

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2008 SPECIAL 301 REPORT

### PEOPLE'S REPUBLIC OF CHINA (PRC)

**Special 301 Recommendation:** IIPA recommends that USTR maintain China on the Priority Watch List in 2008.

#### **PRIORITY ACTIONS TO BE TAKEN IN 2008**

- **Bringing a Significant Number of Criminal Prosecutions, Both for Online and Hard Goods Piracy of U.S. Works:** China's unwillingness to bring a significant number of deterrent criminal cases continued in 2007. If any meaningful change is to occur, China must refer many more cases for criminal prosecution and prosecute them aggressively. This is becoming particularly critical in the area of Internet piracy which continues to grow at alarming rates. Only through these actions can China meet its 2004 JCCT commitment to "significantly reduce IPR infringements" (and its TRIPS obligations) in the near term. In particular, criminal cases must be brought in the following areas:
- **Significantly Increasing the Criminal Prosecution of Infringements on the Internet and Mobile Services:** Stemming Internet piracy<sup>1</sup> in China has become the number one priority for most of the copyright industries. Such piracy is growing and must be significantly reduced, not only by administrative enforcement by the National Copyright Administration of China (NCAC), but also through the vigorous prosecution of criminal infringements. However, without proof of infringement satisfying China's still high threshold requirements, law enforcement agencies are unwilling to take actions against alleged Internet infringers. This problem is further exacerbated by the lack of power on the part of rights holders to investigate the content or to seize the servers of alleged infringers 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 is obligated under TRIPS to use its criminal law against "copyright piracy on a commercial scale." While a few criminal cases have been brought and convictions obtained, the dearth of prosecutions continues unremedied. Cases should be brought against Internet café owners — notorious centers for piracy of music, games and movies -- and against websites, FTP sites, UGC sites, search engines inducing infringement, and major P2P services, including P2P streaming sites, and those who are major uploaders to those services.
- **Criminalizing and Prosecuting Software End-User Piracy:** China continues to insist that use of unauthorized software in a commercial business environment is not a crime. The Criminal Law need not be interpreted so narrowly and the SPC should clarify that such unauthorized uses involve unauthorized reproduction or distribution in violation of Article 217 of the Criminal Law and that prosecutions should proceed since virtually all instances of this kind of piracy are "on a commercial scale."
- **Bringing Many More Prosecutions Against OD Plant Owners Engaging in Unauthorized Production and Export of Pirate ODs:** Despite asserted administrative inspections (which, in any case, lack deterrence), OD piracy by China's factories continues unabated, despite significant and

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<sup>1</sup> The term "Internet piracy" refers to all piracy on the Internet or through mobile communications platforms or similar technologies.

meaningful evidence presented by industry to Chinese authorities and China's claim that it inspects all licensed factories. The Chinese government should take effective and well-publicized action against factories pirating U.S. product to convey a strong message to the Chinese society and to pirate producers that illegal production will not be tolerated. China's tepid current enforcement efforts such as temporarily closing plants without any further action, as China did in March 2006, and its failure to commence factory criminal cases brought to it by some IIPA members, will not deter China's pirates. The authorities must seize and destroy the offending equipment and prosecute those responsible. Investigations must commence based on "reasonable suspicion" that a crime has been committed and prosecutions, convictions and deterrent penalties should ensue. China has forensic "footprints" of OD product produced by each licensed plant, as does industry. China has rejected, without explanation, proposals from industry and the U.S. government to cooperate in using this information to track down pirate producers. Such data should be made available; it would be of immense use in prosecuting and thus deterring OD factory piracy.

- **Significantly Increasing the Manpower and Financial Resources Available to the NCAC and to Local Copyright Bureaus to Improve Administrative Copyright Enforcement Against Piracy on the Internet as Well as Hard Goods Piracy:** Industry reports and surveys indicate, and the Chinese government has acknowledged,<sup>2</sup> that the 2006-2007 government campaign against hard goods and Internet piracy, though involving thousands of actions, raids and seizures, had only a minimal and temporary impact in the marketplace. NCAC's and the local copyright bureaus' resources (some with no more than five employees) are woefully inadequate to fight these types of piracy in China, and administrative enforcement must not be left solely to inspections by other agencies (such as the Ministry of Culture) for licensing violations. More Internet infringement training and investigations are critical. In particular, deterrent administrative penalties should be imposed upon ISPs when they do not expeditiously take down infringing materials upon notice from rights holders. Given the extent of piracy in China and the damage to the local as well as international creative industries, the underfunding and understaffing of NCAC is inexplicable and unfortunately leads to many failures.
- **Enhancing Pre-Release Administrative Enforcement for Motion Pictures and Sound Recordings, and Include Other Works as Well:** China promised to "regularly instruct enforcement authorities nationwide that copies of films and audio-visual products still under censorship or import review or otherwise not yet authorized for distribution that are found in the marketplace are deemed pirated and subject to enhanced enforcement." This should apply to all other subject matter including sound recordings and videogames, as an increasing number of pre-releases (before legitimate worldwide release) have been found to be distributed online from servers, websites, blogs, and forums operated in China. MPA reports moderate success in reducing pre-release piracy but this critical problem needs to receive even more focused attention and must be extended to other products. The recording industry reports that the sale of legitimate products is severely affected by the problem of pre-release piracy.
- **Clarifying Its New Internet Regulations to Ensure their Effectiveness and Implement them Aggressively with both Administrative and Criminal Enforcement:** The promulgation of the Internet regulations in July 2006 was a positive step. However, Chinese authorities should further clarify how they will be implemented and then implement them aggressively. The recent SPP "Guidelines" still leave many questions unanswered. The Chinese High Court properly interpreted these regulations when it upheld the civil judgment that Yahoo China was an infringer by deeplinking to infringing music files, although the damages awarded were woefully low and the scope of injunctive relief far too limited. But the authorities should clarify that services that permit conversion of infringing files (e.g. MP3s to ring tones, or ring back tones) are banned. It should clarify publicly with all ISPs that right holder notices of infringement may be served on ISPs by e-mail, and extend notices to telephone communication in cases of pre-release materials or in other exigent

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<sup>2</sup> See [http://www.chinadaily.com.cn/china/2008-01/18/content\\_6402839.htm](http://www.chinadaily.com.cn/china/2008-01/18/content_6402839.htm).

circumstances. It should publicly clarify that “expeditious” in the Regulations means that ISPs must remove infringing content, or block access to it, in no more than 24 hours after receiving a notice. It should clarify that ISPs must restrict access to their systems or terminate the accounts of repeat infringers. Finally, it is critical that MII and NCAC maintain an accurate database of the many ISPs in China to ensure that notices can be filed in a timely manner.

- **Ensuring Use of Legal Software by Government, SOEs and other Enterprises:** China promised in the 2006 JCCT to begin the process of legalization of software in private and state-owned enterprises. China must implement this commitment fully. Today, the overwhelming majority of China’s state-owned enterprises continue to use pirated software. The government’s compliance mechanisms are at present weak and non-transparent. The basis upon which SOEs have been declared legal or “model” enterprises is unclear. Statements by officials urging SOEs to purchase domestic software contravene specific WTO commitments China made regarding non-discrimination in commercial purchasing of its state-owned enterprises. It is essential that enterprises and the government itself purchase the software being used, and use the software that is purchased, rather than using pirated software. Legalization within the government itself produced increased sales in past years, but that momentum has slowed dramatically. Compliance remains non-transparent and budgeting insufficient. Industry is prepared to partner with both enterprises and government to ensure Chinese entities realize the full value of legally licensed software. Certification based on effective software asset management programs should be part of effective compliance and legalization programs, as well as effective management programs. Legalization is by necessity an on-going process with no fixed end-point. Much work remains.
- **Legitimizing Book Distribution Practices on University Campuses:** In 2007, the General Administration of Press and Publication (GAPP) and the NCAC, in cooperation with local copyright bureaus and law enforcement authorities, continued to make forward strides in addressing the problem of illegal copying by university textbook centers. This cooperation should continue in 2008, with timely issuance of administrative decisions following raids, and with efforts to ensure that fines are deterrent. Furthermore, the Ministry of Education (MOE) should re-engage, in partnership with GAPP and NCAC, in the implementation of the August, September and November 2006 notices about illegal reproduction of textbooks, and enforcement actions should continue against universities that fail to fully implement the notices.
- **Amending the Criminal Law to Bring It into Compliance with TRIPS:** China must criminalize all copyright piracy “on a commercial scale,” including piracy involving acts not currently cognizable under China’s Criminal Law. The “for-profit” criterion for establishing a criminal offense should also be eliminated. An amended law should eliminate all thresholds or, at a minimum, ensure that they are low enough to criminalize all “copyright piracy on a commercial scale” as required by the TRIPS Agreement. China is the only country in the world that calculates a threshold for bringing criminal cases based on pirate profits and business volume at pirate prices; these criteria should be eliminated.
- **Allowing Investigations by Foreign Right Holder Associations:** Foreign rights holders cannot reasonably be expected to fully avail themselves of the Chinese legal system unless they can investigate suspected infringements. Regulations limiting activities (and number of employees) of the trade associations representing U.S. and other foreign rights holders should be, and can be, easily amended to permit them to fully cooperate with the government in fighting piracy.
- **Eliminating Burdensome Evidentiary Requirements:** Evidence rules (including for establishing subsistence and ownership of copyright) for administrative and criminal actions must be reformed and made less expensive and onerous, and more transparent and logical. For example, documentation required from right holders, particularly for foreign parties, is onerous, cumbersome and expensive. All documents need to be notarized and legalized, even though in most cases, the identity of the right holder and the subsistence of copyright are not challenged. The evidentiary

requirements are onerous. For Internet piracy cases, every infringing track must be downloaded in the presence of a Chinese notary public. These burdensome requirements and financial resource constraints limit the number of tracks that can be presented as evidence. This problem is further exacerbated by the practice of Chinese courts to award damages only for the tracks specifically identified in the complaint. Furthermore, damage awards even for this limited number of tracks are also very low. In sum, the entire range of such problems results in remedies that are not effective.

- **Bringing Significant Transparency to the Enforcement Process through NCAC Reporting on Cases Involving Foreign Works and the SPC Extending its Reporting from Civil to Criminal Cases at All Levels:** NCAC and local copyright bureaus need to share information on administrative copyright cases with right holders; a request which has to date too often been refused. Though the NCAC conducted three nationwide crackdowns on online piracy, there remains no improvement in transparency or the sharing of information on the final outcome of investigations and cases filed. The SPC now regularly reports the results of significant civil cases on its website. This reporting should be extended to criminal cases as well.
- **Assigning Specialized IPR Judges to Hear Criminal Cases, and Move Cases to the Intermediate Courts:** The record of China's development of a cadre of well trained IPR judges to sit on specialized IPR tribunals at the Intermediate level courts in China to hear civil cases has been a success. Now China should implement similar reforms in the criminal justice system to enhance deterrent enforcement against copyright piracy.
- **Providing Effective Market Access for All Copyright Materials:** China must fully implement its minimum WTO market access commitments (particularly in the area of trading and distribution rights and national treatment). In addition, the Chinese government, if it wishes to address rampant piracy in the country and foster the growth of creative industries, must significantly liberalize market access for all copyright industries, looking beyond the bare minimum of WTO obligations toward a fairer and more open market for all. Such reforms would include (i) greatly increasing transparency; (ii) eliminating the film quota; (iii) permitting full publishing and distribution activities within China; (iv) eliminating discriminatory or unreasonable investment restrictions; (v) eliminating the ban on video game consoles; and (vi) eliminating delays and discrimination (against foreign right holders) in reviewing content under its censorship regime to ensure that legitimate products get to the market before pirate products. Censorship processes that merely slow the ability of legitimate enterprises to distribute products, whether in the physical market or through digital transmissions, but which are ignored by piratical or unauthorized enterprises, do not advance China's social or cultural concerns, and greatly prejudice the interests of U.S. rights holders by providing further market advantages to pirate operations.

For more details on China's Special 301 history, see IIPA's "History" Appendix to this filing at <http://www.iipa.com/pdf/2008SPEC301HISTORICALSUMMARY.pdf>, as well as the previous years' country reports, at <http://www.iipa.com/countryreports.html>.

**PEOPLE'S REPUBLIC OF CHINA**  
**Estimated Trade Losses Due to Copyright Piracy**  
*(in millions of U.S. dollars)*  
**and Levels of Piracy: 2003-2007<sup>3</sup>**

INDUSTRY	2007		2006		2005		2004		2003	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures <sup>4</sup>	NA	NA	NA	NA	244.0	93%	280.0	95%	178.0	95%
Records & Music <sup>5</sup>	451.2	90%	206.0	85%	204.0	85%	202.9	85%	286.0	90%
Business Software <sup>6</sup>	2472.0	80%	2172.0	82%	1554.0	86%	1488.0	90%	1787.0	92%
Entertainment Software <sup>7</sup>	NA	95%	NA	NA	589.9	92%	510.0	90%	568.2	96%
Books	52.0	NA	52.0	NA	52.0	NA	50.0	NA	40.0	NA
<b>TOTALS</b>	<b>2975.2</b>		<b>2430.0</b>		<b>2643.9</b>		<b>2530.9</b>		<b>2859.2</b>	

## **PIRACY AND ENFORCEMENT UPDATES IN CHINA**

**Internet and Mobile Piracy Continue to Worsen and Has Become a Major Impediment to the Development of the Legitimate Digital Marketplace and Commerce in China:** Securing proper enforcement against Internet piracy in China is one of IIPA's top global priorities. Internet piracy is progressively worsening as the number of Internet users and broadband penetration increases in China. China has become one of the world's largest potential markets in terms of Internet and mobile delivery of copyright content, and unfortunately, one of the world's largest emerging digital piracy problems. China saw continued rapid expansion in 2007 in terms of the number of Internet and mobile users and number of broadband lines. The number of Internet users in China grew to 210 million at the end of 2007, up from 137 million in 2006 — an increase of 53% and almost as many users as there are in the United States. Internet penetration went from 10.5% of the total population at the end of 2006 to 16% at the end of 2007. According to recent reports, broadband users were estimated at 210 million at the end of 2007, with mobile phone users reported to be a staggering 480 million.<sup>8</sup> There are reportedly 110,000 licensed Internet cafés, and approximately the same number, which are unlicensed. Unauthorized transmission and downloading of video product is particularly prevalent at Internet cafés,<sup>9</sup> as is the problem of the use of unauthorized video game software. Typically, the same copy of a game is installed on the numerous machines in the café. In addition, pirate servers, which divert play of online

<sup>3</sup> The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2008 Special 301 submission at [www.iipa.com/pdf/2008spec301methodology.pdf](http://www.iipa.com/pdf/2008spec301methodology.pdf). For information on the history of China under Special 301 review, see Appendix D at (<http://www.iipa.com/pdf/2008SPEC301USTRHISTORY.pdf>) and Appendix E at (<http://www.iipa.com/pdf/2008SPEC301HISTORICALSUMMARY.pdf>) of this submission.

<sup>4</sup> MPAA's trade loss estimates and piracy levels for 2006 and 2007 are not available. MPAA did provide 2005 estimates for a select group of countries, using a new methodology that analyzed both physical/"hard goods" and Internet piracy. Details regarding MPAA's methodology for 2005 and prior years are found in Appendix B of this IIPA submission.

<sup>5</sup> The estimated losses to the sound recording/music industry due to domestic piracy are US\$451.2 million for 2007, and exclude any losses on sales of exported discs. This number is also based on a "displaced sales" methodology.

<sup>6</sup> BSA's 2007 statistics are preliminary. They represent the U.S. software publishers' share of software piracy losses in China, and follow the methodology compiled in the Fourth Annual BSA and IDC Global Software Piracy Study (May 2007), available at <http://w3.bsa.org/globalstudy/>. These figures cover, in addition to business applications software, computer applications such as operating systems, consumer applications such as PC gaming, personal finance, and reference software. BSA's 2006 piracy statistics were preliminary at the time of IIPA's February 12, 2007 Special 301 filing and were finalized in June 2007 (see <http://www.iipa.com/statistics.html>) as reflected above.

<sup>7</sup> ESA's reported dollar figures reflect the value of pirate product present in the marketplace as distinguished from definitive industry "losses." The methodology used by the ESA is further described in Appendix B of this report.

<sup>8</sup> Sources include: [China Internet Network Information Center](http://www.chinamobiletd.com/images/present/20070816/pp02.html); <http://www.chinamobiletd.com/images/present/20070816/pp02.html>; [http://www.macaudailytimesnews.com/index.php?option=com\\_content&task=view&id=6570&Itemid=35](http://www.macaudailytimesnews.com/index.php?option=com_content&task=view&id=6570&Itemid=35); The Economist, February 2, 2008.

<sup>9</sup>For example, in 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](http://www.media.ccidnet.com/art/2619/20050814/310051_1.html)

videogames from the legal to a pirate site, continue to plague legitimate online game publishers in the market.

There is little effective enforcement in China against Internet piracy and, as a result, China is one of the biggest sources of illegal downloads in the world, where the online piracy rate exceeds 99%, choking the legitimate music market, for example, to only \$74 million in 2007, less than 1% of global sales.<sup>10</sup>

There are a reported 1.5 million websites now operating in China, up 78% from the previous year.<sup>11</sup> Many of these websites offer streams, downloads, or links to unauthorized files of copyrighted materials (music, films, software, books and journals). The recording industry reports that seven or more "MP3 search engines" offer "deep links" to thousands of infringing song files and derive significant advertising revenue from doing so. These services account for the majority of online piracy in China. The largest of these is Baidu, which was sued in 2005 by the international record companies for its deep linking activities. The Beijing Intermediate Court sided with Baidu in a decision, which was appealed to the High Court, which rendered a decision on December 20, 2007 upholding the lower court's decision. However, this decision was based on the state of the law prior to the issuance of the 2006 Internet Regulations and the same High Court upheld the lower court's decision on the same day finding infringement in the Yahoo China case brought in 2006. It is believed that the Yahoo case reflects the law in China at this time, which is a major victory for right holders and is a significant legal step forward for the Internet environment in China as well as for the Chinese judicial system.<sup>12</sup> On February 4, 2008, the recording industry filed new civil suits against Baidu and Sohu/Sogou for their music deeplinking services. Legal proceedings were also filed against Yahoo China to enforce the court order of December 20, 2007 with which Yahoo failed to comply.

There are also over a dozen Chinese based P2P services engaging in widespread illegal file sharing activities. The most widely known are Muper, Kugoo, Xunlei and eMule. It was reported on February 3, 2008 that Xunlei lost a civil case to a Shanghai company and was ordered to pay damages of 150,000 Yuan (USD\$20,862) for assisting in the copyright infringement. Most of these are advertising-driven sites (though some are subscription based), given the lack of development in China of credit card or similar payment mechanisms. There are two eMule/eDonkey servers currently hosted in China and there are still many Bit-Torrent sites based in China. Further, there are growing numbers of video locker sites, like Tudou, which are also advertising-driven "User Generated Content (UGC)" sites providing infringing streaming of movies, music videos and the like.

The book and journal publishing industry reports a marked surge in Internet infringements over the past year, affecting academic books and commercial bestsellers or trade books scanned and traded or offered for download in PDF form. Perhaps more disturbing, electronic copies of journals are being shared with commercial entities in violation of site licenses. The commercial enterprises then sell the journals at a significant profit in direct competition with legitimate companies.

With the adoption of the Internet Regulations in July 2006 and the coming into force in China 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, providing the major elements of an effective regime for combating online piracy. Notwithstanding this effort, further clarification and amendment of

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<sup>10</sup> The mobile market is less problematic than the online market, given the more closed nature of mobile networks. As a result, over 70% of these legitimate sales occur in the mobile market.

<sup>11</sup> Source: IFPI.

<sup>12</sup> However, the Yahoo injunction only extended to a few songs and the resulting damages were extremely low. Neither Baidu nor Yahoo is complying with the law as set out in the Yahoo case. This demonstrates the deficiencies that still are present in many areas of the Chinese legal system. IIPA had noted, in its February 2007 report, that, in a meeting between IIPA and the State Council Legislative Affairs Office (SCLAO) in November 2006, the official responsible for drafting the *Regulations on the Protection of the Right of Communication through Information Networks* ("Internet Regulations") that became effective on July 1, 2006 stated that under Article 23 of those regulations, ISPs were liable for these kind of linking activities. This conclusion was clearly correct given the recent judgment of the Beijing High Court in the Yahoo China case.

the 2006 Internet Regulations is warranted. Furthermore, full and aggressive implementation of the existing regulations is a necessary step in beginning to address online piracy. It is worth noting that a Chinese official also acknowledges that further amendments to the copyright law are needed<sup>13</sup> to bring China fully into compliance with those treaties.

The following key clarifications are needed in the Regulations:

First, it should be publicly clarified that email notices are permitted under the new Internet regulations and that takedowns following notice must be within 24 hours.<sup>14</sup>

Second, ISPs that fail to immediately take down sites following compliant notices from right holders are infringers and have violated the Internet regulations and the Copyright Law (by losing the “safe harbor” established under the regulations). As such, they should be subject to the same administrative fines as any other infringer. 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 and bringing administrative actions against the website or the like.

Third, the agency should clarify and reform the evidentiary requirements necessary to provide a compliant notice and to ensure that an administrative fine can be imposed. Unfortunately, Article 14 of the Internet Regulations appears to require detailed evidence and, if so, that Article should be amended.

On June 24, 2007, NCAC released a final version of an unhelpful “recommended” “standard form” to be used when filing takedown requests. This form calls for the provision of detailed information and documents including

- Proof of identity and addresses of each and every copyright owner, with business registration;
- A letter of authorization of the representative for each notice;
- Detailed proof of each and every infringement;
- Affixation of the company stamp (chop) of the copyright owner — which implies also that the notice cannot be sent by email or even fax.

ISPs have used these “recommended” requirements as an excuse to refuse or fail to take down infringing material, purportedly because the notices do not conform to the requirements. NCAC should substantially revise these guidelines, to the full extent possible under Article 14, to permit the equivalent of an emailed takedown request attesting to the right holder owning the copyright in question, with the person subject to penalties if any material information provided is incorrect and the person has failed to exercise due care in providing it. Effective takedown systems are structured in this fashion elsewhere, including in the U.S.

Fourth, since NCAC is obligated to transfer cases involving criminal infringement to the PSB and SPP, as set forth in the March 2006 Criminal Transfer Regulations,<sup>15</sup> it must be clarified exactly how the thresholds established in the 2004 and 2007 JIs apply in the Internet environment and such clarifications should be widely circulated throughout all the agencies responsible for enforcement.<sup>16</sup> NCAC must

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<sup>13</sup> Interview with NCAC Vice Minister Yan Xiaohong, June 13, 2007, BBC republishing and translation of original Xinhua text from June 9, 2007

<sup>14</sup> While an official of the SCLAO has told IIPA that in his view email notices are acceptable, this interpretation has not been effectively communicated to the ISP community. In a November 2006 meeting with IIPA in Beijing, NCAC officials stated that takedowns should occur in no more than 48 hours. Unfortunately, this also appears *not* to have been communicated officially to all ISPs in China; prompt takedowns remain spotty in China.

<sup>15</sup> *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”).

<sup>16</sup> 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.

reach out to industry to create an effective notice, takedown, and administrative enforcement system to combat Internet piracy.

Finally, given that there are more than 1000 local ISPs throughout China, another reform that is critically necessary is for the MII and NCAC to provide stringent rules for ISPs to maintain accurate, up-to-date contact information, residing on the MII 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.

In April 2007, China issued its 2007 IPR Action Plan, which contained a number of initiatives to address Internet (and hard goods) piracy.<sup>17</sup> The Plan called for campaigns against such piracy to go on throughout the year. NCAC reported in January 2008 that, since August 2007, it had investigated 1,001 online infringements. It had closed down 339 websites, seized 127 pirate servers and meted out RMB 870,000 (US\$121,000) in administrative fines.<sup>18</sup> This is a substantially better record than NCAC reported for 2006. However, the lack of manpower, training and a low non-deterrent fine system available to NCAC severely hampers the fight against Internet piracy. Of these cases, it is reported that 31 were referred by NCAC for criminal prosecution, but we have no reports of how many of these cases were actually prosecuted and/or concluded.

One Internet case now being investigated by the PSB is, according to Gao Feng, Vice Director of the Economic Crimes Division of the PSB, the largest Internet case in China to date. The Jin Hu Dong case involved the defendant's licensing of film rights for over 1000 films, including over 600 titles owned by the major U.S. studios, for Internet use. Reportedly, illegal profits of RMB 10 million (US\$1.4 million) easily meeting the criminal threshold, were found. MPA initially filed a complaint in this case in December 2005 with NCAC but a raid by the Beijing PSB was not run until October 2007. Jin Hu Dong and two of his senior managers were originally charged with the crime of copyright infringement,<sup>19</sup> but we understand the two senior managers have since been released.

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

Four hundred and thirteen administrative complaints were filed by the recording industry with the Chinese government in 2007 — 124 with NCAC, 221 with NAPP and 68 with MOC — against websites, etc. offering illegal downloads. Only 77 of the 413 sites have been taken down thus far. This compares with 44 such complaints filed by the recording industry in 2006—all with NCAC—that were eventually combined by NCAC into 33 cases. Twenty-seven of these 33 sites were taken down by NCAC.

The motion picture industry sent 74 takedown notices to ISPs in 2007 and the compliance rate was estimated to be around 67%. Of the 66 websites it is monitoring, three websites have shut down, 18 sites have removed infringing content, two were redirected and the rest were found to constantly switch servers from one city to another. During the NCAC's 2007 national campaign against internet piracy, the MPA filed 40 complaints. To date, all those 40 websites remain unchanged. MPA also filed 14 complaints with the piracy hotline in Beijing, Shanghai, Chongqing, Jiangsu, and Guangdong between June and October 2007. So far, only two positive responses were received in Beijing and Shanghai.

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Unfortunately, the SPP did not take up IIPA's urging, made to an SPP official in October 2007, to use these guidelines to clarify the application of the thresholds in the online environment. "Guidelines" on file at IIPA.

<sup>17</sup> [http://english.ipr.gov.cn/ipr/en/info/Article.jsp?a\\_no=67391&col\\_no=925&dir=200704](http://english.ipr.gov.cn/ipr/en/info/Article.jsp?a_no=67391&col_no=925&dir=200704).

<sup>18</sup> [http://english.ipr.gov.cn/ipr/en/info/Article.jsp?a\\_no=169292&col\\_no=925&dir=200801](http://english.ipr.gov.cn/ipr/en/info/Article.jsp?a_no=169292&col_no=925&dir=200801).

<sup>19</sup> Source: MPA and NCAC. [http://english.ipr.gov.cn/ipr/en/info/Article.jsp?a\\_no=169292&col\\_no=925&dir=200801](http://english.ipr.gov.cn/ipr/en/info/Article.jsp?a_no=169292&col_no=925&dir=200801).

Below are statistics provided by the record industry on Internet takedown actions in China through 2007.

<b>Record Industry Takedown Rate of Suspected Infringing Websites in China</b>			
	<b>Number of notices</b>	<b>Number of sites</b>	<b>Takedown rate</b>
<b>2003</b>	1320	2509	29%
<b>2004</b>	2632	7170	61%
<b>2005</b>	1778	4711	61%
<b>2006</b>	1495	1205	58% <sup>20</sup>
<b>2007</b>	6787	4618	71% <sup>21</sup>

Internet piracy in China is also infecting neighboring markets. For example, Baidu has launched an unauthorized deep-linking service for video search in Japan. Baidu MP3 search in Hong Kong and Taiwan provided redirection of search results to Baidu's unauthorized deep-linking service in China.

In a welcome development, the licensee (Shandha) of the Korean entertainment software developer of the "Legend of Mir" videogame, was successful in obtaining at least two criminal convictions against pirate servers dealing in the game. The division of the PSB that deals with Internet offenses has reported that in 2006 there were 48 Internet criminal cases, either pending or already concluded. IIPA has been unable to find out anything further about these cases but they are a most welcome development, particularly if they result in publicized convictions with deterrent penalties.

NCAC Vice Minister Yan Xiaohong, in a recent development presaged in the 2007 IPR Action Plan, announced on January 17, 2008 the launching of what is being called a "monitoring platform." The "monitoring platform," to be finished in May 2008, appears to be a filtering technology that will use web crawlers to identify pirate audio, video, software and literary product and involves entering the legitimate product into a database to be created as part of this program. If this technology is robust and is used at the ISP level, it could have a significant impact on Internet piracy. The industries, at this point, await further information about this new development, and hope that the Chinese Government will effectively implement such a program in an open, efficient and transparent manner.

**Piracy of "Hard Goods" Continues at the 85%-95% Level.** While the piracy rate for business software (primarily unauthorized use of software in government, SOE's and enterprises) is now 80% of the market, down 12% since 2003 (and 2% since 2006) the piracy levels for video, audio and entertainment software continues to range between 90%-95% of the market. IIPA reported in its 2007 submission that the 2006 "100 Day Campaign," directed primarily at retail piracy, did not achieve the results touted by the Chinese authorities. While seizure statistics were very high,<sup>22</sup> reports and outside surveys commissioned by industry noted that pirate product remained available throughout the campaign in virtually the same quantities as before the campaign commenced. In some cases, however,

<sup>20</sup> Although a number of sites were taken down by ISPs/ICPs after receiving a takedown notice, some of the sites very quickly reappeared on the same ISP/ICP offering different repertoire.

<sup>21</sup> Although a number of sites were taken down by ISPs after receiving a takedown notice, some sites very quickly reappeared on the same ISP/ICP offering different repertoire.

<sup>22</sup> What purported to be final statistics were reported widely in the Chinese press: "Since [the beginning of the campaign], China has destroyed nearly 13 million pirated CDs, DVDs and computer software products. Over the past two months, police and copyright officials have investigated more than 537,000 publication markets, shops, street vendors and distribution companies, and closed down 8,907 shops and street vendors, 481 publishing companies and 942 illegal websites." Xinhua, China Daily, September 29, 2006. In its 2006 submission IIPA reported on China's 15-month national anti-piracy campaign involving thousand of raids and the seizure of millions of units of pirate product. IIPA members also reported then that there was "no meaningful decrease in the widespread availability of pirate products" (<http://www.iipa.com/rbc/2006/2006SPEC301PRC.pdf>). In an IIPA meeting with GAPP/NAPP/NCAC in November 2006, Mr. Li Baozhong gave the statistics for the "100 Day Campaign" from his information: 10,000 cases, 7,634 of which involved copyright infringement (the rest were presumably pornography but this was not clarified). A total of 270 cases were referred to the PSB and 63 of these cases were concluded involving 140 defendants. Industry still has not been given any further information on these cases, what penalties were imposed, whether U.S. works were involved etc.

pirate product became less visible in retail establishments and was made available clandestinely from catalogues and stocks hidden at the rear of stores or down back alleyways.

Despite the repeat of campaigns like this in 2007, industry still cannot report any meaningful improvement in the marketplace, which actually seemed to worsen during the course of the year. OD piracy at the manufacturing/factory level (discussed below) continues as a major problem. Furthermore, raids and seizures at the wholesale/warehouse/distribution level continue to turn up massive quantities of pirate product. The authorities reported 15,444 cases involving audio-visual products in which over 104 million articles were seized. The continued lack of criminal prosecutions and the lack of deterrence in administrative enforcement in China has prevented improvements in the market and ensures that piracy rates of physical copyrighted products continue to be among the highest in the world.

IIPA reported, in its 2007 submission, on the campaign against hard disk loading of business software, which accompanied the 2006 decision on loading legal operating systems and the “100 Day Campaign” against other retail piracy. While BSA commended this action, it urged that enforcement in this area be significantly enhanced.

**Criminal Actions to Deter High Levels of Piracy in Licensed and Underground OD Factories Continue to be Rare, Including Actions Against Exports:** 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. We have no new updates since then. 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. A considerable amount of very high quality pirate Chinese OD production continues to be exported. Infringing product from China was found in nearly every major market in the world, as it was in 2006.

A separate problem is the increasing export of so-called “parallel” or gray-market products, especially sound recordings, which continues to disrupt and undermine legitimate commerce in nearly every Asia-Pacific market, especially in Australia and Singapore. There is also a growing trend in which high quality and difficult-to-distinguish pirated products are mixed in with these parallel exports, making detection and identification much more difficult.

A considerable effort was made during 2006 and in early 2007 by the recording and motion picture industries, and the U.S government in bilateral meetings, to persuade the Chinese government to cooperate effectively with industry to identify forensically infringing CDs and DVDs produced by Chinese OD factories. They specifically proposed that Chinese authorities collect and maintain “exemplars,” (e.g. 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 also, 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 should facilitate greater regional and global cooperation in the fight against piracy. Despite China’s call in the 2007 IPR Action Plan for greater international cooperation to fight piracy, the Chinese government has been unwilling to cooperate with right holders or governments in such an endeavor.

IIPA and the U.S. government have repeatedly urged the Chinese government to bring criminal actions against OD factories engaging in piratical activities. IIPA, in its 2007 submission, reported on administrative actions finally 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 with respect to 17 OD plants directly to the PSB and formally requested, in writing, criminal prosecutions against them. Industry has 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. IIPA members are unaware of any criminal prosecutions having been commenced against any of these plants for which formal complaints were made to the proper authorities. The PSB gave various reasons for not bringing such actions. They said that the cases had to be brought initially to administrative authorities, or that the evidence presented, which industry believed clearly raised a strong, virtually irrefutable, inference that piracy meeting the thresholds was occurring, did not “prove” that the thresholds were met. In the first case, Chinese law expressly permits citizens and right holders to bring criminal cases *directly* to the PSB<sup>23</sup> and in the second case, China stands alone in the world in apparently requiring more than “reasonable suspicion” in 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 can be significantly reduced.

**China must Significantly Increase Criminal Prosecutions for Copyright Piracy to Create Deterrence in its Enforcement System:** Despite statements by Chinese leaders that criminal enforcement is a necessary component of its enforcement system, the reality remains that copyright piracy is still viewed by most government policy-makers as a problem to be dealt with through administrative rather than criminal means.<sup>24</sup> China has not met its promises in the JCCT to increase the number of criminal prosecutions for copyright piracy. IIPA has continued its effort, begun in 2006, through news reports released in China and through its own investigations, to identify criminal cases brought for copyright piracy under Articles 217 and 218 of the Criminal Law. China does not separately break out criminal cases involving copyright. IIPA and its members remain aware of only six criminal cases involving U.S. works brought by China since it joined the WTO in 2001 (all six in 2005-2006) and a few more cases involving the works of other WTO members.<sup>25</sup>

Without significant increases in criminal prosecutions resulting in deterrent penalties and a willingness (a) to devote the resources to such prosecutions, (b) to seek assistance from right holders with respect to training etc., and (c) to announce publicly throughout China that criminal prosecutions for

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<sup>23</sup> 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).

<sup>24</sup> On January 11, 2007, the SPC released to all lower courts in China, the *Opinions on Strengthening All Respective Work on Intellectual Property Trials to Provide Judicial Safeguard for Building An Innovation-oriented State*. Just one of the 26 sections of this document dealt with criminal enforcement and urged the lower courts to treat criminal piracy as an important crime. The 2007 IPR Action Plan specifically refers to the need to bring criminal cases, but the number of copyright criminal cases actually commenced appears to be minimal.

<sup>25</sup> IIPA has been able to identify 82 cases since 2001 which it believes were brought under the piracy provisions of the Criminal Law, namely Articles 217 and 218. The vast majority of these involve only Chinese works, or IIPA has been unable to ascertain if foreign works were involved. China does bring criminal cases for “illegal business operations” under Article 225 of the Criminal Law and these cases can involve acts of piracy and most often prosecutions for manufacturing or dealing in pornography. Known Article 217-218 cases involving U.S. product include *In re SHEN Jiuchun* (沈久春) (December 20, 2006, People's Court of Shijingshan District, Beijing) (pirated Chinese version of book on Jiang Zemin); *In re CHEN Fuqiang* (陈富强), *WU Jun* (吴军) and *WU Xiaojun* (吴小军) (date decided unknown, possibly December 2006, People's Court of Beichen District, Tianjin) (MS SQL 2000); *In re HUANG Yilong* (黄毅龙) & *CHEN Zengcai* (陈贻才) (September 17, 2006, People's Court of Huli District, Xiamen) (online U.S. music and sound recordings); *In re TONG Yaxi* (People's Court of Yuzhong District, Chongqing, August 12, 2005), (U.S. motion picture product); *In re Randolph Hobson GUTHRIE III, Abram Cody THRUSH, WU Dong and WU Shibiao* (Shanghai No. 2 Intermediate Court, April 19, 2005) (U.S. motion pictures on DVD); and *In re CHEN Fuqiang* (陈富强) (date decided unknown but probably early 2005; People's Court of Haidian District, Beijing)(U.S. software).

piracy will be a primary feature of its enforcement system, we do not believe that China can make a meaningful dent in piracy levels. Other countries/territories that have significantly reduced piracy levels have done so, only through the aggressive use of deterrent criminal prosecutions.<sup>26</sup> China must do the same.

**China Must Implement Deterrent Measures in Fighting Piracy of Books and Journals:** 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 Internet piracy encompassing online academic and professional journals and sites offering scanned books for download. Although 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, there was some progress toward bringing bookstores into compliance during 2007.

Throughout 2007, 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.<sup>27</sup> In its 2007 submission, IIPA applauded the unprecedented administrative actions taken by GAPP, NCAC and local authorities in the second half of 2006 on this issue, many of which resulted in administrative fines.

At industry request, administrative actions continued in March/April 2007 when authorities raided university textbook centers at two universities in Wuhan (Hubei Province) and a university in Chengdu (Sichuan Province). In April 2007, Sichuan authorities penalized the University of Electronic Science and Technology in Chengdu with a fine of RMB50,000 (US\$6,954) and an order to seize the infringing items. This was followed by a November 2007 decision by Hubei authorities to fine repeat offender Wuhan University RMB50,000 (US\$6,954) and order the destruction of nearly 6000 seized pirate copies. Wuhan Huazhong University received a smaller fine of RMB5000 (US\$695) on October 28, 2007. Meanwhile, actions continued at the start of the school term in October. Shaan’xi provincial authorities conducted a raid at Jiaotong University in Xi’an, issuing a fine of RMB30,000 (US\$4,172) just a few weeks later and destroying nearly 2,000 pirate books. All of the universities were ordered to cease further infringements.

IIPA applauds 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, and authorities are generally responsive to complaints in a timely manner. Given the narrow window of opportunity available for action in each case, this is an extremely positive development.<sup>28</sup> IIPA hopes this good cooperation continues into the high seasons (February/March and September/October) of 2008.

One concern that has emerged is the timing of issuance of administrative decisions. While some local authorities issue their decisions quite quickly (witness the Shaan’xi authorities following the October 2007 raid), others are taking quite a while to announce fines and terms. This delay takes away from the good work the enforcement authorities are doing and sends a message to universities that swift consequences are not likely to ensue from infringing activity. IIPA hopes that GAPP and NCAC can play a role in ensuring timely issuance of administrative decisions following raids, which only enhances the deterrent effects of the raids themselves.

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<sup>26</sup> South Korea, Singapore, Taiwan and Hong Kong are examples of countries where criminal enforcement has been able to significantly reduce piracy levels.

<sup>27</sup> IIPA notes that this problem plagues Chinese publishers as well, with locally-produced Chinese books found in every raid conducted to date.

<sup>28</sup> 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 right 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 year.

IIPA remains convinced that 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, 2007 saw a waning of MOE willingness to engage on this issue, with no open dialogue with right holders, and no apparent progress in implementing the notices issued by the Ministry in late 2006.<sup>29</sup> 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 one year later, right holders have been told of no plan for implementing these notices. IIPA considers it imperative that an action plan be developed to ensure that the notices don't become just ink on paper.

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 street vendors and in large book markets throughout China.

As noted earlier, Internet piracy also affects the publishing sector, most notably with respect to sites offering free or pay downloads of academic and trade titles, as well as academic and professional journals. Publishing industry groups have recently brought two complaints to NCAC and local authorities about this problem. NCAC should continue work, along with the MII and local and regional copyright bureaus, to ensure immediate and effective action against such sites.<sup>30</sup>

**Business Software End-User Piracy:** Unauthorized use of software within enterprises and government offices in China causes the majority of piracy losses faced by the business software industry.<sup>31</sup> China made a commitment in the JCCT to complete legalization within all government agencies, including provincial and local level government offices, by the end of 2005 and announced completion of its effort at the end of 2006. While progress appears to have been made, more needs to be done and multi-year implementation plans should be put into place. This must include budgeting for the purchase of legal software.

In the 2005 JCCT and again in 2006, China committed to the legalization program for state-owned enterprises and private business and to discuss software asset management. 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 is still under discussion and no permanent plan is in place. Toward the end of 2007, NCAC announced a list of model enterprises for software legalization. However, it does not appear that the selected enterprises had complete software asset management programs in place or had undergone a review of the software license history. The business software industry also has not seen any material change in enforcement activity against corporate end user piracy that would 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

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<sup>29</sup> 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.

<sup>30</sup> The industry reports that its complaint against [www.fixdown.com](http://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. Another pending complaint against a rather notorious and commercially sophisticated site offering journals for download has been awaiting action for quite some time. IIPA urges the authorities to take immediate action against this site.

<sup>31</sup> The business software industry also loses revenue due to retail hard-disk loading (discussed earlier), and the production in China (generally for export) of high-quality counterfeit software packages.

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.

Among the most notable and far reaching commitment emanating from the 2006 JCCT was the commitment to prohibit sale of computers both manufactured in China and imported without legal operating systems. Implementation of this commitment has resulted in a significant increase in sales but the compliance rate to date is estimated by industry to be less than 50%. In a rapidly-growing market for PCs — now the second largest in the world — IIPA and BSA urge the Chinese authorities to expand the current reporting requirement for computer makers to cover the 10 largest system builders at the national level and in each province. 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 a 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.

NCAC is woefully understaffed and while it has run end-user raids upon request, it cannot, even with the best of intentions, undertake truly meaningful and deterrent enforcement in this critical area without significantly more manpower. BSA requested 41 end user actions with local enforcement authorities in 2007, and has achieved 21 settlements with targets (including 10 from cases filed in 2006), four administrative fines (including a record high fine of RMB 800,000 (US\$111,266)) have been issued (two more than in 2006). However, deterrence remains insufficient. In addition to adding significant staff and resources at NCAC, many more deterrent administrative fines must be issued. Failure to confiscate equipment in many cases is also a problem.

**Broadcast, Cable and Public Performance Piracy of Motion Pictures; Failure to Pay U.S. Right Holders for the Public Performance of Musical Compositions:** The unauthorized public performance of U.S. motion pictures continues mostly unchecked in hotels, clubs, mini-theaters and even government facilities. Television piracy, particularly at the provincial and local levels, and cable piracy (over 1,500 registered systems which routinely pirate U.S. product) continue to harm the U.S. and Chinese film industries.

U.S. owners of musical compositions (songwriters and music publishers) are receiving virtually nothing out of China for the public performance of their music by government broadcasters, bars, and other public establishments. This is a fundamental TRIPS/Berne right and IIPA is not aware of any efforts by the Chinese PRO, MCSC, to take legal action to enforce its rights on behalf of the U.S. and Chinese right holders it represents. Not only should these actions be brought, but royalties must be collected and actually paid to U.S. right holders (if done properly, very substantial sums would be involved). The Chinese authorities should ensure that these royalties are paid during pending litigation or at least into escrow during that period.

**Piracy of Entertainment Software Products:** Piracy levels for hard goods 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. During 2007, acting on the complaints filed by Nintendo, 69 raids were conducted against factories, warehouses or workshops mainly in Guangdong Province, resulting in the seizure of over one million infringing Nintendo products. Despite these actions, and the fact that many of the enterprises raided are engaged in willful commercial-scale infringement, not a single action was initiated or prosecuted by the Chinese criminal enforcement authorities. China remains the primary source of counterfeit Nintendo cartridge-based video games, with shipments of China-sourced pirated and

counterfeit games being seized in 13 countries around the world.<sup>32</sup> Unfortunately, Chinese customs authorities have not done much to stem the flow of pirated and counterfeit cartridges, and China has now also become a significant source of pirated *Wii* game discs.

**Civil Cases Brought, Including Against Internet Pirates:** The copyright industries have fared somewhat better in the civil courts in China, though not in a manner yielding deterrence.<sup>33</sup> Unfortunately, the average awards do not come close to compensating right holders for the injury suffered as a result of the infringement, though improvements are slowly being made. For example, the average damages awarded in the recording industry's cases were about RMB3,500 (US\$487) per title, which usually does not even cover legal fees and expenses, much less compensate the rights holder for its loss. This paltry sum has fallen further to an average of about RMB2,000 (US\$278) per title in 2006. Damages awarded in the December 2007 Yahoo case are also very low and non-deterrent. US\$25,000 in damages was awarded for 229 tracks infringed, and average of about US\$50 per title. 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 registration information for these Internet operators is usually inaccurate or incomplete. Additional burdens are imposed by the Chinese court's requirement on who may act as the "legal representative" of a party. Under these provisions, 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 for statutory damages and reasonable compensation for legal fees and expenses; (b) introducing a presumption of subsistence and ownership of copyright; and (c) allowing organizations that are authorized by right holders to conduct anti-piracy cases on their behalf to sue in their own name.

## **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 to Chinese consumers. It has been more than six years since China joined the World Trade Organization, and the copyright industries are still waiting for China to comply with a number of commitments it made in that agreement to open its market. China's failure to meet these commitments significantly harms U.S. rights holders who would like to more effectively and efficiently provide their products to Chinese consumers.<sup>34</sup>

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<sup>32</sup> For example, in April 2007, customs officials in Montevideo, Uruguay, seized approximately 160,000 counterfeit Nintendo video games. The shipment originated in China and was ultimately destined for Paraguay. Similarly, customs seizures of *Wii* game discs as well as Nintendo game cartridges were conducted in the Czech Republic, Luxembourg, Taiwan (where in a six-week period, close to 10,000 pirated *Wii* game discs were seized), the United Kingdom and the United States.

<sup>33</sup> 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, and six complaints against an entertainment content provider which remain pending.

<sup>34</sup> It is worth noting that as a result of these deficiencies, on April 10, 2007, the U.S. government, supported by the China Copyright Alliance, filed a WTO dispute settlement case asserting that China has failed to afford trading rights and certain distribution rights for some copyright industries. See [http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds363\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds363_e.htm). The U.S. requested the establishment of a WTO dispute settlement panel on October 11, 2007. The market access measures that the U.S. government alleged to be WTO-incompatible include: (1) claims involving the failure to afford trading rights (the right to freely import without going through a government monopoly) to imported films for theatrical release, audiovisual home entertainment product, sound recordings and book and journal publications; (2) measures that restrict market access for, or discriminate against, foreign suppliers of audiovisual services (including distribution services) for audiovisual home entertainment product and that discriminate against foreign suppliers of distribution services for publications; (3) measures that provide less favorable distribution opportunities for foreign films for theatrical release than for domestic films; and (4) measures that provide less favorable opportunities for foreign suppliers of sound recording distribution services and for the distribution of foreign sound recordings than are provided to like service suppliers or like products.

There are a range of general restrictions, affecting more than a single copyright industry, which stifle the ability of U.S. right holders to do business effectively in China. Some of these have been challenged in the WTO case. 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), or entertainment software publishers, at best, to enter the Chinese market as a partner in a minority-share (up to 49%) joint venture with a Chinese company.<sup>35</sup> These limitations should be eliminated. In many instances, China does not permit any foreign ownership at all.

**The 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 only recorded, not censored (and, of course, pirate product is uncensored). China should terminate this discriminatory practice, which violates the basic tenet of national treatment that foreign goods will be treated on equal footing with domestic goods.

The Ministry of Culture's December 11, 2006 *Opinion on the Development and Regulation of Internet Music*, also discussed below, imposes unnecessarily burdensome censorship and ownership requirements on legitimate online music providers. The *Opinion* 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, implementation of this *Opinion* would impose virtually impossible delays on these foreign businesses and the right holders who license their product to them.

Entertainment software companies continue to face lengthy delays in the censorship approval process, wiping out the market window for legitimate distribution of an entertainment software product (this window is often shorter for entertainment software titles than for other works). Each entertainment software title must go through an approval process at the GAPP, which takes several weeks to several months.<sup>36</sup> As has been committed for other industries, and consistent with the JCCT outcome, 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 involves another approval process with the Ministry of Culture for online versions of games.<sup>37</sup> The review function should be lodged with only one agency, either the GAPP or the MOC. As more entertainment software products distributed on physical optical disc media increasingly have an online component, such games become subject to two separate content review processes before two different agencies. The need to comply with two review procedures before two different agencies

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<sup>35</sup> In what was considered a positive development in IIPA's 2006 submission, ownership restrictions on cinemas had been lifted slightly, allowing up to 75% foreign ownership in Beijing, Shanghai, Guangzhou, Chengdu, Xi'an, Wuhan and Nanjing, compared to 49% elsewhere. However, these regulations were rescinded later in 2006 and after investments had been made under the new rules, returned to the 49% rule. As a consequence, one U.S. company simply left the market. Moreover, foreign-owned companies may not operate those cinemas in China. In the television sector, wholly or jointly foreign-owned companies are strictly prohibited from investing in the broadcast industry.

<sup>36</sup> 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.

<sup>37</sup> IIPA notes as a general trend that inconsistencies in the laws and regulations in China are beginning to appear (and have detrimental market effects) in the handling of copyright material in traditional media versus content on the Internet. The State Council was long ago charged with creating Internet policy, but several agencies have gotten into the fray (e.g., the State Secrecy Bureau's announcement in January 2000 that all websites in China were to be strictly controlled and censored). Ministry of Culture Regulations (including the new *Opinion* discussed above and below in the text) require that providers of Internet-based content (with any broadly defined "cultural" attributes) receive MOC approval prior to distribution in China. SARFT also claims some censorship role on the Internet and has recently issued new regulations covering the Internet. In addition, from a technological standpoint, China maintains firewalls between China and foreign Internet sites to keep foreign media sites out of China, and regularly filters and closes down Chinese sites that are seen as potentially subversive.

exacerbates the delay in getting new releases to market, and is overly burdensome to publishers. Finally, transparency in the review process and in the criteria employed in these reviews are likewise sorely needed.

**Internet Audio-Visual Program Service Management Regulation:** This new regulation issued by MII and SARFT took effect on January 31, 2008 and is stated to apply to all audio visual programs provided to the public via the Internet in China. The regulation requires that all Internet audiovisual program service providers obtain a permit for the “Transmission of audio-visual programme via the Information Network” or to file recordation. Such permits would only be granted to state-owned or state-controlled companies. However, it was reported in the press on February 5 that SARFT and MII have issued a statement clarifying that the new rules on ownership of video sites apply only to new set-ups and that existing privately-owned sites can continue to operate. The permit holders are responsible for the legality of the content of the programming and the relevant government authority may transfer cases that involve criminal acts to the Ministry of Public Security for criminal investigations. It remains to be seen if this regulation can be used to fight piracy of audio visual products (e.g., music videos) and films on the Internet.

**Restrictions on Trade Association Staff and on Anti-Piracy Investigations:** Also affecting the ability of the copyright industries to do business in China are the severe restrictions maintained on the ability of copyright industries’ trade associations in China from engaging in investigations in the anti-piracy area as well as limiting the number of employees that such “representative offices” may employ. Companies that invest in China are not subject to these same restrictions. Because copyright-based companies in certain sectors conduct virtually 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 developing 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.<sup>38</sup> 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 and direct importation of finished products (at present, a U.S. company must: (1) license a Chinese company to produce the recordings in China or (2) import finished sound recording carriers (CDs) through the China National Publications Import and Export Control (CNPIEC)).

Similarly, the *Opinion on Development and Regulation of Internet Music*, along with earlier regulations, significantly stifles the development of legitimate online music commerce in China, including

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<sup>38</sup> 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.

both Internet-based music services and the fast-growing mobile phone delivery of music content. It imposes a complete prohibition on foreign ownership of online and mobile music services and, as noted above, burdensome, discriminatory and unnecessary censorship requirements. Foreign record companies should be able to service Chinese consumers as part of these online music services and be able to import and deliver music content without restriction.

**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.
- **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.
- **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 ISSN), 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.
- **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 films (theatrical release) into the country each year. However, China has stated that 20 is a "maximum," not a "minimum." 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. In the rest of the world the convention is to split the box office 50-50 between studios and distributor. 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, in violation of China's WTO trading rights commitments. China Film held the sole monopoly on the distribution of foreign films until Huaxia Distribution was authorized by SARFT to be a second distributor of imported films in August 2002.<sup>39</sup> Like China Film, Huaxia is beholden to SARFT and its operations are virtually transparent to

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<sup>39</sup> Huaxia is a stock corporation with investment from over 20 shareholders, the largest of which is SARFT with over 20% ownership, then China Film, Shanghai Film Group and Changchun Film Group, each with about 10% ownership.

China Film, which it effectively controls, thwarting any real competition between the two. Foreign studios or other distributors cannot directly distribute revenue-sharing foreign films.

- **Restricted Market Access for Foreign Satellite Signals:** Foreign satellite channels may only be shown in three-star hotels and above and in foreign institutions. Moreover, foreign satellite channels beaming into China are required to uplink from a government-owned satellite for a fee of US\$100,000, placing a significant and unnecessary financial burden on satellite channel providers. Further, foreign satellite channels are not allowed carriage on local cable networks without government approval or landing permits. Offending news items on sensitive subjects in China are still routinely blacked out by officials who monitor all broadcasts over the national satellite system. Only a handful of foreign channels have been granted approval, and carriage is currently limited to Guangdong province.
- **Broadcast Quotas, Content Restrictions, and Restrictive License Practices for Satellite Channels:** SARFT's "Regulations on the Import and Broadcasting of Foreign TV Programming" effective October 23, 2004, sets severe quotas on the broadcast of foreign content (e.g., no more than 25% of all content broadcast can be foreign films or television dramas, with a 0% allowance during prime time).<sup>40</sup> 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).<sup>41</sup>
- **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. This ban artificially drives down foreign right holders' theatrical revenues and contributes to increased piracy, as pirates meet immediate consumer demand for major foreign titles by offering illegal downloads through the Internet, pirate optical discs, and pirate video-on-demand channels.
- **Local Print Production Requirement:** China Film continues to require that film prints be made in local laboratories, reducing rights holders' abilities to control the quality of a film copy and potentially resulting in increased costs.
- **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:** In mid-January 2008, news reports surfaced that the GAPP had put in place measures that would restrict the ability of foreign online game publishers to enter the market.<sup>42</sup> Under these regulations, the GAPP could postpone the examination, approval and licensing of products from foreign publishers if the foreign company was the subject of a suit or an arbitration proceeding initiated by a Chinese online game company. It appears that the GAPP will simply halt consideration of the product subject of its review upon the mere initiation of a suit by a Chinese company. Product consideration will not be resumed until the complaint is resolved. The industry has yet

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<sup>40</sup> 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.

<sup>41</sup> The "Interim Management Regulations on Sino-Foreign Joint Ventures and Sino-Foreign Cooperative Television Program Production Enterprises," effective November 28, 2004, sets out the 49% minority joint-venture restriction for "production ventures"; investment requirements of foreigners; licensure requirements; requirements that foreign partners must be "specialized radio or TV ventures"; restrictions on access to non-media investors; and, perhaps most important from a content perspective, requirements for use of "Chinese themes" in two-thirds of the programming.

<sup>42</sup> See <http://virtuallyblind.com/2008/01/17/china-regulates-foreign-game-companies/>, last viewed on January 23, 2008.

to obtain the regulations for review and thus cannot yet comment as to whether the regulations contain guidelines as to the nature of the dispute that may trigger GAPP's refusal to act or whether there are measures in place to guard against frivolous complaints aimed only at impeding a foreign publisher's access to the burgeoning Chinese online games market.

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*, is also impeding the growth of the entertainment software sector in China. The ban also includes within its ambit development kits used in creating and developing video games. It is a rather unfortunate situation as it also prevents foreign publishers from outsourcing the development of segments of games to 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 for home use 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.

## **COPYRIGHT LAW AND RELATED ISSUES**

Previous years of 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.

**Administrative-Criminal Transfer Regulations:** It was hoped that the amended Criminal Transfer Regulation would lead to more and easier referrals from administrative agencies to the PSB. However, as IIPA has noted in its 2007 submission, it was left unclear whether transfers were required upon "reasonable suspicion" that the criminal thresholds had been met. There appears to be no uniform practice among administrative agencies and PSB offices on this critical question and further clarification as to what would facilitate such "reasonable suspicion" transfers is necessary. Reports in the Chinese press routinely note such referrals occurring (though in a very limited number of cases, likely given that the thresholds are too high) but it is never, or very rarely, reported what happens to the case after that event. In general, however, the adoption of these regulations does not appear to have led to an increase in transfers or any further clarity on when they are required.

**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, which had ultimate responsibility, following a drafting and vetting process in NCAC, for the final regulations decided not to clarify coverage for temporary copies. While there is 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, Director General Zhang of the SCLAO indicated to IIPA at its November meetings that this issue remains controversial. IIPA noted that over 100 countries around the world extend, or have committed to extend, such protection.
- **Coverage of the Regulation Generally:** IIPA had voiced concern in its series of comments that the regulations were limited only to the right of communication to the public. Director General Zhang responded that he believed that all other rights were covered directly by Article 47 of the Copyright Law. This would appear to result in the conclusion that Article 47 also mandates the coverage of

devices and services with respect to copy controls. We indicated that further regulations would be highly desirable to remove any ambiguity in coverage. He did not close the door to this possibility.

- **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. The test of what constitutes a circumvention device still remains unsatisfactory. Exceptions were significantly narrowed, though remain overbroad in some areas.
- **Service Provider Liability 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 compliant notice). As described above, what constitutes a compliant notice must be publicly clarified. Exceptions still cause some concern with Director General Zhang confirming that the Article 9 statutory license will apply 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. Director General Zhang also said that ISPs are liable for linking activities under Article 23, which we believe is the correct reading as affirmed in the Yahoo China decision of the Beijing High Court. Furthermore, the Beijing Higher People’s Court in the Yahoo appeal case clarified that the Article 14 notice is not a pre-requisite to invoke joint liability under Article 23 of the Internet Regulations.
- **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 “nonprofit” entities, and (d) failure to clarify that Article 8 does not apply to foreign works.<sup>43</sup>

**The Criminal Law Should be Amended to Cover All “Commercial Scale” Piracy:** Articles 217 and 218, the criminal piracy articles of the Criminal Law of the People’s Republic of China (1997), fail to cover all possible commercial scale piracy, and as such, these provisions violate TRIPS Article 61. 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 calculated based on pirate profits or income.<sup>44</sup> 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 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. The most important update would be to criminalize the circumvention of TPMs. Thus, we propose that Article 217 be amended to achieve the following, among other things: (1) expressly criminalize end-user piracy, (2) add the TRIPS-required reference to all the exclusive rights now provided in the law (and include the 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

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<sup>43</sup> 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 .

<sup>44</sup> As noted below, the new IIs 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.

on right 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).<sup>45</sup> 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.<sup>46</sup>

**Criminal Thresholds Should be Further Lowered or Abolished Entirely:** The SPC’s 2004 and 2007 JIs still leave thresholds too high. The U.S. government has challenged, in the WTO, the maintenance of these thresholds as incompatible with China’s TRIPS obligations.<sup>47</sup> The 2004 JIs made only minimal decreases in the monetary thresholds and leave in place calculation of “gain” or “illicit income” at pirate prices. Further, to date, copyright owners have not found that the copy thresholds (1,000 for individuals, 3,000 for “units,” and 5,000 copies (for the more severe penalties) and since July 1, 2007 under the 2007 amended JIs, 500 for the less serious, and 2,500 for the more serious, penalties) have proven helpful in generating new criminal prosecutions, although copy thresholds could be helpful if lowered significantly (in 2004, IIPA proposed 50 copies of software or books and 100 copies of recorded music or motion pictures for criminal liability, and twice this number for more serious offenses; the Supreme People’s Court adopted a number 30 to 60 times higher than what IIPA proposed).

A new challenge is how to meet the threshold in the case of Internet infringement. The new SPP “guidelines” do not deal with this issue.<sup>48</sup> 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.

Without clear evidence of infringement satisfying the threshold requirement, law enforcement agencies are often reluctant to take actions against alleged Internet infringers. This is further exacerbated by the lack of power on the part of right holders to investigate the content or to seize the servers of alleged infringers 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:** China should provide performers and phonogram producers with rights of communication to the public, including of course broadcasting, 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 also establish clear rules that promote more responsible practices on the part of all players involved in the digital transmission of copyright materials. Legal accountability will lead to the development and deployment of advanced technological measures, which will advance legitimate commerce while preventing unfair competition.

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<sup>45</sup> 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.”

<sup>46</sup> 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.”

<sup>47</sup> [http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds362\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds362_e.htm)

<sup>48</sup> See footnote 17.

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

## **TRAINING AND PUBLIC AWARENESS**

MPA, IFPI and BSA undertook many training and awareness programs throughout China in 2007. The trainings have involved police, prosecutors, judges, customs officials, and administrative agency enforcement personnel. Training and awareness has always been a high priority for the copyright industries in China.

In 2007, MPA sponsored and co-organized 15 trainings/seminars for 1,159 enforcement officials, IPR judges, representatives from ISPs and ICPs, local copyright industries, with topics covering new trends in piracy worldwide, MPA's anti-piracy strategy, impact of piracy on the film industry, strategic civil litigation against piracy, IPR cases in U.S. courts, investigative techniques against Internet piracy, identification of pirate optical disks, etc.

- In January 2007, MPA conducted an enforcement training for officials from Beijing Press & Publication Bureau, Cultural Committee, the Police, Administration of Industry & Commerce, City Management Task Force at the district level.
- MPA conducted another enforcement training in January for Internet police and officials from the Guangzhou Culture Bureau and Copyright Bureau.
- In March 2007, MPA conducted an enforcement training for officials from the Shenzhen Culture Task Force.
- In April 2007, MPA conducted three trainings: 1) an Internet anti-piracy training for NCAC officials nationwide and Internet Police of the Ministry of Public Security; 2) an Internet seminar for major ISPs & ICPs in China, officials from NCAC & MII, IPR judges in Beijing; and 3) a symposium for IPR judges nationwide, focusing on civil litigation for IPR enforcement in China and intellectual property cases in U.S. court
- In May 2007, MPA conducted an enforcement training for MOC officials nationwide, as well as an Internet seminar for officials from the Shenzhen Intellectual Property Office, the Shenzhen Copyright Bureau, the Internet police of Shenzhen PSB and representatives from copyright industries in Shenzhen and Hong Kong. Also in May 2007, an enforcement training was conducted for officials from the Municipal Culture Task Force, AIC, the Police, and Customs in Zhuhai, Guangdong Province.
- In August 2007, MPA provided Internet anti-piracy training for MOC officials nationwide.
- In September 2007, MPA conducted an enforcement training for cultural market enforcement officials in Shandong Province.
- In November 2007, MPA conducted an Internet anti-piracy training for NCAC officials nationwide.
- In December 2007, MPA conducted three trainings: 1) for top officials of NAPP's local offices nationwide, focusing on awareness of piracy's impact on the movie industry; and 2) two trainings on enforcement for copyright enforcement officials and cultural market enforcement officials in Shenzhen and Guangzhou.

The record industry provided the following trainings:

- In June 2007, a training for Guangdong Province Customs officials on pirate product identification.
- In June 2007 and December 2007, an Internet anti-piracy training for NAPP officials nationwide.

- In August 2007, an Internet anti-piracy training for MOC officials nationwide.
- In September 2007, an Internet anti-piracy training for MOC officials in Shandong.
- In November 2007, an Internet anti-piracy training for NCAC officials nationwide.

The business software industry (BSA) provided the following trainings:

- In June 2007, an enforcement training for 100 enforcement officials in Chongqing, focusing on evidence gathering during an end-user raid.
- In December 2007, an end-user enforcement training for the Beijing Culture Law Enforcement Agency.
- Both these trainings were followed by end-user piracy actions taken in these two cities.
- As of the end of November 2007, BSA had conducted 39 software asset management trainings in 12 major cities, either with local government agencies or Ministries of the State Council. Altogether more than 4,000 enterprises have participated in these trainings.

## **CONCLUSION**

The scope of the physical piracy problem faced by the copyright industries in China has not fundamentally changed in the last 20 years—and incredibly, the online and mobile piracy problem threatens to overtake the issues in the physical realm. The piracy levels then — among the world’s highest — continue at only minimally reduced levels today. In the 1990s, China adopted reasonably good laws and regulations (consistent with the international obligations they assumed) and has done fairly well at keeping them up to date. However, over this entire period China has relied on a flawed administrative enforcement system to enforce these laws and regulations that has been, and remains, wholly inadequate to the task of ensuring compliance and provides very little deterrence against the various forms of copyright piracy that have plagued China for so long.

With rare exception, China has chosen to avoid using deterrent criminal enforcement as a tool to address commercial copyright piracy. (IIPA estimates that, since China joined the WTO, it has brought only six criminal cases involving U.S. works). This problem is exacerbated by China’s failure to open its market in any meaningful way to legitimate copyright products, allowing pirates largely free reign to reap massive profits. China’s joining the WTO in 2001 has had almost no impact on addressing these manifold problems.

The same massive copyright piracy and market access problems have now infected the online marketplace, where the potential benefits for U.S. (and for that matter Chinese) creative industries are simply enormous but will likely go unrealized if the Chinese government persists with applying these flawed policies in the online environment.

The solutions for China’s IPR and market access problems is fairly straightforward. They are highlighted earlier in this submission in the list of “priority actions” we recommend the government take. We look forward to the Chinese government taking a new look at these issues and working with our industries and the U.S. government to finally solve them.