousands of them. The second problem is that reporting by the top 30 or so computer makers that are required to report PC sales and OS shipments is not verified by the government. It is easy to claim that all new PCs shipped without proprietary software are shipped with Linux yet it is actually shifted to unlicensed Windows in channel or by end-users, and it is very difficult to capture installation of unlicensed proprietary software onsite at businesses by small PC makers ("system builders") or in PC malls. These remain prevalent practices. In this rapidly-growing market for PCs, IIPA and BSA urge the Chinese authorities to require a certificate on each new PC sold that it contains legally licensed operating system software, and step up auditing and enforcement. The government itself committed to procure computers with legally licensed operating system software pre-installed, and to provide adequate budget resources for compliance. We are not aware of any effective reporting or compliance mechanism for this decree, and getting adequate budget resources to agencies appears to be a problem. The government needs to institute an effective compliance mechanism that focuses primarily on pre-installation sales to government agencies and enterprises.

Book and journal piracy: U.S. book and journal publishers continue to suffer from piracy in three key forms: illegal printing of academic books and commercial bestsellers, unauthorized commercial-scale photocopying, and, as discussed above, Internet piracy encompassing online academic and professional journals and sites offering scanned books for download. Well-known university presses suffer from trademark infringement as well, with university names and seals reproduced on content bearing no relation to the university and sold at mainstream bookstores.

Throughout 2008 and 2009 the publishing industry continued to work with GAPP, NCAC and several local copyright bureaus to deal with illegal reproduction of textbooks in "textbook centers" on university campuses.[28] In its 2007- 2009 submissions, IIPA applauded the unprecedented administrative actions taken by GAPP, NCAC and local authorities on this issue, many of which resulted in administrative fines. While some progress has been made, piracy continues at high levels.

IIPA and AAP applaud this continued engagement by the local authorities and the coordination by GAPP and NCAC. The timing issues that plagued the authorities' inspections early on have been remedied to a large extent, and authorities are generally responsive to complaints in a fairly timely manner. Given the narrow window of opportunity available for action in each case, this is an extremely positive development.[29] IIPA and AAP hope this good cooperation continues into the high seasons (February/March and September/October) of 2010.

One area of possible improvement concerns transparency in the process of inspections, raids and formulation of administrative decisions. As reported above, this transparency has been enhanced by NCAC with some other industries and in some provinces.

In its 2009 submission, IIPA reported that libraries had begun stocking copies of illegally reproduced textbooks and reference books for use by patrons. These books are similar in quality to those reproduced by the textbook centers. Universities should take immediate steps to ensure that their collections feature only legitimate

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[28] IIPA notes that this problem plagues Chinese publishers as well, with locally-produced Chinese books found in every raid conducted to date.

[29] The pertinent periods for enforcement against university textbook centers—or any type of copying of academic materials—surround the start of university terms. These most often begin in September and March. Several of the government investigations in response to rights holder complaints in previous years were conducted outside of these time periods. For example, the first 2006 investigations took place in June and July, when universities were out of session. Low seizures and low fines are bound to result. However, this problem seems to have subsided, with timely raids over the past three years.

books. In mid-2009, publishers conducted a letter campaign directed at 20 university libraries, informing their administrators that pirated books had been found on their library shelves and requesting that they remove the infringing materials immediately. Of the 20 libraries, 8 responded positively, either stating that the infringing books would be or had been removed.

IIPA and AAP remain convinced that the partnership of the Ministry of Education (MOE) with GAPP, NCAC and local authorities is essential to tackling the ongoing on-campus infringement issues, especially given the large number and wide geographic spread of universities engaged in these practices. Unfortunately, after some promising activity in prior years, MOE has been reluctant to engage, and indeed has consistently refused meetings with rights holders during 2008 and 2009. The past year saw no apparent progress in implementing the notices issued by the Ministry in late 2006.[30] These notices instructed universities that, among other things, they were to ensure that textbook centers were free of infringing activity by December 31, 2006. Unfortunately, over three years later, rights holders have been told of no plan for implementing these notices. IIPA and AAP consider it imperative that an action plan be developed to ensure that the notices are fully implemented.

In addition to the unauthorized reproduction of books on campuses, copy shops outside universities continue with illegal photocopying. Furthermore, English language teaching programs often use the prospect of high-quality, color materials to lure students to their after-school programs, but then make and distribute unauthorized photocopies of those materials instead of the originals.

Illegal printing of books continues to plague publishers in China outside the university context as well. High-level foreign technical or medical books marketed to professionals and bestsellers tend to be vulnerable to this type of piracy, as are commercial bestsellers, undermining the legitimate market for foreign and Chinese publishers alike. These books are sold widely by ambulatory street vendors throughout China, thus making enforcement difficult. It is rather ironic that pirated copies of books that have been denied entry into China for censorship reasons are increasingly prevalent in the market. The content control mechanisms prevent or delay the entry of legitimate books into market, thus allowing the marketplace to be saturated with pirated versions.

Piracy of entertainment software products: Piracy levels for hard goods videogame products (both optical disc and cartridge-based formats) remain extremely high. Chinese enforcement authorities continue to fail to impose deterrent administrative penalties or initiate criminal prosecutions against infringers for piracy of U.S. entertainment software.

Internet café and public performance piracy: Piracy in Internet cafés is a major concern. Virtually all of these cyber cafés make available unauthorized videos and music for viewing, listening or copying by customers onto discs or mobile devices.[31] The unauthorized public performance of U.S. motion pictures and music videos continues mostly unchecked in hotels, clubs, mini-theaters, and karaoke establishments. Television piracy, particularly at the city level, and cable piracy (over 1,500 registered systems which routinely pirate U.S. product) continue to harm the U.S. and Chinese industries.

The public performance of musical compositions: On November 10, 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 a longstanding violation by China of their TRIPS/Berne Convention obligation to compensate copyright owners for the

[30] MOE joined GAPP and NCAC at the end of 2006 in issuing notices to regional education bureaus and regional copyright bureaus that copying of books at universities was not to be tolerated.

[31] Even as far back as 2005 it was reported that 76% of Internet café users visit to watch movies. See http://www.media.ccidnet.com/art/2619/20050814/310051_1.html.

broadcast of musical composition. However, according to U.S. rights holders, 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$0.04) per minute for music paid on the radio or RMB1.5 (US$0.22) for TV. Advertising revenue for Chinese broadcasting was reported to be US$10.16 billion in 2008.[32] 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 cumulative recovery for U.S. composers and music publishers would be tens of millions of dollars below what would be a fair rate. In last year's submission, IIPA urged that the new tariff be retroactive, at least to the date of China's joining the WTO. The new tariff is prospective only.

COPYRIGHT LAW AND RELATED ISSUES

On January 26, 2009, the WTO DSU panel issued a final decision in the dispute in which the U.S. asserted that China was in violation of its WTO TRIPS obligations. The U.S. government prevailed on two of its three claims – one which successfully challenged Article 4 of the Copyright Law on the grounds that it denied copyright protection to works whose "publication and distribution was prohibited by law," and the second which held for the U.S. in its challenge that releasing counterfeit goods into the marketplace and only removing the infringing mark was a violation of TRIPS. The third claim challenged China's high thresholds for criminal liability for piracy on the grounds that China failed to criminalize a great deal of copyright piracy and trademark counterfeiting "on a commercial scale" – a mandatory obligation under TRIPS. While the panel concluded that the U.S. did not prove its claim, the panel did carefully analyze the TRIPS Article 61 term "on a commercial scale" and agreed with the vast majority of the U.S.' arguments. It also did NOT conclude that China's criminal thresholds were acceptable under its "commercial scale" standard. Based on the definitions and discussion of what constitutes "commercial scale" piracy, China will need to revisit its criminal thresholds and consider amending Articles 217 and 218 of the Copyright Law.

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

Adoption of the "Regulations for Protection of Copyrights on Information Networks": In a welcome transparent process, the new "Internet Regulations" were issued and entered into force on July 1, 2006 and set out the legal infrastructure, along with provisions of the Copyright Law, for protecting content online. In general, IIPA welcomed the new regulations as responsive to many of the comments made by it and other members of industry over a long comment period. Some concerns remain, however:

- **Coverage of temporary copies:** The SCLAO has yet to clarify coverage for temporary copies. There continues to be support in many quarters for an additional regulation clarifying this issue and extending the scope of the regulations to *all* the rights implicated by reproducing and transmitting content online. IIPA notes that over 100 countries around the world extend, or have committed to extend, such protection in accordance with their (and indeed China's) obligations under the WCT and WPPT

- **Scope of Coverage:** Although SCLAO's Director General Zhang has taken the position that all rights are covered directly by Article 47 of the Copyright Law, IIPA remains concerned that textual vagueness may result in an interpretation under which Article 47 applies only to the right of communication to the public. IIPA reiterates that further regulations would be highly desirable to remove any ambiguity in coverage and urges this result.

[32] http://www.onscreenasia.com/article-4897-chinainfocus-onscreenasia.html

- **Technological protection measures:** The treatment of technological protection measures was substantially improved in the final regulations. Both devices and services are now covered by the prohibition as are "acts." Access controls are also covered, as they affect the right of communication to the public. Notwithstanding these laudable improvements, the test for what constitutes a circumvention device still remains unsatisfactory, and despite the narrowing of exceptions, they remain overbroad in some areas.

- **Service provider liability, notice and takedown, and exceptions:** The final regulation is a substantial improvement over earlier drafts and generally tracks the DMCA and EU E-Commerce Directive provisions. The "safe harbors" provide limitations only for liability from damages, not injunctive relief, and ISPs are liable if they know or should have known that the material was infringing even absent express notifications (and of course there is no safe harbor unless the ISP takes down the infringing material after receiving a compliant notice). Exceptions still cause some concern, especially the Article 9 statutory license, which Director General Zhang confirmed applies to foreign works which are owned by a Chinese legal entity. This would violate the Berne Convention and TRIPS. Director General Zhang also confirmed that Article 8, which affects publishers, would not apply to foreign works and said that ISPs are liable for linking activities under Article 23. While IIPA and RIAA also believe this to be the case, the recent Baidu decision seems to cast doubt on the extent to which Article 23 applies to deeplinking in the absence of actual knowledge. Other necessary clarifications are: that email notices are permitted and that takedowns following notice must be within 24 hours,[33] and that ISPs that fail to immediately take down sites following compliant notices from rights holders are infringers and, as such, should be subject to the same administrative fines as any other infringer.[34] The NCAC should clarify and reform the evidentiary requirements necessary to provide a compliant notice. Unfortunately, Article 14 of the Internet Regulations arguably appears to require detailed evidence, including detailed copyright verification reports, and, if so, that Article should be amended. In addition, the current law does not provide a specific remedy against repeat infringers.

- **Exemptions for libraries, educational bodies and "similar institutions":** IIPA remains concerned about certain aspects of Articles 6, 7 and 8. A representative list of potential issues includes: (a) overbroad language applying to teachers, researchers and government organs in Article 6, (b) Article 7's reference to "similar institutions," which may open up the scope of exemptions far beyond organizations that perform the traditional functions leading to these exemptions, (c) failure to limit Article 7 to "non-profit" entities, and (d) failure to clarify that Article 8 does not apply to foreign works.[35]

Administrative-Criminal Transfer Regulations: The amended Criminal Transfer Regulation has not assisted greatly in securing more and easier referrals from administrative agencies to the PSB. The regulations leave unclear whether transfers were required upon "reasonable suspicion" that the criminal thresholds had been met. Indeed, the enforcement authorities have taken the position that "reasonable suspicion" is insufficient to result in a transfer. In assessing whether to accept case transfers from administrative authorities, the PSB requires proof of illegal proceeds/gains obtained by the infringers. However, administrative authorities lack the investigative power to collect the type of evidence necessary to fulfill this requirement. As a result, administrative authorities are often unable to transfer cases, and are left only with the option of seizing infringing productions, producing little deterrence. While we report a number of transfers to criminal authorities in this submission, IIPA urges the practice

[33] The January 20, 2010 Declaration on Content Protection contains the principle that takedowns should be accomplished within 24 hours.
[34] Until these fines are imposed and announced publicly, it will remain extremely difficult for NCAC and the local copyright bureaus to deter Internet piracy, given the difficulties of identifying infringers and bringing administrative actions against them. NCAC has apparently to date not acknowledged that fines can be imposed.
[35] Director General Zhang of the SCLAO confirmed to IIPA that Article 8 did not apply to foreign works but this should be confirmed in writing and a notice made widely available.

be reversed and, if necessary, that the "reasonable suspicion" rule be expressly included in amended transfer regulations. In those cases where copyright owners have worked closely with administrative authorities to develop criminal complaints, some have experienced great difficulties in obtaining case updates from the PSB after the case transfer.

The Copyright Law should be amended to bring it into compliance with the WIPO Internet treaties and the WTO panel decision: It is worth noting that a Chinese official has acknowledged that further amendments to the copyright law are needed[36] to bring China fully into compliance with its international obligations, particularly under the WIPO Internet Treaties. This view has also been expressed by Chinese experts at a number of recent seminars held in China on protection of copyrights on the Internet. IIPA understands that the Copyright Law amendment has now begun and it urges that these issues be dealt with in the amendment process. Some of the amendments that should be made are:

- protection for temporary copies (can also be done in regulations or a JI);
- narrow some exceptions to protection and add reference to the three-step test;
- ensure that the anti-circumvention provisions clearly cover copy controls and preparatory acts e.g., devices and services, and that there is a clear definition of circumvention;
- ensure that live sporting events are protected either as works or under neighboring rights;
- remove reference to "public interest" as a criteria for administrative enforcement;
- add full communication to the public rights, including performance., broadcast, simulcast and cable transmission rights for all works and for sound recordings;
- increase and clarify statutory damages for infringements, and maximum administrative fines for infringements;
- clarify secondary liability for infringement and ensure that central government authorities and courts have jurisdiction over Internet infringements, regardless of where the infringement occurs or the server resides;
- establish clear presumptions of subsistence and ownership;
- impose a clear obligation on ISPs to take action against repeat infringers.

Additionally, in order to comply with the WTO panel's recent decision, Article 4 must be amended to remove all language that limits the scope of subject matter eligible for full copyright protection. WTO rules require that this action must be taken no later than March 2010.

The Criminal Law should be amended to cover all "commercial scale" piracy: Articles 217 and 218, the criminal piracy articles of the Criminal Law of the People's Republic of China (1997), fail to cover all cases of piracy on a commercial scale as required by TRIPS Article 61. Examples of omissions include the exhibition and broadcast right, the translation right and others, the infringement of which do not constitute crimes even if done "on a commercial scale." In addition, China is one of the only countries in the world that requires proof that the act in question was undertaken with the "purpose of reaping profits," and is the only country we know of that has a threshold ("gains a fairly large amount" or "when the amount of the illicit income is huge") for criminal liability based on pirate profits or income.[37] China should remove the "purpose of reaping profits" standard since commercial scale piracy can be, and in the digital age often is, engaged in without any purpose of reaping profit (e.g., on a P2P Internet site where no money is exchanged, or in the case of hard-disk loading where the software might be

[36] Interview with NCAC Vice Minister Yan Xiaohong, June 13, 2007, BBC republishing and translation of original Xinhua text from June 9, 2007

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

characterized as a "gift"). The criminal provisions also need an update to take into account the WCT and WPPT (WIPO Internet Treaties), which, as discussed above, China has joined. It is also important to criminalize the manufacture and distribution of circumvention devices. Thus, IIPA proposes that Article 217 be amended to achieve the following, among other things: (1) expressly criminalize end-user piracy, (2) add the TRIPS-required reference to all the exclusive rights now provided in the law (and include the interactive public communication right), (3) criminalize violations of the anti-circumvention and rights management information provisions, (4) remove "purpose of reaping profits" to criminalize offenses that are without profit motive but that have a "commercial scale" impact on rights holders, and (5) increase the level of penalties overall. China must also make good on its promise to criminalize fully the importation and exportation of pirate product (under the JIs such acts are actionable under "accomplice" liability, but the penalties available are much lower and generally non-deterrent).[38] We also note that the JI provisions on repeat offenders, while included in the 1998 JIs, were not included in the 2004 JIs; we seek confirmation that the recidivist provision in the 1998 JIs remains intact, since it is not inconsistent with the 2004 JIs.[39]

Criminal thresholds should be further lowered or abolished entirely: The 2004 and 2007 JIs made only minimal decreases in the monetary thresholds required for criminal prosecutions, and left in place the requirement that calculations of "gain" or "illicit income" are to be assessed at pirate prices (as opposed to legitimate retail prices). Further, copyright owners have not found that the lowering of the copy threshold in 2007 has proven very helpful in generating new criminal prosecutions. China should further lower its thresholds or abolish them. As noted above, IIPA believes that China's current thresholds are inconsistent with the test laid out by the WTO panel and thus should be promptly revisited by the SPC.

A new challenge is how to meet the threshold in the case of Internet infringement. The severity of Internet piracy clearly calls for adjustments to the thresholds in the JIs so that Internet piracy, when on a commercial scale, is actionable with clear copy thresholds and even if pirate profit or "illegal business volume" is not proved.

As a result of these onerous evidentiary threshold requirements, law enforcement agencies are often reluctant to take actions against alleged Internet infringers. This problem is further exacerbated by the inability of rights holders to investigate the content or to seize the servers of alleged infringers in order to preserve the evidence. There is an urgent need for a new and separate Judicial Interpretation to deal with guidelines for criminal cases involving the Internet.

China should adopt full communication to the public and broadcasting rights for record producers and for all works: China should provide performers and phonogram producers with rights of communication to the public, including broadcasting, simulcasting and cable transmission, and it should clarify whether the right of public performance in sound recordings still exists. The right of public performance for foreign sound recordings was initially accorded in the "International Copyright Treaties Implementation Rules", in force since September 1992. The "Implementation Rules" were issued, *inter alia*, to comply with China's obligations under a January 1992 MOU with the U.S., in which China had undertaken to grant a public performance right to U.S. works and sound recordings. However, the 2001 Copyright Act failed to confirm this right, so no public performance right is clearly acknowledged by legislation, and no collections have been made. China should adopt an exclusive right of public performance and broadcasting for sound recordings, permitting the Chinese performing rights society to negotiate freely a fair payment for this right.

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[38] In the JCCT, the Chinese government committed that the Chinese Ministry of Public Security and the General Administration of Customs would issue regulations "to ensure the timely transfer of cases [involving pirate exports] for criminal investigation." The JCCT outcomes indicate that the "goal of the regulations is to reduce exports of infringing goods by increasing criminal prosecution."

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

China should also establish clear rules that promote more responsible practices on the part of all players involved in the digital transmission of copyright materials, following the example set out in the recent *China Internet Industry Declaration on Content Protection.* Legal accountability will lead to the development and deployment of advanced technological measures, which will advance legitimate commerce while preventing unfair competition.

China should adopt an anti-camcording criminal provision: As discussed above, a vast number of movies are stolen right off the screen by professional camcorder pirates, who use video cameras to illicitly copy a movie during exhibition in a movie theatre, usually very early in its theatrical release or even prior to the film's release (e.g., at a promotional screening). In some cases prints shipped to theaters were misappropriated and copied to electronic media (e.g., telecine transfer), which can then be used for mass production of high quality DVDs. These copies and masters are then distributed to bootleg "dealers" throughout the world and over the Internet. China should take whatever legislative steps necessary to criminalize camcording and telecine transfer of motion pictures.

MARKET ACCESS AND RELATED ISSUES

IIPA has consistently stressed the direct, symbiotic relationship between the fight against piracy and the need for liberalized market access to supply legitimate product (both foreign and local) to Chinese consumers. 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.[40] The Appellate Body affirmed the Panel's ruling that requires China to (a) allow U.S. companies to import freely into China (without going through the government monopoly) films for theatrical release, DVDs, sound recordings, and reading materials; (b) distribute certain reading materials and sound recordings in electronic form; (c) remove certain restrictions that impose discriminatory operating requirements on foreign-invested distributors of reading materials and DVDs; (d) remove burdensome requirements that discriminate against the distribution of imported reading materials. These copyright industries had sought to remove these and other market access barriers ever since China joined the WTO in 2001 and may must now be eliminated as a result of this WTO case.[41]

This landmark WTO case will, within an expected 12 to 15 months, require China to open up its market for these industries in significant ways and we hope 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 piracy there.

There are a range of restrictions, affecting more than a single copyright industry, some of which must be eliminated as a result of the WTO case, and all of which stifle the ability of U.S. rights holders to do business effectively in China. Taken together, these are summarized below.

Ownership/investment restrictions: The Chinese government allows foreign book and journal publishers, sound recording producers, motion picture companies (for theatrical and home video, DVD, etc., distribution), and entertainment software publishers, to enter the Chinese market, if at all, only as a partner in a minority-share (up to 49%) joint venture with a Chinese company. These limitations must be eliminated.

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[40] http://www.wto.int, CHINA – MEASURES AFFECTING TRADING RIGHTS AND DISTRIBUTION SERVICES FOR CERTAIN PUBLICATIONS AND AUDIOVISUAL ENTERTAINMENT PRODUCTS, WT/DS363/AB/R, 21 December 2009.

[41] 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). The U.S. requested the establishment of a WTO dispute settlement panel on October 11, 2007 and a panel was established on November 27, 2007. The panel rendered its confidential interim decision on April 20, 2009 and its final decision to WTO members and the public on August 12, 2009.

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

Earlier in this submission we cite to the Ministry of Culture's September 2009 *Circular on Strengthening and Improving Online Music Content Examination* which imposes unnecessarily burdensome censorship and ownership requirements on legitimate online music providers. The *Circular* would require censorship approval for all foreign music licensed to such providers while requiring only recordation for domestic repertoire. Especially because of the large number of titles involved, this imposes virtually impossible delays on these foreign businesses and the rights holders who license their product to them. In addition, the *Circular* interferes with the commercial licensing of foreign music by imposing on rights holders certain conditions in the licensing of their music, for example in the appointment of exclusive licensees for not less than 1 year period. The *Circular* will significantly hamper the development of a healthy legitimate digital music business in China, whilst making it easier for the pirates, who do not need to comply with these rules, to thrive.

Entertainment software companies continue to face lengthy delays in the censorship approval process, wiping out the window for legitimate distribution of entertainment software products, a window that is already shorter than for other types of works. Each entertainment software title must go through an approval process at the GAPP, which takes several weeks to several months.[42] Consistent with its approach to other industries, the Chinese government should rid the market of pirated game titles that are still under GAPP review, effecting an immediate seizure of the unauthorized titles. Pirates should not be given free reign of the market while legitimate publishers comply in good faith with China's content review process. Another serious concern is the ongoing dispute between GAPP and MOC on which agency has the authority to grant censorship review for online versions of games.[43] The review function should be lodged with only one agency, either the GAPP or the MOC. Finally, transparency in the review process and in the criteria employed in these reviews are likewise sorely needed.

IIPA notes that the responsibility for censorship of home video product and sound recordings released in a physical format has been transferred from the Ministry of Culture to the GAPP. MPA member companies had experienced a slow down in the censorship process, but the situation started to improve somewhat by the end of 2009. The average censorship process for home video product in other Asian countries is seven working days, although in some cases it may take up to 21 days, compared with the 30-day timeframe that is typical in China. Pirates effectively enjoy a "protected window" where only illegitimate copies are available and consumers were given no legitimate alternative. If the GAPP censorship process is not improved to match international practice quickly, piracy levels will worsen and government efforts on enforcement will be ineffective due to the lack of legitimate home video product to meet consumer demand.

Restrictions on ability of trade association staff to engage in anti-piracy investigations: Also affecting the ability of some copyright industries to do business in China are the severe restrictions on the ability of copyright industries' local trade associations from engaging in investigations in the anti-piracy area, as well as restrictions limiting the number of employees that trade associations may employ. Companies that invest in China are not subject to these same restrictions. Because copyright-based companies in certain sectors conduct virtually

[42] An ESA member company reports that one of its titles was under review for a period of 18 months (the longest such review period known thus far), and subjected to several layers of reviews before several different bodies. Despite the length of the review, the process remained opaque with the criteria for review still unknown to the publisher.

[43] This overlapping jurisdiction and these interagency power struggles engulf most of the agencies responsible for cultural and copyright product, including the MOC, GAPP, SARFT and the MIIT to the detriment of the industry affected.

all their global anti-piracy operations through their designated trade associations, and given the restrictions on becoming a foreign invested company in China, these rules hamper the fight against piracy in China.

There are also many industry-specific market access restrictions:

Recording industry: Record companies are prevented from establishing a meaningful commercial presence that would permit them to develop talent in China, and from getting legitimate product quickly to market. The fact that U.S. record companies cannot distribute a recording in physical format except through a minority joint venture with a Chinese company (and may not "publish" a recording at all—a stage in the process of bringing materials to the market left entirely to state-owned companies) artificially segments China's market, making it extraordinarily difficult for legitimate companies to participate effectively. U.S. record companies are skilled at and desirous of developing, creating, producing, distributing, and promoting sound recordings worldwide.[44] The universal experience of nations in which the international record companies do business is that local artists have expanded opportunities to have their music recorded and distributed widely. The in-country presence of U.S. companies also has brought jobs and expertise in a wide variety of areas. China should permit U.S. (and other foreign) sound recording producers to engage in:

- the integrated production, publishing and marketing of sound recordings;
- production, publication and marketing their own recordings in China;
- the signing and management of domestic artistes;
- the distribution of sound recordings via digital platforms and in physical formats; and
- the importation of finished products of their own sound recordings.

Book and journal publishing industry: The U.S. book and journal publishing industry continues to suffer from severe restrictions on its activities within China. Below are listed the fundamental issues hindering this industry from offering the widest possible array of tailored products to the Chinese consumer.

- **Trading rights:** Foreign companies are prohibited from importing material into China. Importation is limited to 38 state-owned trading companies, through which all imports must be channeled. Under the terms of China's WTO accession, foreign-invested and foreign-owned companies should be permitted to engage in direct importation of their products. These restrictions should be eliminated in accordance with the WTO panel decision.
- **Distribution:** Foreign-invested and foreign-owned companies should be permitted to engage in wholesale and retail distribution of all product (locally produced or imported) in the Chinese market without any limitations. These restrictions should also be eliminated in accordance with the WTO decision.
- **Publishing:** Liberalizations to core publishing activities would allow foreign companies to better tailor a product to the Chinese market. Activities such as obtaining Chinese International Standard Book and Serial Numbers (ISBNs or ISSNs), editorial and manufacturing work, and printing for the Chinese market remain off-limits to foreign companies. Restrictions on these activities result in greater expense to publishers and consumers alike, and discourage development of materials most appropriate for Chinese users. These restrictions also create delays and a lack of transparency in the dissemination of legitimate product in the Chinese market, opening the door for pirate supply.

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

- **Online content:** High fees related to access to foreign servers by users of the China Education and Research Network (CERNET) result in high costs to publishers of electronic materials (such as academic and professional journals) in making their products available in China, resulting in fewer options available to Chinese scholars and students.

Motion picture industry: There has been no change in the current severe restrictions on market access for motion pictures. These include the following:

- **Onerous and indefensible import quota for theatrical release of films:** Under the terms of China's WTO commitment, China agreed to allow 20 revenue sharing foreign films (theatrical release) into the country each year. The monopoly import structure (described below) and the censorship mechanism go hand-in-hand with the way this quota is imposed and enforced. Demonstrably unfair and adhesive contractual conditions (under the so-called "Master Contract") still prevail for theatrical-release motion pictures in China, ensuring that the film distributor/studio gets only a small proportion of the box office. This creates a completely non-competitive environment for film importation and distribution in China.
- **Cutting the screen quota for foreign films:** SARFT regulations require that foreign films occupy less than one-third of the total screen time in cinemas. Even where foreign blockbusters are allowed into China under the film quota system, the screen quota then mandates that the distributor restrict the number of prints available to cinemas.
- **Monopoly on film imports and film distribution:** China Film continues to be one of the entities holding a state-enforced monopoly on the import of foreign films. This must be eliminated under the WTO decision. Foreign producers cannot directly distribute revenue-sharing foreign films but China has indicated to the WTO that distributors other than the China Film and Huaxia may apply to distribute foreign films, including through joint ventures with foreign producers.
- **Restricted market access for foreign satellite signals:** Foreign satellite channels may only be shown in three-star hotels and above and in foreign institutions. Moreover, foreign satellite channels beaming into China are required to uplink from a government-owned satellite for a fee of US$100,000, placing a significant and unnecessary financial burden on satellite channel providers. Further, foreign satellite channels are not allowed carriage on local cable networks without government approval or landing permits. Offending news items on sensitive subjects in China are still routinely blacked out by officials who monitor all broadcasts over the national satellite system. Only a handful of foreign channels have been granted approval, and carriage is currently limited to Guangdong province.
- **Broadcast quotas, content restrictions, and restrictive license practices for satellite channels:** SARFT's "Regulations on the Import and Broadcasting of Foreign TV Programming" effective October 23, 2004, sets severe quotas on the broadcast of foreign content (e.g., no more than 25% of all content broadcast can be foreign films or television dramas, with a 0% allowance during prime time).[45] The China TV Program Agency under CCTV must approve all importation of foreign programming under the guidance of SARFT. China has also issued regulations restricting who can invest and what kinds of programs can be produced in China, again with the aim of severely restricting foreigners' ability to operate in China, and restricting the kinds of content to be permitted (of course, this belies the fact that pirate content comes in unfettered, unregulated, and uncensored).[46]

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[45] Broadcast of foreign film and television dramas may not comprise more than 25% of total air time each day and 0% during prime time (17:00-20:00) on any channel other than pay television, without SARFT approval. Other foreign programming (news, documentaries, talk shows, travel shows, etc.) is restricted to no more than 15% of total air time each day. Foreign animation programming may not exceed 30% of daily animation programming delivered by animation and youth and children channels, and during prime time, foreign animation and programming is banned. To further complicate matters, only producers of domestic animation programming can import foreign animation programming and no more than an equal share of what they produce.

[46] The "Interim Management Regulations on Sino-Foreign Joint Ventures and Sino-Foreign Cooperative Television Program Production Enterprises," effective November 28, 2004, sets out the 49% minority joint-venture restriction for "production ventures"; investment requirements of foreigners; licensure requirements; requirements that foreign partners must be "specialized radio or TV ventures"; restrictions

- **Black-out periods:** The Chinese government has on various occasions, including a complete ban imposed in December 2007, decreed "black-out periods" (during which no new revenue sharing blockbuster foreign films may be released) in an effort to restrict competition with Chinese films being released in the same period. These "black out periods" artificially drive down foreign rights holders' theatrical revenues and contributes to increased piracy, as pirates meet immediate consumer demand for major foreign titles by offering illegal downloads through the Internet, pirate optical discs, and pirate video-on-demand channels.
- **Local print production requirement:** China Film continues to require that film prints be made in local laboratories, reducing rights holders' abilities to control the quality of a film copy and potentially resulting in increased costs.
- **Regulations on Home Video Licensing Agreements:** The General Administration of Press and Publication (GAPP) requires that copyright owners enter into home video license agreements of not less than three years duration with their licensees in China – an unnecessary intrusion into copyright owners' contractual rights.
- **Import duties should be based on the value of physical media:** Import duties on theatrical and home video products may be assessed on the potential royalty generation of an imported film, a method of assessment, which is excessive and inconsistent with international practice of assessing these duties on the value of the underlying imported physical media.

Entertainment software industry: The entertainment software industry notes its concern over the ban on video game consoles. The current ban on the manufacture, sale and importation of electronic gaming devices (i.e., video game consoles), in effect since a 2000 *Opinion on the Special Administration of Electronic Gaming Operating Venues*, stymies the growth of the entertainment software sector in China. The ban even extends to development kits used in the creations and development of video games. The ban impacts not only foreign game publishers, but also domestic Chinese developers, who are unable to obtain such kits given the prohibition on their importation. The Chinese government should be encouraged to eliminate this ban, on both video game consoles and on development kits. Maintaining the ban not only impedes access to the market for foreign publishers but also hinders the fledging Chinese game industry's access to game development technology — a policy seemingly at odds with the government's interest in spurring the growth of this dynamic sector.

Business software industry: In November 2009 the National Development and Reform Commission, the Ministry of Finance and the Ministry of Science and Technology issued a joint circular which would establish an accreditation system for a national catalogue of "indigenous innovation" products to receive significant preferences for government procurement. Among the criteria for eligibility for the catalogue is that the products contain intellectual property that is developed and owned in China and that any associated trademarks are originally registered in China. This represents an unprecedented use of domestic intellectual property as a market-access condition and would make it nearly impossible for the U.S. software products (and the products of other high-tech industries) to qualify unless they are prepared to transfer their IP and/or research and development to China. This November circular was followed in late December by the announcement that the government would develop a broader catalogue of indigenous innovation products and sectors to be afforded preferences beyond government procurement (i.e., including subsidies and other preferential treatment). The December announcement, which was issued by four Chinese agencies including the State Owned Assets Supervision and Administration Commission (SASAC), also raises the specter of China subtly encouraging its many state-owned enterprises to discriminate against foreign companies, including software companies, in the context of procurement, including for commercial purposes. In January, BSA and a broad array of other U.S. business associations sent a letter to five U.S. cabinet officials (State, Treasury, Justice, Commerce and USTR) urging them to make addressing China's discriminatory

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on access to non-media investors; and, perhaps most important from a content perspective, requirements for use of "Chinese themes" in two-thirds of the programming.

"indigenous innovation" policies a strategic priority in the bilateral economic relationship. It is noteworthy that these Chinese policies directly counter the repeated pledges by the Chinese government to avoid protectionism, including the joint commitment of President Hu and President Obama at their recent summit in November to pursue open trade and investment. They also are counter to China's commitments in the JCCT and US-China Strategic and Economic Dialogue (S&ED) to keep government procurement open to foreign-invested enterprises (FIEs) and its efforts to join the WTO's Government Procurement Agreement (GPA).

In addition, government efforts to legalize software use in enterprises have, on occasion, gone hand in hand with preferences favoring the acquisition of Chinese software over non-Chinese software. Other examples of state-owned enterprises being instructed to prefer domestic software include a January 2008 "Announcement on Preparation for the Inspection of the Use of Genuine Software in State-Owned Enterprises by the Province" issued by the Guangdong provincial government and a December 2007 speech by a Deputy Party Secretary and Vice Chairman of SASAC at a "Working and Training Conference on the Software Legalization in Central Enterprises". MIIT has also been known to encourage and commend those enterprises that have adopted indigenous software products in their legalization. All these actions appear to be inconsistent 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 . . . ." China reiterated this commitment in the JCCT. The Chinese government should, consistent with its WTO and JCCT obligations, refrain from instructing or encouraging state-owned enterprises 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.

TRAINING AND PUBLIC AWARENESS

MPA, IFPI and BSA undertook a number of training and awareness programs throughout China in 2009. The trainings have involved police, prosecutors, judges, customs officials, and administrative agency enforcement personnel. Training and awareness have always been a high priority for the copyright industries in China.

In 2009, MPA sponsored and co-organized 15 trainings/seminars for over 1,500 administrative enforcement officials, police, prosecutors, IPR judges, Customs officials, and representatives from ISPs and ICPs, local copyright industries, with topics covering new challenges and strategies for the movie industry in the digital industry, trends in technological solutions for content protection, the need to amend China's copyright law, the impact of piracy on the film industry, and investigative techniques against Internet piracy and the identification of pirate optical disks, among other topics.

MPA assisted in organizing the following law enforcement trainings with the NAPP and its provincial offices:

- May – Hefei (50 officials from mainland China, Taiwan, and Hong Kong participated)
- July – Nanching (102 participants)
- August – Hefei (50 participants)

MPA assisted in organizing the following law enforcement trainings with the Ministry of Culture

- June – Fuzhou (130 officials from Fujian, Jiangxi, Shangdong, Sichuan, Guizhou, and Xinjiang participated)
- July – Hangzhou (78 participants)
- September – Nanjing (63 officials from Jiangsu, Guangdong, Gansu, Hainan, Chongqing, and Inner Mongolia participated)
- September – Chengdu (108 officials nationwide participated)

MPA assisted in organizing the following trainings with local Cultural Task Forces

- April – Shanghai (70 participants)
- July – Shenzhen (80 participants)
- November – Shanghai (86 participants)
- November – Qingdao (103 participants)

...and sponsored/participated in seminars and conferences

- July – Copyright protection for movies and music (84 attendees)
- November – International conference on trends in copyright protection (over 200 participants)
- December – Training seminar on copyright industries and digital technologies (120 participants)
- December – US-China Forum on frontier and hotspot issues for copyright protection over the internet (180 participants)

The record industry focused primarily on training for online enforcement and conducted over 20 training events for enforcement officers at central and provincial level from various government agencies including Copyright bureaus, Cultural Enforcement Taskforces, Press and Publication Bureaus, NAPP, and Customs, as well as for IP Court judges and representatives from ISPs and other internet companies.

BSA offered two training seminars in 2009 on software enforcement and also provided training to the Qingdao and Guangxi copyright bureaus and in early June and in November joined with MPA and IFPI and others in seminar on amending the Copyright law. It also collaborated in mid-June with the SPC on a seminar on software end-user civil liability and litigation. BSA also provided seven SAM training for enterprises in six cities.

- March – Guangzhou (80 enterprises)
- April – Shanghai (40 enterprises)
- July – Guangzhou (60 enterprises)
- July – Chengdu (62 enterprises)
- July – Shenzhen (46 enterprises)
- November – Hangzhou (55 enterprises)
- December – Nanjing (44 enterprises)