

**INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE**  
**2003 SPECIAL 301 REPORT**  
**PEOPLE'S REPUBLIC OF CHINA**

## **EXECUTIVE SUMMARY**

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**Special 301 recommendation:** With piracy losses at a staggering \$1.85 billion in 2002, piracy rates continuing at over 90% across all copyright industries, and with no significant movement to enforce the criminal law against piracy as required by TRIPS, IIPA recommends that China remain subject to Section 306 Monitoring.

**Overview of key problems in China:** More than one year following China's WTO accession, piracy rates in China remain among the highest in the world. While enforcement actions throughout China continue, the apparent unwillingness of the Chinese government at the highest levels to take the actions necessary to reduce these rates, continues to be the cause of the greatest concern, particularly the failure to date to provide a truly deterrent enforcement system by imposing criminal penalties against pirates and by significantly increasing administrative fines for acts of piracy. Piracy by both unlicensed and licensed optical disc factories continues to flood the domestic market with pirate music, movies, videogames, books, and business software, making it very difficult for local Chinese creators and U.S. right holders to build viable businesses in China. Exports have diminished to a trickle, but pirate Chinese optical disc (OD) product has been found in Hong Kong, Russia and Vietnam. Piracy at the wholesale and retail level, and over the Internet, remains rampant, even though provincial and central government authorities, as well as Customs with respect to pirate imports, have undertaken numerous raids and massive seizures. The lack of deterrence in the system, the uncoordinated enforcement activities throughout China, the lack of transparency, and continued local protectionism are the primary causes of China's inability to reduce piracy rates. The absence of an effective criminal remedy has necessitated that right holders, in desperation, resort to less effective, more expensive and less deterrent civil actions, which have resulted in injunctions and civil damages to right holders in some cases, but little deterrence and thus a reduction in piracy rates.

Severe market access limitations, some enshrined in the agreements accompanying China's WTO accession, also severely inhibit the ability of many segments of the U.S. copyright industries to open and conduct efficient business operations and to better assist in the anti-piracy fight.

**Actions to be taken by the Chinese government:** The following actions must be taken in 2003—

- Appoint, and publicly support, a Vice-Premier to be permanently in charge of coordinating nationwide enforcement and law reform activities;
- Immediately reduce or eliminate the high criminal thresholds (and accompanying procedural hurdles) that in practice prevent the effective application of the criminal law to piracy—the only way to significantly reduce piracy in China. Then, establish a national anti-piracy criminal task force to

deter OD factory, wholesale and retail, Internet, and end-user piracy of software and other works with arrests and the imposition of severe criminal penalties. Amend the Penal Code to clarify its full application to all piracy crimes;

- Announce a national campaign to unleash this Anti-Piracy Task Force to prevent and punish criminal acts of piracy both internally and at the border;
- Through amended copyright legislation or regulations, correct the deficiencies in China's implementation of the WCT and WPPT, and ratify the two treaties.

**PEOPLE'S REPUBLIC OF CHINA**  
**ESTIMATED TRADE LOSSES DUE TO PIRACY**  
*(in millions of U.S. dollars)*  
**and LEVELS OF PIRACY: 1998 - 2002<sup>1</sup>**

INDUSTRY	2002		2001		2000		1999		1998	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	168.0	91%	160.0	88%	120.0	90%	120.0	90%	120.0	90%
Records & Music <sup>2</sup>	48.0	90%	47.0 <sup>2</sup>	90%	70.0	93%	70.0	90%	80.0	56%
Business Software Applications <sup>3</sup>	1593.3	93%	1140.2	92%	765.1	94%	437.2	91%	808.4	95%
Entertainment Software	NA	96%	455.0	92%	NA	99%	1382.5	95%	1420.1	95%
Books	40.0	NA	130.0	NA	130.0	NA	128.0	NA	125.0	NA
<b>TOTALS</b>	<b>1849.3</b>		<b>1932.5</b>		<b>1085.1</b>		<b>2137.7</b>		<b>2553.5</b>	

<sup>1</sup> The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2003 Special 301 submission, and is available on the IIPA website ([www.iipa.com/pdf/2003spec301methodology.pdf](http://www.iipa.com/pdf/2003spec301methodology.pdf)).

<sup>2</sup> The estimated losses to the sound recording/music industry due to domestic piracy are US\$48 million for 2002, and exclude any losses on sales of exported discs, which have decreased substantially in the last few years. This number is also based on sales at pirate prices. Using a "displaced sales" methodology, the industry estimate for losses would be up to US\$600 million.

<sup>3</sup> BSA's estimated piracy losses and levels for 2002 are preliminary, and will be finalized in mid-2003. In IIPA's February 2002 Special 301 filing, BSA's 2001 estimates of \$765.2 million at 93% were identified as preliminary; BSA finalized its 2001 numbers in mid-2002, and those revised figures are reflected above. BSA's trade loss estimates reported here represent losses due to piracy which affect only U.S. computer software publishers in this country, and differ from BSA's trade loss numbers released separately in its annual global piracy study which reflects losses to (a) all software publishers in this country (including U.S. publishers) and (b) losses to local distributors and retailers in this country.

# COPYRIGHT PIRACY IN CHINA

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## Optical disc Piracy

The levels of optical disc piracy in China across all lines of copyright business continue to remain over 90% despite the seizure of a record number of pirate discs in both 2001 and 2002. IIPA members report that the Chinese authorities conducted over 20,000 raids against optical disc pirates (production, wholesale and retail) in 2002 and seized over 75.8 million VCDs, CDs, CD-ROMs and DVDs (7.96 million DVDs) compared to a then-record 51 million VCDs, etc., and 4.9 million DVDs in 2001. While this indicates that the National Anti-Pornography and Piracy Working Group (NAPPWG) and its affiliated agencies, central and provincial, continue to take action, once again, as in 2001, we must report that this activity is having little effect in reducing the piracy rate. The authorities also have raided both licensed and unlicensed factories and seized 25 production lines (12 DVD lines and 13 VCD and CD lines), again more than were seized in 2001—a record year. By the end of 2002, Chinese enforcement authorities had seized a cumulative total of 160 replication lines since the 1995 U.S.-China bilateral IPR agreement. Industry estimates are that as of January 2003, there are 70 factories operating 196 replication and mastering lines in China compared to 72 plants and 162 lines at the end of 2001. Overall capacity, not including underground plants that continue to spring up around China, is estimated at close to 690 million units annually, up 100 million since 2001.

As reported in last year's submission, pirate production is not limited to underground, unlicensed plants that are to be found throughout China, many in locations more inaccessible than in the past. Last year, industry estimated that approximately 80% of the plants operating in China produce some pirate product to satisfy a huge domestic demand. This has apparently not changed, though some dent may have been made by the NAPPWG raiding and the successful civil cases brought by the recording industry against licensed plants. Much of this production is still accomplished through fraudulent licensing documents from Hong Kong, Taiwan and other Asian territories. Industry reports seizures of pirate product with SID codes present allowing authorities to easily identify the producing plant. But as has become true throughout Asia, there are many OD products being sold with their SID codes removed, whether by scratching them out manually or with new machines built by the pirate syndicates for this purpose. It is suspected that many of these "burned" products are also produced in licensed Chinese factories. Adding to the plant production increases is the new and increasingly widening phenomenon of commercial "burning" of CD-Rs, which has also contributed to the massive output of pirate product in China.

In addition to what appears to be growing production levels in underground, unlicensed plants, it is estimated that a high percentage of the pirate product trading in China is imported from other territories in Asia, including Hong Kong, Taiwan, Malaysia, Thailand and even Myanmar, and increasingly in CD-R format (in our 2002 submission, industry had estimated about 50%). For example, in March 2002, Guangdong border police seized close to 5 million pirate discs being smuggled through Hong Kong territorial waters, and three weeks later, Zhuhai Customs seized an additional almost 2 million pirate units coming in through Macau territorial waters. This mere sampling is indicative of massive smuggling operations<sup>4</sup> which, when added

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<sup>4</sup> MPA reports that China Customs seized over 30 million units of pirate smuggled product in seven major cross-border operations through September 2002. These seizures were part of the 75.8 million discs referred to in the text above.

to domestic pirate production, adds up to a market more than 90% pirate and still out of control, despite valiant efforts by Chinese authorities, the Ministry of Culture, NAPPWG and China Customs. The problem, of course, is that the profits are so high, and the deterrence is so low in China, that the authorities are, in reality, fighting a losing battle unless a new strategy is found.

Despite the severe problems affecting the domestic market, industry reports that there continue to be negligible *exports* from China. Nevertheless, some exports can still be traced to China with Chinese product still found in Russia, Hong Kong,<sup>5</sup> Vietnam and Thailand. It was the export piracy that gave rise to the 1995-1996 crisis that almost resulted in U.S. trade retaliation. Unfortunately, that problem has moved to other countries in Asia, like Taiwan, Malaysia, Indonesia and other territories, particularly as the Asian criminal syndicates have widened and deepened their influence in the region.

The crisis in the local music industry continues for a fourth year in a row with revenues only very slightly up in 2002 due to intensive anti-piracy operations by the Ministry of Culture. The recording industry views this as a hopeful sign after three years of revenue decline. It also is encouraged by the cooperation of the courts in imposing civil damages against pirate plants as described below. Noteworthy in 2002 was the persistence problem of cassette piracy. RIAA/IFPI in a recent survey found that 39% of the sound carriers in circulation in China were cassettes, with the number around 50% in rural areas. Virtually all this product is piratical.

The music industry estimates that, overall, including local Chinese repertoire and all international (including U.S.) repertoire, lost sales due to piracy amount to up to \$600 million, with U.S. repertoire amounting to about \$48 million.

Piracy of audiovisual product in digital format remains a serious problem, with continuing huge seizures, as noted above, throughout China. DVD lines have remained constant from 2001 at a total of 18. Piracy in DVD format is particularly damaging to U.S. companies given the vast global growth in this format for serving the home video business. Already 967 titles of MPA product are being released in pirate form in China, which threatens further investment by U.S. motion picture companies in the DVD business in China.

But motion picture piracy has been particularly devastating to the Chinese industry. A recent article in the Shanghai Daily<sup>6</sup> documents the fruitless efforts of famed Chinese director Zhang Yimou, and the distributor of his latest acclaimed film *Hero*, the New Picture Film Company, to secure a decent return on their investment. When the film was released in October 2002 in Shenzhen and in Shanghai on December 20, moviegoers were prevented from taking handbags or anything made of metal into the movie theater during the preview to prevent illegal camcording of the film. The distributor spent over RMB1 million (US\$120,800) in financing a local anti-piracy unit, knowing that without major precautions, the film would be on the street in VCD and DVD format in days. But on January 8, a cinema in Xi'an reported losing a print. The police cooperated and interviewed the theater's employees, one of whom killed

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<sup>5</sup> For example, in May 2002 Hong Kong Customs, Shenzhen NAPP, and Shenzhen PSB in a joint effort broke a notorious DVD-smuggling operation. Hong Kong arrested one HK citizen and seized 2200 DVDs, and the Shenzhen authorities raided three locations, arrested four Chinese citizens (including the syndicate head) and seized 54,000 pirate DVDs.

<sup>6</sup> January 18, 2003. On November 1, 2002 a story about the sad saga of this film also appeared in the *New York Times*, <http://nytimes.com/2002/11/01/business/01PIRA.html>. As was stated then by the head of New Pictures, Jiang Wei, "After the release, we often have only three days before the pirate copies hit the market ... The industry can't survive that." Another Chinese film, *The Touch*, starring famed Michelle Yeoh, was available on pirate DVDs four days after the film's release, "and ticket sales slid fast."

herself by jumping off a building. Then low-quality copies started showing up on the street. The legitimate DVD distributor then violated his contract with the film's distributor and began selling pirate DVDs before it was authorized to begin legitimate distribution on February 20, and in low-quality, cheap format to compete with the pirates. The film distributor is now considering taking legal action against the distributor. Zhang's effort was a first for China—he was able to keep pirate copies off the street for a number of weeks and actually broke records at the box office. This is unusual, however, and most first run movies—U.S. and Chinese—are available in pirate form within days in China, and for U.S. films this is well before even their theatrical release in China.

Pirate DVDs are selling for US\$0.76 to US\$2.50 and the penetration of DVD players in China have grown from an estimated 5.3 million in 2001 to an estimated 18 million today. VCDs, the format invented by the Chinese pirates, are selling for US\$0.76 to US\$1.92 per title in major cities, and VCD players can now be purchased for as little as US\$43. MPA estimates there are over 60 million VCD players in China.

In 2001 MPA reported a small decrease in the piracy rate in China. However, despite considerable efforts of the authorities and MPA to fight piracy, the rate actually increased for 2002 to 91%, this despite record seizures in 2002. The lesson is simple, and must be grasped by the Chinese authorities, that without significantly heavier deterrence afforded by real criminal prosecutions for piracy and a national campaign to accompany it, piracy rates will not go down.

Unfortunately, we must report again that, with the exception of many raids and administrative cases brought against pirates of Nintendo's Game Boy products, the government has made no concerted effort to address videogame piracy in China, which remains at among the highest levels of all copyright industry products. It is estimated that PC-based videogame piracy stands at 94% of that market in China, while console-based games are at 97%. Imports appeared to have diminished and most production (particularly of entertainment software for PCs) occurs locally in Chinese factories or increasingly through CD-R burning, which is reportedly on the increase. High quality counterfeits of such popular videogames as *Harry Potter* and *The Lord of the Rings* can be found throughout China, complete with the copied video game packaging as well as instruction manuals. Domestic factory production allows for the localization of pirate product before legitimate fare is available on the market (in some instances, pirate product carries the "logo" or "brand" of the pirate operation controlling the production and distribution of the videogame).

## **Wholesale and Retail Piracy**

Enterprise end-user piracy is the most pressing problem for the business software industry in China but counterfeiting of enterprise software and hard disk loading are also major problems. Indeed, China is the source of some of the most sophisticated counterfeits of software anywhere in the world. In order to deal with the counterfeit and hard disk loading problem, the Chinese government should initiate a crackdown on the open sale of pirate software.

In order to regularize the audiovisual marketplace, the Ministry of Culture, in early 2001, set about to close what were predominately pirate markets throughout China. To date 277 audiovisual markets in major cities have been closed, including the notorious Chendu Chenghuangmiao Market, Liaoning Haicheng Market, Shenzhen Luohu Market and Wuhan Jiangnanlu Market.

Supplied by both licensed and unlicensed factories and by smugglers, the wholesale and retail trade in pirate OD product in particular continues to thrive despite the improvements described above. The recording industry reports that small retail shops have become the major outlets of pirate music product with up to half of these outlets selling pirate music. In Beijing alone there are 1,500 of these small pirate outlets. As in other countries in the region, mobile vendors and individuals, supplied by larger well-organized distributors ply their trade actively. Audio, video and entertainment software products are the mainstays of all these businesses.

MPA has also targeted major distribution centers and major retailers. One major distribution center in Beijing was raided and 312,000 pirate OD products, including 35,000 pirate DVDs and 65,000 VCDs were seized. Another such distribution center was hit in October 2002 and 77,000 DVDs were seized. And retail piracy is not limited to small shops. In April 2002, a major retail operation in the Yongsheng Century AV Center in Beijing was raided, with both large quantities of DVDs and music cassettes seized. This outlet is part of a larger group of companies that have faced repeated complaints from industry. This time the owners were charged with operating an illegal business and, in October 2002, sentenced to six and five and one-half years, respectively. This kind of action will result in deterring further infringements.

## **Enterprise End-User Piracy of Business Applications Software**

As in other countries, unauthorized use of software in enterprises in China causes the great majority of piracy losses faced by the business software industry. In February 1999, the State Council reissued a "Notice" released by the National Copyright Administration of China in August 1995 ordering all government ministries at all levels to use only legal software. This welcome announcement (the so-called "Red Top Decree") put the highest levels of the Chinese government behind software legalization throughout government ministries, and sent a message to the private sector that it should not be using software without authorization. On June 27, 2000, the State Council again spoke on this issue with the release of Document No. 18, which made clear that no entity (public or private, and regardless of level) might make unauthorized use of software. In 2000, the Business Software Alliance cooperated with the National Copyright Administration to carry out a series of software asset-management training seminars for government officials and some companies in four markets, and undertook other such sessions in 2001 in Qingdao and Suzhou.

Following up on these actions, on August 28, 2001, the National Copyright Administration (NCA), Ministry of Finance, Ministry of Information Industry (MII) and State Development and Planning Committee co-issued a decree, titled "Notice on Governmental Organizations as Role Models by Using Legal Software." The decree was approved by the State Council and distributed to all provincial governments and ministry-level agencies in the central government. The decree takes a firm position on IPR protection by ordering governmental organizations at all levels to use only legal software and, most important, it provides that the Ministry of Finance will itemize a budget for software, to ensure that government agencies have money to include software purchases in their own purchasing plan. In addition, the NCA and the MII shall give necessary training on software copyright protection and software asset management. The supervision of software usage in government organizations, at all levels, is to be conducted by the NCA and its local branches.

In order to assist, BSA continued to conduct software asset management training seminars, in partnership with NCA, MII and the Chinese Software Alliance in four major cities in 2002, targeting government end users.

These actions signal that the government recognizes the problem, but far more needs to be done to make the orders contained in these decrees a reality, including programs initiated by the central government. The most urgent needs are to continue the programs for detailed software management guidelines governing the procurement and use of software; to ensure that government entities *actually* have the funding to comply with these guidelines; and to ensure that government officials continue to receive adequate training on the management of software assets.

While legalizing software use by the government is moving forward, end-user piracy in the private sector remains the greatest barrier to the development of the software industry in China, for domestic and foreign companies alike. As described further in the sections on enforcement, it is here that aggressive steps must be taken to establish an effective administrative and judicial enforcement regime against this type of piracy.

## Internet Piracy

Internet piracy is a growing phenomenon and IIPA hopes that the Chinese government will do more to recognize the problem. With over 58 million Internet users (up from 33.7 million or 72% from 2001) and over 293,313<sup>7</sup> websites as of June 30, 2002, China's response will be all important.

For the entertainment software industry, piracy in Internet cafes remains a problem. This is due in part to the fact that a majority of Chinese are dependent on these cafes for their Internet access. Last year, IIPA urged the Chinese government to look into the use of entertainment software at these cafes, citing the fact that while the government had been vigilant in requiring cafes to install blocking software for pornographic and subversive sites, the issue of piracy of entertainment software products was not addressed. In January 2003, it was reported that the Chinese Ministry of Culture announced that it will launch a crackdown on Internet game piracy at Internet cafes beginning in February 2003. An official announcement, however, has not been issued, nor has the IDSA or IIPA yet been able to obtain a translation of the Culture Ministry's announcement that supposedly addresses normalizing software use at Internet cafes. This is, however, a promising step in combating Internet piracy and it is hoped that the regulation, once in place, is effectively enforced.

Internet piracy has reached crisis level for the recording industry in 2002, and the industry expects the situation to worsen if the Chinese government does not take immediate action. Not counting music files (mainly MP3, but increasingly in Microsoft's Windows Media format) being exchanged through FTP servers set up by university students, and other peer-to-peer servers (such as the Taiwan-based Kuro), RIAA/IFPI estimate that there are over 7 million music files being offered for download and listening (through audio streaming) from over a thousand active pirate music websites in China.

In a recent warning campaign conducted by the industry, up to 60 warning letters were sent to ISPs that were hosting websites with alleged telecommunication companies' background. Although it is encouraging that most of those websites have ceased to operate after receiving the letters, there is still a large portion of sites offering infringing music files. Moreover, while many of those sites are mainly targeting local Chinese users (i.e., the web pages are mainly written in Chinese and a larger portion of music files are Chinese titles), RIAA/IFPI has also found that many China-based ISPs are now being used by international

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<sup>7</sup> Source: CNNIC Internet Report 2002/01, <http://www.cnnic.net.cn/develst/2002-7e/6.shtml>.

Internet music pirate syndicates to store their infringing files. In a number of cases, RIAA/IFPI have located sites that were offering new releases of Western artists for downloading with their MP3 files mainly stored in servers located in China.

Meanwhile, mainly because of the lack of awareness of copyright laws and the lack of government initiative to crack down on online piracy, even large and popular Chinese portals were found to have offered services that allowed users of mobile phones to select recorded music from a list of over a thousand titles. There are now over 200 million mobile phone users in China. Fortunately, these services were immediately stopped after RIAA/IFPI took action against the infringing websites.

It is critical that the government intervene with clear rules in the Internet area, accompanied by more effective enforcement. The recording industry fears that the local market, which is already seriously affected by massive CD and cassette piracy, will be further devastated. More importantly, if the problem continues to grow, there is a real possibility that ISPs in China will soon become the most important “warehouses” for many international online pirates to store their music files as they can take advantage of the inadequate legal protection and feeble enforcement.

MPA also experiences growing Internet piracy in China and has embarked on a program of issuing cease and desist letters to ISPs and monitoring Chinese websites to find pirate MPA titles. As of December 4, 2002, it had taken down a total of 225 pirate websites. There is an urgent need to update the Supreme Court “interpretations” in light of the new copyright law, particularly with respect to spelling out more clearly the liability of ISPs, and to deal with the temporary copy issue. See further discussion below.

## **Piracy of Journals and Books**

After years of suffering from lack of action regarding journal piracy in China, the Association of American Publishers (AAP) reports unparalleled improvement for 2002. This comes as a result of several months of research into the issue of massive journal piracy, undertaken by foreign publishing groups and culminating in a letter of August 14, 2001 from AAP President Patricia Schroeder to Vice Premier Li Lanqing, calling attention to the journal piracy problem, which AAP estimated cost publishers upward of \$100 million annually. Other letters came from the International Publishers Association (IPA) and the Publishers Association of the United Kingdom (PA). These industry actions resulted in a directive/statement by the Vice Premier that journal piracy was wrong and must be stopped and within a short time. In October 2001, the major journal pirate, Guanhua, informed its customers that it would thereafter be unable to supply pirate journals. Following this, the General Administration of Press and Publications (GAPP, formerly the Press and Publications Administration, PPA) sent a directive to all libraries advising that “with immediate effect, circulation of unauthorized journal copies is prohibited.” NCAC also issued a directive to universities and research institutions instructing them not to subscribe to pirate journals. Guanhua was closed down in December 2001.

By mid-January 2002, local representatives of U.S. publishers were reporting considerable increases in interest by Chinese libraries in licensing journals, with many halting their prior subscriptions to pirate journals with the expectation of paying legitimate licensing fees. Whereas 2001 had seen virtually all journals pirated, stifling the legitimate market, journal piracy has now slowed to a trickle. This is quite a positive development, and one that the

Chinese government must work to sustain through proper funding for purchase of legitimate journals and proper enforcement measures. The outlook is hopeful, as many journal subscriptions for 2003 are now complete. IIPA and AAP commend the Chinese government for taking these firm actions and encourage continued reinforcement of the importance of honoring journal copyrights; this will encourage foreign investment and greatly benefit Chinese scientists, academics and students.

Unfortunately, the successes against journal piracy have not carried over into efforts to combat piracy of other materials. Traditional reprint piracy continues to remain a major problem in China. Piracy of higher education textbooks continues unabated. The Chinese government needs to take action against textbook piracy with the same vigor with which it tackled journal piracy. Reprint piracy affects the market for trade books as well. J.K. Rowling's Harry Potter books were a rousing success in China, with the local publisher selling over 5.5 million copies. However, it has been reported that an equal number of pirate copies have also been sold.<sup>8</sup> Counterfeiting problems also abound. We have previously reported the publication of totally bogus books purportedly written by a famous author. This happened most recently with the Harry Potter series, with Chinese publishers producing at least three additional books about Harry under Rowling's name. One of the publishers was caught and subjected to a \$2,500 fine.<sup>9</sup> Furthermore, well-known business and academic trademarks, such as those of the Harvard Business School, are used illicitly to promote sales of books by implying a nonexistent affiliation or endorsement. Finally, translation piracy remains a problem for foreign publishers. While official State publishing houses have largely ceased their illegal translation activities, second-channel distributors continue production of illegal translations at an alarming rate. The government must take vigorous action against these problems in order to continue the positive example it set with regard to journal piracy.

A new problem has developed with publishers stealing PIN numbers and downloading online journals off the Internet and other electronic databases. In fact, publishers now report more illegal downloads of online journals and digital license violations in China than anywhere else in the world. Publishers have been working with librarians to try to minimize file transfers and to prevent pirate "document delivery services" from developing, but the Chinese government must work to promote digital copyright compliance as well.

Also new in 2002 is the discovery of a Chinese printer, Duoli International in Guangzhou, that has been shipping large quantities of pirate books to Africa, particularly Nigeria. The case is still being researched. It is suspected that the company is exporting pirate books to other countries, including the United States, and reports of pirate exports to Iran have appeared recently as well.

## **Other Types of Piracy**

The unauthorized public performance of U.S. motion picture product continues mostly unchecked in hotels, clubs, mini-theaters and even government facilities. These public performances compete directly with plans to release popular titles in Chinese theaters and threaten the development of the legitimate theatrical market in China. Although the Chinese authorities have taken a number of actions against these facilities, the thrust of these actions has been against pornography, not copyright protection. It is hoped that the new film and

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<sup>8</sup> "Chinese Pirates Rob 'Harry' of Magic, and Fees," Washington Post, November 1, 2002.

<sup>9</sup> Id.

audiovisual regulations issued last year by the State Council will result in the closure of many of these sites and a significant reduction in the problem.

As noted above, software counterfeiting is on the rise in China. Some of the most sophisticated counterfeits of software anywhere in the world are produced in southern China. BSA urges enforcement action by a body such as the PSB at the central level to control this illegal activity.

Television piracy continues to be a concern in 2001. There are 38 provincial broadcast television stations and 368 local stations, all run by the government, which reach over 318 million households. These stations commonly make unauthorized broadcasts, increasingly including popular MPA member company titles. These stations commonly rely on counterfeit “letters of authorization” or “licenses” from companies in Hong Kong, Thailand or Taiwan, which purport to have rights to the title. Some stations also try to hide behind a purported “fair use” exception, broadcasting heavily edited versions of MPA member company films under the guise of “introduction to film.”

There are approximately 1,500 registered cable systems in China, serving 90 million cable households, all of which routinely include pirated product in their programs. In 2001, actions against An Hui Cable TV (April 2001), Hunan Zhuzhou Cable TV (May 2001) and Chengdu Cable TV (June 2001) were taken. Unfortunately, these cable operators were given a warning only by the local Radio, Film & Television Bureau; no fine was imposed nor were their licenses revoked as a result. An action was taken in May 2002 against Hanzhong Cable TV.

Cartridge-based games suffer high rates of piracy as well. Nintendo has taken a number of actions, and so far the authorities have been cooperative, which has resulted in the seizure and destruction of the pirate products, as well as the imposition of administrative penalties and fines. In August 2002, Chinese police raided an electronics factory in Guangzhou, where a sizable amount of counterfeit Game Boy Color printed circuit boards and cartridges were seized. The owner of the factory is a Taiwanese citizen who reportedly purchased the component parts from Taiwan, and shipped them back to China for assembly of the finished product at his factory. It appears that there is still production of component chips in Taiwan, but their assembly into finished counterfeit cartridges appears to be taking place in factories on the Chinese mainland. Nintendo reports that it seized 1 million counterfeit products in China in 2002 and supported 135 raids on Chinese manufacturers. A January 2003 January raid in Guangdong province netted 300,000 counterfeit games, according to a recent Reuters report.<sup>10</sup>

## **COPYRIGHT ENFORCEMENT**

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To meet its WTO/TRIPS commitments on enforcement and particularly TRIPS Articles 41, 50 and 61 (provide enforcement which “on the ground” deters further infringements, provide effective *ex parte* civil search orders, and provide specific deterrent “criminal” remedies), China must implement a system in which the State Council ensures that the authorities (a) cooperate more closely with affected industries; (b) make the system far more transparent than it now is; (c) make fighting piracy a national priority articulated at the State Council level on a regular basis; (d) appoint a Vice-Premier to lead and coordinate the nationwide enforcement effort; (e) significantly increase administrative penalties and actually impose them at deterrent levels; and (f) increase criminal penalties, lower the criminal thresholds and actually criminally prosecute,

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<sup>10</sup> Reuters News, February 11, 2003.

convict and impose deterrent fines and prison sentences on pirates. None of these objectives has as yet been either fully articulated or accomplished.

## Administrative Enforcement

China continued to take many enforcement actions at the distribution and retail level and also undertook a number of factory raids. These actions included many arrests (NAPPWC reported more than 4,500 arrests in the first 8 months of 2002) but they usually cover arrests for pornography as well as piracy without differentiation. Moreover, IIPA and its members have never been able to ascertain what has happened to those arrested. Finally, we do know that administrative actions almost always result in small fines, usually between RMB 50 and 200 (\$6 to \$25) for retail piracy.

In short, the copyright industries find it difficult to measure progress because of the lack of transparency in the enforcement system, particularly the lack of industry access to levels of fines and other penalties for infringement. The Chinese government regularly claim large numbers of administrative actions (NAPPWC reports over 6,000 in 2002—again for pornography and piracy) dealing with copyright infringements but industry is not able to evaluate the deterrent impact of these actions.

Virtually all enforcement in China is done through a complex and overlapping local, provincial and national administrative system. Given the overwhelmingly high piracy rates, it is crystal clear to all that this system fails to deter piracy as required by TRIPS Article 41. There are myriad deficiencies in the administrative enforcement system in China:

- Fines are too low, both as written and as imposed; these need to be increased significantly, imposed in practice and widely publicized throughout China, and the results provided to the U.S.G. as promised in the bilateral IPR agreement. In the WTO Working Party Protocol, the State Council formally committed to recommend to the Supreme People's Court the lowering of the RMB50,000 (over US\$6,000) threshold for sustaining a criminal prosecution. IIPA continues to hear rumors of movement on this issue, but to date we have seen no action yet to redeem this commitment. In the new Regulations to the Copyright Law, issued in August 2002 and effective on September 15, 2002, administrative fines have been changed from a simple maximum of RMB 100,000 (\$12,000) (which, to the best of our knowledge, has seldom been imposed by NCAC) to a "fine not exceeding three times the amount of the illegal business gains, or a maximum of RMB 100,000 when it is difficult to calculate the amount of the business gains" (Article 36). Depending on how this provision is administered, it could result in a reduction in fines in practice since in most retail situations, vendors are not carrying large inventories (and growing "burn-to-order" CD-R techniques will exacerbate this problem). It is highly unfortunate that the State Council did not use the opportunity offered by the need to adopt new copyright regulations as a means to increase administrative fines to real deterrent levels. As noted below, China has, however, in a welcome development, instituted a new system of civil statutory damages, which is discussed below in the section on the new copyright law amendments.
- IIPA reported above that many markets are being closed pursuant to plans instituted by the Ministry of Culture to regularize the audio and audiovisual marketplace. The audiovisual regulations also contain a closure remedy for licensing and related violations. However, IIPA members are not hearing reports that markets and retail

shops selling pirate CDs, VCDs, DVDs, CD-ROMs and other pirate products are being closed even after subsequent administrative “convictions” for copyright piracy or trademark violations.<sup>11</sup> The WTO IPR Working Party Protocol promises that this will change, but the copyright law amendments do not include such an important and deterrent remedy.

- The system is almost entirely nontransparent; it is often impossible to ascertain what penalties are imposed in particular cases. This extends to the Chinese public as well as to foreign right holders. Right holders cannot, for example, obtain documents from the government on the activities of CD plants (even though every order the plant accepts must be recorded and reported to the authorities). Foreign right holders are usually told that these are “national confidential documents.” IIPA members have no evidence that these practices will change.
- There is a lack of time limits for investigations, leading to long delays and a resulting failure to deter pirates. The new copyright law amendment requiring the courts in civil cases to execute an *ex parte* search within 48 hours of the request by the right holder has not proven as yet to work in practice. (See further discussion below.)
- There is still “local protectionism” by administrative agencies involving politically or financially powerful people engaged in pirate activities.
- As discussed in the section on the new software regulations, it continues to be unclear what authority and powers officials have to address the problem of rampant corporate end-user piracy. Even if they did have this authority, they have few resources to tackle this problem without the regular use of the AICs and PSB. This problem must be addressed if meaningful administrative enforcement is to be taken against this type of piracy.

There are two bright lights, however: MPA and AFMA continue to report positively on the title verification program run by NCAC. At the end of August 2001, a total of 7,858 title verification requests (an additional 736 from a year earlier) have been submitted to NCAC by MPA, and a total 2,866 titles have been challenged as unauthorized (an additional 103 from a year earlier).

After years of requests by BSA, NCAC exercised its administrative authority in two enterprise end-user cases. In August 2002, the Shanghai branch of NCAC conducted two raids, with one of these uncovering unauthorized software valued at over US\$1 million. Settlements in these cases amounted to tens of thousands of dollars. These cases were a major advance, and BSA hopes they are a harbinger of the large-scale use of administrative authority. Unfortunately however, NCAC does not have sufficient resources for wide-scale and sustained enforcement actions of this kind without utilizing the resources of other agencies such as the AICs.

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<sup>11</sup> In year 2002, however, MOC did revoke over 7,000 audio/video retail licenses because the space of the shop was less than 50 square meters.

ADMINISTRATIVE COPYRIGHT ENFORCEMENT STATISTICS			
ACTIONS	2002		2001
	MOTION PICTURES	BUSINESS APPLICATIONS SOFTWARE	MOTION PICTURES
Number of raids/searches conducted	852	3*	983
Number of administrative cases brought by agency	812	3*	769
Number of defendants found liable (including admissions/pleas of guilt)	808	0	769
Ratio of convictions to the number of raids conducted	99.5%	0	78%
Ratio of convictions to the number of cases brought	99.8%	0	78%
Number of cases resulting in administrative fines	808	0	501
Total amount of fines levied		0	
US\$0-\$1,000	764	0	493
\$1,001-\$5,000	42	0	4
\$5,001-\$10,000	2	0	4
\$10,000 and above	0	0	0
Total amount of restitution ordered in how many cases (e.g. \$XXX in Y cases)		0	

## Criminal Enforcement

IIPA and its members (and the USG) have pressed China for years to use its criminal law to prosecute pirates, as the only viable means effectively to reduce piracy levels in China. While criminal enforcement does occur under other laws such as those dealing with pornography or running an illegal business, it will be difficult for China to convince its people that piracy is an economic crime that damages the Chinese economy and Chinese culture until there is a publicly stated commitment and an ample record of convictions with deterrent penalties. As discussed in detail below, the piracy provisions in Article 217 and 218 of China's criminal law have rarely been used because of the high thresholds established by the People's Supreme Court in its "interpretations" of these provisions. These thresholds must be substantially lowered, and the "interpretations" otherwise amended, to permit effective criminal prosecutions.

IIPA members have inquired on many occasions about the existence of criminal convictions purely for piracy offenses and we have received no confirmations. 2002 may mark the year of the first pure piracy case ever, involving a factory in Guangdong Province, where two defendants was sentenced in March 2002 to 2 years imprisonment for copyright piracy only. This case involved the Foshan Jinzhu Laser Digital Chip Co. Ltd., which had accepted a phony order for 920,000 DVDs from a Taiwan defendant (who was fined RMB 400,000 (\$48,000)). In addition to the prison terms, three lines were removed, and the GPPA revoked the plant's license.<sup>12</sup> There were earlier rumors of criminal piracy convictions in Anhui Province but no confirmation was obtained. Another case in Shanghai involved the *Dictionary of Cihai*, but again it appears that this was not a pure copyright case either. IIPA has received informal reports of two book-piracy cases which were decided purely under Article 217 and 218, but these may be the Anhui cases for which we have no confirmation.

Again, we urge the USG to press the State Council to redeem its commitment at least to "recommend" to the Supreme People's Court that its "interpretations" be significantly amended

<sup>12</sup> This is precisely the kind of result, if repeated and widely publicized, that will eventually result in China reducing its staggering piracy rates.

to make criminal prosecutions more available. Indeed, as discussed below, the State Council has ultimate authority merely to order those amendments.

<b>CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS 2002</b>		
<b>ACTIONS</b>	<b>MOTION PICTURES</b>	<b>BUSINESS APPLICATIONS SOFTWARE</b>
Number of Raids conducted	80 (Shanghai & Beijing)	0
Number of cases commenced	N/A	0
Number of defendants convicted (including guilty pleas)	3 (Guangzhou case)	0
Acquittals and Dismissals	N/A	0
Number of Cases Pending	N/A	0
Total number of cases resulting in jail time	1 (Guangzhou case)	0
Suspended Prison Terms	N/A	0
Maximum 6 months		0
Over 6 months		0
Over 1 year		0
Total Suspended Prison Terms		0
Prison Terms Served (not suspended)	3	0
Maximum 6 months		0
Over 6 months	2	0
Over 1 year	1	0
Total Prison Terms Served (not suspended)		0
Number of cases resulting in criminal fines	N/A	0
Up to \$1,000		0
\$1,000 to \$5,000		0
Over \$5,000		0
Total amount of fines levied		0

## **CIVIL ENFORCEMENT**

One positive development is the increasing sophistication and effectiveness of the IPR courts throughout China. This has resulted in an increase in the number of civil cases for damages being brought by Chinese right holders and, increasingly, by U.S. right holders, particularly given the failures of the criminal and administrative enforcement systems. The recording industry began to use civil litigation in 2001 when it brought over 40 cases against suspected infringers in the courts (out of 100 potential cases that were prepared for court submission, but many of which were settled). Twenty-six of these cases resulted in judgments for the copyright owners and involved factories, music distribution companies and retailers. Also included were further cases involving illegal distribution of MP3 files on the Internet. In 2002, RIAA/IFPI report about 80 cases in progress or completed/settled (against 30 licensed plants) and so far close to 100% (approximately 11 judgments) have been successfully concluded. Some of these cases resulted in significant damages, and it is reported that these cases have had a deterrent effect on the licensed plants that were engaging in pirate activities.

The motion picture industry has also embarked on a civil litigation program with a total of five cases commenced in the second half of 2002, two in Beijing against factories as well as a retail outlet in each case, and three solely against retail outlets in Shanghai. None of these cases has yet reached its conclusion. In the Shanghai cases, the court is seeking to separate the actions for each separate plaintiff. This increases the difficulty of efficiently prosecuting these cases and creates a greater backlog of cases for any court system to deal with.

As discussed below, the new copyright law amendments have made certain positive changes that should assist in bringing successful civil cases against infringers.

- Provisional remedies were added in Articles 49 and 50 and, as we understand it, it is intended that these operate on an *ex parte* basis.
- Court-determined “pre-established” damages can now be awarded up to a maximum of RMB500,000 (US\$60,000) where the “actual losses suffered by the holder of the right or the profit earned by the infringing party cannot be determined.”

While these changes are significant improvements, U.S. right holders have continued to have problems in successfully bringing civil cases in China, particularly the business software industry.

The business software industry also commenced two civil cases in 2001 relying on advice that the civil procedure code provided a ready *ex parte* remedy against corporate end-users of unauthorized software and in consideration of NCAC’s Document 01, issued in March 2001, directing local copyright authorities to take action against corporate end user piracy. However, the courts in those cases never did issue the search orders, despite acknowledging the existence of the remedy and that the orders needed to be executed in 48 hours as required under the new amendments.

As reported in our 2002 submission, the same result fell to two BSA members that also sought to commence civil cases against two corporate end-users in the Shenzhen IP Court. While the court first agreed to accept the cases (*ex parte* search orders were also requested), a month and a half passed when a court official was sick and, when the official returned, the court demanded that the four actions be refiled as 37 separate actions, or one separate action for each work. Discussion and argument ensued, following which the right holders sought to withdraw the cases altogether. The court then decided that it would accept the original four cases, but in the end BSA felt that it was not in its best interest to continue these cases.

Fortunately, in March 2002, a BSA member was finally granted such an order; it was then executed and illegal software found. In November 2002, after three hearings, the Shanghai No. 1 Intermediate Court found the party guilty and awarded damages of RMB 500,000 (US\$60,000) as statutory damages under the new amendments, the maximum amount allowed. BSA initiated two other civil actions in December—one in Nanjing and one in Shanghai. The targets are both advertising companies. BSA applied for an evidence preservation order and a preservation of property order. The case is now in process.

In the area of book and other literary works piracy, in December 2000, a civil suit was filed by the Educational Testing Service (ETS) seeking damages against the Beijing New Oriental School, which had for years administered the TOEFL and GRE tests to Chinese students seeking entrance into U.S. universities. ETS alleged that the school has been stealing ETS’s highly secure test questions and test forms and selling them to its students at a significant profit. The school also distributed these highly secret test questions widely in China. ETS claimed that the security and integrity of the tests have been compromised to the extent that it has led some U.S. universities to doubt the authenticity of all test scores from China, harming the entrance prospects of Chinese students. The school had been sued by ETS before, but that suit failed to stop the conduct. The progress of the case has been hindered by inadequacies in Chinese procedural law, including lack of meaningful discovery and serious difficulties in preventing relevant evidence from being destroyed without actually seizing it

through a court order after posting money as security (bonds are not used). This case is still pending in the Beijing People's Court, after a trial in May 2002 and submission of post-trial briefs in fall, 2002.

CIVIL COPYRIGHT ENFORCEMENT STATISTICS 2002		
ACTIONS	MOTION PICTURES	BUSINESS APPLICATIONS SOFTWARE
Number of civil raids conducted	5	2*
Post Search Action		NA
Cases Pending	5	2
Cases Dropped		0
Cases Settled or Adjudicated		0
Value of loss as determined by Rightholder (\$USD)		Not Known
Settlement/Judgment Amount (\$USD)		0

## Enforcement Against Internet Piracy

Due to the rapid growth of Internet piracy in China, some of the copyright industries have begun concerted enforcement campaigns. MPA began such a program in earnest in May 2002 employing web crawlers that can find pirate movies both in English and simplified Chinese characters. Since that time, 548 cease and desist letters were sent to mainland Chinese ISPs, with an average compliance rate of 41%. This rate was significantly improved after MPA officials met with China Telecom. Significant improvements in these compliance rates are not likely to occur until the Chinese government clarifies the liability of ISPs and thereafter civil cases are brought which hold ISPs liable for failing to take down pirate sites. MPA keeps NCAC fully informed of these activities but to date NCAC has done little on their own initiative.

The recording industry, facing massive Internet piracy in China, issued 60 cease and desist letters to offending ISPs and websites, FTP sites etc. in 2002. Compliance has generally been good by the ISPs but litigation and *ex officio* action by Chinese enforcement authorities will be necessary to make a significant difference. RIAA/IFPI have brought a number of civil suits against ISPs and websites which have been reported in earlier submission. Some success has been achieved.

## STATUTORY LAW AND REGULATIONS

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### The New Copyright Law Amendments

On October 27, 2001, following review of many variant drafts, the Standing Committee adopted the "Decision to Amend Copyright Law of the People's Republic of China," thereby amending that law.<sup>13</sup> These new amendments ("2001 Copyright Law") make a number of very significant and welcome changes to the 1990 law and attempt to bring that law into compliance with TRIPS, which became effective on December 11, 2001 when China joined the WTO.

<sup>13</sup> Copyright Law of the People's Republic of China, Adopted at the Fifteenth Session of the Standing Committee of the Seventh National People's Congress on September 7, 1990, Amended in Accordance with "Decision to Amend Copyright Law of the People's Republic of China," Adopted at the Twenty-fourth Session of the Standing Committee of the Ninth National People's Congress on October 27, 2001 (translation on file at IIPA).

Importantly, the amendments also purport to implement the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT).

In its 2002 submission, IIPA set out many of the positive changes wrought by these amendments, and we won't repeat these here. Listed below are those changes which IIPA believes are deficiencies that remain to be fixed, and were not fixed either by the December 2001 regulations governing computer software, or the regulations to the Copyright Law which became effective on September 15, 2002 and were issued in December 2001.

1. The most glaring deficiency is that criminal liability is not affected and there are apparently no plans to amend the criminal code.
2. While the Law [Article 47(6)] provides anti-circumvention protection, it does not fully implement the WIPO treaties obligation, in that it: 1) does not expressly prohibit the manufacture or trade in circumvention devices, components, services, etc.; 2) does not define "technical protection measures" to clearly cover both "copy-controls" and "access controls"; 3) does not make clear that copyright exceptions are not available as defenses to circumvention violations; 4) does not expressly include component parts of circumvention technologies (assuming devices are covered); 5) imposes an "intent" requirement as to acts (and business/trade if such activities are covered), which might make proving a violation difficult; and 6) does not provide for criminal penalties for circumvention violations (since the copyright law only deals with civil and administrative remedies). Unfortunately, none of these deficiencies was dealt with in the implementing regulations.
3. While the law protects against "intentionally deleting or altering the electronic rights management system of the rights to a work, sound recording or video recording" without consent of the right holder [Article 47(7)], this protection may not fully satisfy WIPO treaties requirements and requires further elaboration in the implementation process. For example, the law does not expressly cover "distribution, importation for distribution, broadcast or communication to the public" of works or other subject matter knowing that RMI has been removed or altered without authority, as required by the WIPO treaties, nor does it define "electronic rights management system" in a broad, technology-neutral manner.
4. Temporary copies are not expressly protected as required by the WIPO treaties. As with the copyright law prior to amendment, protection of temporary copies of works and other subject matter under the 2001 copyright law remains unclear. According to an earlier (February 2001) draft amendment of Article 10, "reproduction" as applied to works was to include copying "by digital or non-digital means." The phrase "by digital or non-digital means" was removed from the final version of Article 10(5) prior to passage. Article 10(5) also fails (as did the definition of "reproduction" in Article 52 of the old law, which was deleted, and Article 5(1) of the 1991 Implementing Regulations) to specify that reproductions of works "in any manner or form" are protected. Addition of either of these phrases might have indicated China's intent to broadly cover all reproductions, including temporary reproductions, in line with the Berne Convention and the Agreed Statement of

the WIPO Copyright Treaty.<sup>14</sup> As it stands, the current Article 10(5) description of the reproduction right includes “one or more copies of a work by printing, photocopying, copying, lithographing, sound recording, video recording with or without sound, duplicating a photographic work, etc.” Objects of neighboring rights (Articles 37, 41 and 44) mention “reproduction” (e.g., Article 41 provides sound recording and video recording producers a “reproduction” right), but the Article 10(5) description is not expressly applied *mutatis mutandis*. It should also be noted that the Article 41 reproduction right for sound recording producers does not expressly extend to indirect reproductions, as required by TRIPS (Article 14.2) and the WPPT (Article 11). This deficiency should be fixed in the implementing regulations.

5. A new compulsory license (Article 23) permits the compilation of “[p]ortions of a published work, a short work in words or music, or a single piece of artwork or photographic work” into elementary and high school (so-called “el-hi”) textbooks, and “State Plan” textbooks (which we are still trying to determine would not include university textbooks, which would cause great concern for U.S. publishers); in addition, sound recordings, video recordings, performances, and broadcasts apparently are subject to this compulsory license. IIPA hopes that the Chinese government will confirm that this compulsory license provision will not be read to apply to foreign works and other subject matter since it would violate the Berne Convention and TRIPS if it did. It would also violate the International Treaty regulations referenced above (which implemented the 1992 U.S.-China Memorandum of Understanding (MOU)), even if it were further confirmed that it only applies to foreign printed materials used in elementary or high school “textbooks” (hard copies). The damage to publishers would be particularly significant if “State Plan” were to encompass university textbooks and/or if “textbook” includes forms other than “printed” forms (e.g., digital forms or multimedia). The regulations must be framed to exclude foreign works or to limit their scope in a manner consistent with the Berne Appendix.
6. The provisions on collecting societies leave unclear whether this provision extends to the creation of anti-piracy organizations which can “enforce” the rights of their members in the association’s name. This change is sorely needed in China, particularly for the benefit of foreign right holders, and other laws or regulations which inhibit the formation of such organizations should also be amended or repealed. Regulations should clarify these points and ensure effective and fair treatment of foreign right holders.
7. The treatment of works and sound recordings used in broadcasting continues to remain woefully deficient and out of date. While Article 46 spells out that broadcasters must

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<sup>14</sup> The agreed statement to Article 1 of the WIPO Copyright Treaty provides,

[t]he reproduction right, as set out in Article 9 of the Berne Convention, and the exceptions permitted thereunder, fully apply in the digital environment, in particular to the use of works in digital form. It is understood that the storage of a protected work in digital form in an electronic medium constitutes a reproduction within the meaning of Article 9 of the Berne Convention.

Dr. Mihály Ficsor, who was Secretary of the WIPO Diplomatic Conference in December 1996, has stated that the term “storage” naturally encompasses temporary and transient reproductions. Ficsor notes that “the concept of reproduction under Article 9(1) of the Convention, which extends to reproduction ‘in any manner or form,’ must not be restricted just because a reproduction is in digital form, through storage in electronic memory, and just because a reproduction is of a temporary nature.” Mihály Ficsor, Copyright for the Digital Era: The WIPO “Internet” Treaties, Colum.-VLA J.L. & Arts (1998), at 8. See also, Mihály Ficsor, The Law of Copyright and the Internet: The 1996 WIPO Treaties, their Interpretation and Implementation (2002).

obtain permission to broadcast “unpublished” works (e.g., an exclusive right), Article 47 provides a mere “right of remuneration” for the broadcast of all other works, with the sole exception of cinematographic and “videographic” works. Such a broad compulsory license (not even limited to noncommercial broadcasting) is not found in any other law, to IIPA’s knowledge. Furthermore, the broadcast of sound recordings is not even subject to a right of remuneration by virtue of Article 41 and Article 43. Record producers should not only enjoy full exclusive rights for both performances and broadcasts in line with modern trends, and this treatment appears to conflict with the “Regulations Relating to the Implementation of International Treaties” promulgated in 1992. Article 12 extends these rights to foreign cinematographic works and Article 18 applies that Article 12 applies to sound recordings. The authorities, though asked, did not clarify this contradiction in the Implementing Regulations to the Copyright Law discussed below. Provisions should be added to ensure that certain uses of sound recordings that are the equivalent of interactive transmissions in economic effect should be given an exclusive right. An exclusive importation right should also be added.

8. The draft does not take advantage of the opportunity to extend terms of protection to life plus 70 years and 95 years from publication. This is the modern trend.
9. A full right of importation applicable to both piratical and parallel imports should have been included.

Deficiencies also occur in the enforcement area:

1. Administrative fines have not been increased. This must be done in the implementing regulations, both for NCAC and in other regulations, as appropriate for other administrative agencies like the SAICs.
2. As noted above, criminal remedies are not dealt with at all. Criminal remedies must be extended to include violations of the TPMs and RMI provisions in order to comply with the WIPO treaties obligations.

## **The New Computer Software Regulations**

The new regulations governing computer software were issued on December 28, 2001 and became effective, replacing the 1991 regulations, as of January 1, 2002. The deficiencies noted above in the copyright amendments were not eliminated in these regulations.

Furthermore, the regulations created other, new, problems which are listed below:

1. Article 17 of the regulations establishes a potentially huge and TRIPS-incompatible exception to protection for software. To the extent this provision allows any use (including reproduction, etc.) of software for learning and to study the design of the software, it goes well beyond what is permitted under Berne 9(2) and TRIPS Article 13. To be compatible with TRIPS this provision must be revised and implemented so that (a) it applies only to software within the lawful possession of the person engaged in the activity; (b) it may be carried out only if the information is not otherwise available, such as by licensing arrangement; (c) it only applies to information or design related to the interoperability of the program with hardware or a noncompeting program; (d) the information cannot be used to generate a competing program; and (e) it is subject to the three-part test in Berne 9(2) and TRIPS Article 13. Any such provisions on

decompilation should follow, at a minimum, the standards in the EU Software Directive, from which these conditions are taken.

2. Article 30 of the regulations creates a huge loophole and will have significant adverse effects on enforcing the copyright law against corporate end-user pirates. It provides that the possessor of infringing software is relieved of liability if the possessor is ignorant, or reasonably ignorant, of the infringing nature of the software. This is inconsistent with Article 52 of the 2001 law itself, and with Article 28 of the regulations, which puts the burden of proof in such cases of infringement on the possessor. Even under the terms of regulation itself, it is not clear that liability will attach where the right holder or administrative authority can show that it would have been unreasonable to think that the software was legal. The provisions of Article 52 of the law and Article 28 of the regulations should govern. If Article 30 is abused, it would so weaken enforcement against corporate end-user piracy that it would amount to a violation of TRIPS Article 41. Article 30 of the regulations is also highly problematic when it provides that if discontinuation or destruction of the illegal use of software would bring great loss to the infringer, the right holder will be forced to license the software to the infringer at a “reasonable royalty.” It is not clear what will meet the standard of “great loss” to the infringer or how a “reasonable royalty” should be calculated. This provision extends beyond the exceptions and limitations permitted by TRIPS Article 13 by establishing a compulsory license that directly conflicts with the normal exploitation of the work and the legitimate interests of right holders. The normal damages provision of the law should govern in these cases.
3. The regulations should have made clear that the new provisional remedies provided for in Articles 49 and 50 of the 2001 copyright law should apply in the case of administrative enforcement, as well as before the courts.
4. The administrative penalties in the regulations (Article 24) are woefully inadequate and must be significantly increased to take into account the value of the software that is pirated.

## **The New Copyright Regulations**

Another opportunity was available to the Chinese authorities to clarify many of these deficiencies but that opportunity was not taken. What was done was a shortening of the 1991 Regulations with few changes. Selected problems include:

1. Still left unclear was the fate of the public performance and broadcast right for sound recordings. The 1992 “International” regulations, referred to above, should clearly take precedence over these regulations and the copyright law with respect to foreign works and sound recordings such that foreign sound recordings have an exclusive broadcast right and must be compensated by Chinese broadcasters.
2. Article 32 of the 2002 Implementing Regulations seems to imply that the Article 23 compulsory license covers all subject matter, not just printed material. As such the law and the regulation violate the Berne Convention and TRIPS. No attempt was made to limit the application of Article 23 to domestic works or to so-called el-hi uses.

3. Again, as discussed above, the administrative fines should have been increased, but they still remain at a maximum of only RMB100,000 (US\$12,000).

## **Criminal Code “Interpretations”**

As noted above and in our prior submissions, the 1997 formalization of the provisions on copyright in the criminal code plus the Supreme People’s Court “interpretations” given to those provisions has resulted in a worsening of the situation with respect to subjecting pirates to criminal sanctions. While ultimately the criminal code should be amended (and IIPA strongly recommends that this be done), many of the problems that infect the criminal system can be corrected, at least at the statutory/regulatory level, by the Supreme Court itself and/or by the State Council agreeing to revisit these “interpretations” and to make criminal cases much more available to both Chinese and foreign right holders. This is a very high priority for U.S. industry. Such a commitment is contained in the U.S.-China IPR Working Party “protocol,” but in a manner committing the State Council only to “recommend” such change. The State Council has ultimate authority to make these changes directly. The USG should press the State Council to redeem this commitment.

In particular, the US\$6,000 threshold of income to the defendant, has, as a practical matter, made criminal remedies unavailable. Moreover, prosecutors have been reading these “interpretations” to relate to income at pirate prices and have counted income only on the basis of what is found to have actually been distributed, not what pirate product may be sitting in a warehouse. All these provisions should go to the issue of the amount of the penalty to be imposed, not to the basis of liability in the first place. In this respect, China is far out of the mainstream of thinking within the international community and has prolonged and made virtually impossible its ability to reduce piracy rates. Finally, IIPA has a report that China Customs is not referring significant seizure cases at the border for criminal prosecution on the apparent ground that under the “interpretations” the act of importation is not a “sale.” These interpretations should be immediately amended.

## **Application of the Copyright Law to Internet Disputes: Supreme People’s Court “Interpretations”**

The Supreme People’s Court issued its “Interpretations of Laws on Solving Online Copyright Disputes,” with effect from December 20, 2000. In general, these “interpretations” were incorporated into the new 2001 Copyright Law and need not be amended further except to incorporate the new terminology in the new law, such as “transmission over information networks.” Article 3 of the “interpretations,” however, as discussed below, remains deficient. Indeed, the State Council has reserved to itself (Article 58) the task of issuing regulations governing “the right to transmit via information networks.” Again, IIPA will cover only the highlights of these interpretations which (except for Article 3) are generally very positive with respect to protecting the on-line environment from rampant piracy.

1. Basically, the “interpretations” applied the existing provisions of the 1990 copyright law (and are consistent for the most part with the 2001 copyright law) to all digital forms of works, particularly the reproduction right and other exploitation rights, including covering unauthorized Internet transmissions as infringing “disseminations.”

2. Article 3, however, is unclear in that it appears to provide a loophole for dissemination of works “published on the Internet in newspapers and magazines or [works] disseminated on the Internet,” unless the right holder clearly states that those works may not be “carried or extracted.” The provision then says that the works must be paid for by the particular website. It is unclear whether this provision applies to works “first” published on the Internet (when a right holder might be able to add a prohibition against further carriage without permission), or whether it is limited purely to works published in newspapers and magazines.<sup>15</sup> In any of these cases, however, this would amount to a TRIPS-incompatible compulsory license. We assume this is not what is meant by this ambiguous and potentially very dangerous provision. For example, the final sentence of Article 3 reads that “however, a Web site that re-carries and extracts works beyond the scope as prescribed for reprinting in newspaper and magazine articles shall be considered copyright infringement.” This sentence could be read to refer to “beyond” the scope of the right holder’s license. The provision is unclear.
3. Article 4 establishes the contributory liability of ISPs under Article 130 of the Civil Law. IIPA members have requested, however, that these regulations be further clarified to ensure that the liability of ISPs in connection with transmitting pirate product is made especially clear.
4. Article 5 makes ISPs fully liable where they have knowledge of the infringement, either before notice from the right holder or after receiving notice and failing to take down the infringing site. The ISP must have “adequate evidence” of infringement. What constitutes “adequate evidence” of infringement, and the proper communication of this information to the ISP, must be defined. The speed with which the ISP moves to take down infringing material must also be defined.
5. Article 6 requires the ISP to provide the right holder with “online registered data” about the infringer, or it violates Article 106 of the Civil Code (IIPA does not have a copy of this provision at this writing).
6. Article 7 appears to establish what is needed to provide adequate notice of the infringement to the ISP, including “proof of identity, a certificate of copyright ownership and proof of infringement.” Depending on how these are interpreted, they could be unnecessarily onerous requirements. While past experience indicates that these may not be applied literally and that proof of infringement will be taken to mean “evidence of infringement,” such as a screen shot, this is far from clear and should be further defined. It is also unclear what is meant by a “certificate of ownership”. It is assumed this does not mean a Chinese copyright registration certificate, since this would violate the formalities prohibition of Berne and TRIPS. Perhaps it refers to an affidavit; this needs to be clarified. If the ISP does not take the site down at this point, it will be subject to suit

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<sup>15</sup> One legal commentator described this provision as follows: “If a work has been published in newspapers, magazines or disseminated through computer networks and does not bear a ‘copying or editing is forbidden’ statement, a website holder may use that work on its website without the author’s approval, but it must quote the source and pay a remuneration to the copyright holder.” If this is the correct interpretation, the provision blatantly violates TRIPS and the Berne Convention as a prohibited compulsory license. How would any copyright owner of a motion picture, sound recording, videogame, or book be able to put such a notice on every work it has created? This provision would permit a pirate to upload any of these works, or sound recordings, with impunity, since none would carry such a notice unless, perhaps, it were produced specifically for initial publication over the Internet in China. Under China’s international obligations, this provision, if so interpreted, cannot apply to foreign works or sound recordings.

in the People's Court to order them to do so. It would appear from Article 5 that damages could also be awarded.

7. Article 8 insulates the ISP from liability to its customer when it takes down allegedly infringing material following the right holder's providing adequate evidence. This is very positive. Additionally, right holders providing a "false accusation of infringement," where the alleged infringer suffers losses, can be held liable.
8. Article 9 lays out the specific parts of the 1990 copyright law that apply to online infringements and includes reference to Clause 8 of Article 45, which refers to the catch-all "other acts of infringement." This should be conformed to the new law and could prove very positive, allowing the courts to take an expansive approach to exclusive rights on the Internet.
9. Article 10 adopts essentially the damage and statutory damages provisions in the copyright law amendments discussed above. This is also very positive.

## Market Access Issues

Most of the copyright-industries suffer from non-tariff and tariff trade barriers which severely limit their ability to enter into, or operate profitably, business in China. These are only selected barriers which affect the named industries:

Entertainment software: Entertainment software titles must go through an approval process at the Chinese Ministry of Culture before distribution is allowed. In many instances, the approval process takes several weeks to complete. In the interim, pirate copies of popular games are already readily available in the market, localized into Chinese, before the legitimate product has been approved for distribution.

Book and Journal Publishing: The government-run China Educational and Research Network, which is the Internet service provider used by universities, levies a charge on access to internet sites outside China. This has the effect of making foreign publishers' on-line journals prohibitively expensive to would-be subscribers. In order to combat this, publishers must spend hundreds of thousands of dollars per year funding lease lines on China-based servers. Furthermore, the ban on publishing and printing by foreign publishing companies remains in place and opens AAP members up to rampant offset piracy. A compromise suggestion, short of the strongly preferred option of removing restrictions on foreign publishing, is to soften restrictions on printing, allowing foreign entities to print in special "export processing zones," similar to those used in India.

### Motion Picture Industry:

*Import quotas*: Limits on the number of films imported into China continue. Under the terms of China's WTO commitment, China has agreed to allow 20 revenue-sharing films into the country each year, up from a previous limit of 10. The Chinese are insisting that the 20 is a "maximum," not a "minimum." This interpretation is not in accordance with WTO policy and should be corrected. Moreover, the needs of the market far exceed the legal films now available as demonstrated by the huge market in pirated optical discs. Censorship and the monopoly import structure are the tools by which these quotas are imposed and enforced.

*Monopoly on film imports and film distribution:* China Film continues to be the monopoly importer and distributor of imported films. China Film is capable of handling effectively only 7-8 films a year. This restriction of legal film supply leaves the market to the pirates and they are taking full advantage of that. Import and distribution of films should be broadened to meet the demands of the market.

*Cinema ownership and operation:* Current law restricts foreign ownership of cinemas to no more than 49%. Foreigners are not permitted to operate cinemas. For the growth and health of the industry, foreigners should be allowed to own and operate cinemas.

*Broadcast quota:* Foreign television programming is restricted to no more than 25% of total air time and no more than 40 minutes of prime time between 6:00 PM and 10:00 PM on terrestrial stations and pay television systems. Since June 2000, foreign animation must follow the same censorship procedure as general programming and is restricted to no more than 25% of total air time and cannot exceed 40% of total animation programming delivered by each station. The quota on air time should be raised to at least 50%, and the prime-time quotas should be eliminated altogether.

*Retransmission of foreign satellite signals:* Foreign satellite channels may only be shown in four or five-star hotels, government buildings and foreign institutions. Moreover, foreign satellite channels beaming into China are required to uplink from a government owned satellite for a fee of \$100,000, placing a significant and unnecessary financial burden on satellite channel providers. The up-linking fee should be eliminated.

*Television regulations:* Under the 1997 Foreign Investment Guidelines, companies that are wholly or jointly owned by foreign entities are strictly prohibited from investing in the broadcast industry. MPA member companies are not allowed to invest in broadcast stations or pay television systems. China TV Program Agency, the government acquisition arm, must approve all importation of foreign programming.