



September 5, 2003

BY ELECTRONIC MAIL (FR0082@ustr.gov)

Ms. Gloria Blue
Executive Secretary
Trade Policy Staff Committee (TPSC)
Office of the United States Trade Representative
1724 F Street, N.W.
Washington, D.C. 20508

Re: China WTO Notice of Testimony and Testimony of Eric Smith,
President, International Intellectual Property Alliance in Response
to the "Request for Comments and Notice of Public Hearing
Concerning China's Compliance With WTO Commitments," 68
Fed. Reg. 43247-8 (July 21, 2003)

Dear Ms. Blue:

This written notification responds to the Request for Comments and Notice of Public Hearing Concerning China's Compliance with WTO Commitments, appearing in 68 Fed. Reg. 43247-8 (July 21, 2003). The request requires persons wishing to testify orally at a hearing that will be held in Washington, DC, on Thursday, September 18, 2003, before the Trade Policy Staff Committee, to provide written notification of their intention, as well as a copy of their testimony, which is attached hereto. We hereby notify you that the following person wishes to testify orally at the September 18, 2003 hearing:

Eric H. Smith
President, International Intellectual Property Alliance (IIPA)
1747 Pennsylvania Ave., NW, Suite 825
Washington, DC 20006
(tel) 202-833-4198

The following is a short summary of the presentation:

Nearly two years after China's entry to the WTO, two key problems continue to prevent the copyright industries from developing a legitimate market in China: 1) copyright piracy, which dominates the local market for copyrighted materials and, as in the mid-1990s, is



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Page 2

beginning to become an export problem again; and 2) market access restrictions (including import, investment, and service barriers) which further exacerbate, and limit the ability of Chinese authorities to tackle, the piracy problem. At the same time, some progress can be noted. Administrative enforcement continues to yield huge seizures of pirated product (although, as noted below, such actions are not being coordinated on a nationwide level, and the copyright administrations have been much less successful combating institutional piracy of business software). Since late 2001, the Chinese government has taken a strong position against continued piracy of academic journals, leading to significant progress in opening the market to U.S. publishers in this sector. Finally, the specialized IP courts' (panels') growing expertise has resulted in better, more reasoned civil decisions in writing in even complex copyright cases.¹

A crucial deficiency in the Chinese legal system remains the excessively high thresholds set for bringing criminal copyright actions. The high thresholds for copyright offences in the Criminal Law translate to difficulties convincing Chinese authorities to prosecute commercial piracy cases under those copyright provisions.² One very recent conviction in Shanghai involving U.S. motion picture product resulted in strict penalties being meted out against several defendants. However, that prosecution was brought for commission of a crime other than criminal copyright infringement – for 'illegal business operations' – so while the result was very positive, it does not go to satisfy China's TRIPS obligations, since Article 61 of TRIPS requires China to provide a criminal remedy at least in cases of commercial copyright piracy.

In 2003, authorities continued to carry out mostly administrative enforcement actions, chiefly aimed at seizing infringing materials. However, such efforts remain largely *ad hoc* and lack the kind of coordination to have an overall deterrent effect in the market. In addition, such administrative actions are carried out without the necessary follow up criminal prosecutions with deterrent penalties against egregious pirates for China to meet its TRIPS enforcement obligations. Piracy rates continue to hover around or above 90% for all industries; any enforcement system that fails to lower such piracy levels cannot be said to provide adequate procedures and effective legal remedies to protect copyright, as is required by the TRIPS

¹ We are also pleased to be able to report that foreign copyright owners are receiving good cooperation from government and judicial authorities in bringing civil cases. They are also receiving a fair amount of positive press regarding their actions against alleged infringers. These developments are noted by those on the ground in China as fundamental changes in the legal landscape in China since it joined the WTO, and we acknowledge here these improvements.

² There were several successful criminal prosecutions in 2003, but they mainly involved local right holders. For example, Film director Victor Tam Long-cheung was sentenced in April 2003 to eight months in prison for selling the master tapes of a television series he directed to a pirate producer. Tam, a former director with Hong Kong's TVB, sold the tapes of a 30-part martial arts series for 200,000 Yuan (US\$24,100) to a Guangdong company which produced thousands of illegal copies, according to the Shenyang Today newspaper. He was also fined 200,000 Yuan by the Shenyang court. In July 2003, Jiangxi's largest criminal copyright case concluded, with the Peoples' Court of Jiangxi sentencing the defendant to 30 months in prison and ordering him to pay a fine of RMB40,000 (US\$4,832) for pirating children's textbooks. See China Intellectual Property, July 9, 2003.



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Page 3

enforcement provisions. Optical media plants, unfortunately, continue to produce pirate product, and there is increasing evidence that pirate producers in China have once again begun exporting product out from China – a very disturbing development. Imports of pirate product from other territories in Asia remain a most significant problem. Internet piracy is an ever-growing phenomenon in China today.³ There is no effective administrative enforcement system against end user piracy of software and other copyrighted materials in China, and few court-ordered preservation measures, required by TRIPS Article 50, have been carried out in practice.

The preceding anti piracy concerns must be placed in a context of market supply. Providing market access to allow more legitimate product into China is an essential element of an effective anti-piracy strategy. China has taken some positive steps towards liberalization, but much more needs to be done to create an environment where legitimate business can compete effectively, and have an opportunity to fill the space currently occupied by pirate enterprise. For example, for the motion picture industry, a relaxation of foreign ownership controls on cinemas should help attract capital to build out a modern cinema infrastructure and offer consumers an entertainment experience that pirates cannot match. In addition, the establishment of a second theatrical film distributor is another welcome development, which will help facilitate effective distribution of more foreign films. At the same time, policies such as China's WTO commitment to allow in a minimum of 20 films annually under standard commercial terms (revenue sharing) essentially provide pirates with a monopoly in the Chinese market for the six-month period between theatrical release of a motion picture and the release of the product in home video formats. If delays are permitted to occur in the censorship process for home video entertainment, then pirates have an even longer period in which they can operate before legitimate product enters the market.

For other industries, for example, the book publishing industry, the WTO commits China to gradually open retail and wholesale distribution to foreign entities (finally without restriction⁴ no later than December 2004). Unfortunately, continued severe restrictions on related activities,

³ While China passed amendments to its copyright law which addressed certain key issues, and generally, made some improvements in the overall legal framework in China, some key ingredients for a modern world-class law were left out: 1) criminal liability is not affected and there are apparently no plans to amend the criminal code; 2) the opportunity was missed to extend terms of protection to life plus 70 years and 95 years from publication – the modern trend; 3) the Law [Article 47(6)] generally prohibits the 'circumvention' of technological protections used by copyright owners to protect their works, it does not fully implement the WIPO treaties obligation; 4) the law's provision [Article 47(7)] protecting rights management information may not fully satisfy WIPO treaties requirements; 5) temporary copies are not expressly protected as required by the WIPO treaties, although local experts/scholars have recently indicated that protection for such copies will be expressly clarified; 6) certain 'compulsory license' provisions go beyond what is permissible in China's international commitments; and 7) a full right of importation applicable to both piratical and parallel imports should also have been included. The U.S. government should also urge China to join the WIPO "Internet" treaties, the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT).

⁴ Retail distribution of books, newspapers and magazines is permitted without restriction, except as to so-called "chain stores" as that phrase is defined in China's WTO commitments.



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September 5, 2003

Page 4

such as importation (which remains "prohibited") and printing (which is "restricted") call into doubt whether China can meet its WTO obligations under the current system. The record industry faces serious market access hurdles (for every essential activity to their business in China) that result in limiting China's ability to effectively fight piracy. The overall restrictive nature of the recording business in China makes it impossible for the Chinese government to effectively fight piracy of foreign content. Even more important to the Chinese people and the Chinese economy, failure to open the Chinese market to those with the bulk of the wherewithal and know-how to make records makes it impossible for the vast majority of record producers worldwide to bring local Chinese content to the Chinese people and to make those artists and the music known to the world.

As noted above, we acknowledge some progress in the areas of publishing and in the civil courts. Through immediate implementation of a State Council Decree issued in late 2001, the pirating of academic journals has been largely diminished, and foreign publishers have been the direct beneficiaries of this very positive development. In addition, the civil courts handling IP cases in China continue to develop expertise and are working well to decide copyright cases.⁵ In the most recent cases, relatively large civil damages were awarded to foreign plaintiffs for infringement of plaintiff's copyrighted materials, in addition to the court enjoining further infringement and requiring the defendants to issue public apologies and be subject to severe sanctions if they repeated the infringement.

Respectfully submitted,

Eric H. Smith
President
International Intellectual Property Alliance

⁵ For example, on March 24, 2003, the Shanghai No 2 Intermediate People's Court ordered three copyright violators to pay a combined 500,000 Yuan (US\$60,241) in compensation to the Shanghai Lexicographical Publishing House for pirating "Cihai," the most popular encyclopedia in the Chinese language. Some recent cases involved uses of copyrighted works in the digital environment, and were decided in accordance with the laws and with reasoned decisions in writing. *See, e.g.*, Guangdong Taixin Co Ltd. v. EMI (HK) Group Ltd., Guangdong Province People's High Court Civil Judgment (2001, Guangdong Province People's High Court IP Case No. 153).



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September 5, 2003

Page 5

**TESTIMONY OF
ERIC H. SMITH
PRESIDENT
INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE**

**PUBLIC HEARING CONCERNING
CHINA'S COMPLIANCE WITH WTO COMMITMENTS
THURSDAY, SEPTEMBER 18, 2003**

INTRODUCTION

My name is Eric H. Smith, and I am President of the International Intellectual Property Alliance, or IIPA. I am pleased to have this opportunity to share with you the perspectives of the U.S. creative industries on China's WTO compliance.

ABOUT IIPA

IIPA is a coalition of six trade associations¹ representing the copyright industries, which now contribute well over 5% to the total U.S. economy.² IIPA's members produce the nation's books, recorded music, films, videos and TV programming, and computer software for business and entertainment uses. Since 1984, this diverse range of industries has worked together, individually and under the IIPA umbrella, to strengthen the copyright laws and enforcement regimes in over 100 countries around the world. IIPA has also represented the copyright-based industries in the negotiation of key bilateral and multilateral agreements (including of course TRIPS) to raise international minimum standards of copyright protection and, of increasing importance, enforcement.

Specifically with respect to China, IIPA's members were at the forefront of discussions in 1992 that led to the signing of a Memorandum of Understanding between the United States and China. That MOU obliged China to protect copyright in line with international standards in place at the time. IIPA's members were again at the forefront of USTR-led negotiations in 1995 and 1996, resulting in exchanges of letters, by which China undertook to close down factories producing and exporting pirate optical media product with impunity (causing catastrophic disruption of global markets), and

¹ IIPA's members are: [the Association of American Publishers \(AAP\)](#), [AFMA](#) (formerly the American Film Marketing Association), [the Business Software Alliance \(BSA\)](#), [Entertainment Software Association \(ESA\)](#), [the Motion Picture Association of America \(MPAA\)](#), and [the Recording Industry Association of America \(RIAA\)](#). IIPA's members represent over 1,100 U.S. companies.

² Economists Inc., Copyright Industries in the U.S. Economy: the 2002 Report (2002).

commence a nationally-coordinated enforcement regime for copyright protection. IIPA and its members were heavily involved in a number of sectoral negotiations in connection with China's WTO accession, and supported the renewal of normal trade relations annually, and eventually permanent normal trade relations – PNTR. Finally, IIPA and its members observed developments with great interest that led to China's entry to the WTO on December 11, 2001. Each of these milestones has had significant commercial ramifications for the U.S. copyright industries.

WTO COMPLIANCE ISSUES

We thank the Trade Policy Staff Committee for giving us the opportunity to examine where China stands nearly two years after its entry to the WTO with respect to copyright protection and enforcement against piracy, and with respect to barriers to entry to the Chinese market, both of which threaten the health of our businesses in China. Our conclusion is that two primary problems have kept China's market largely closed and have prevented copyright owners from benefiting from China's accession to the WTO. The first is copyright piracy, which dominates the local market for copyrighted materials and, as in the 1990s, is beginning to become an export problem again.³ The second is market access restrictions which further exacerbate and limit the ability of Chinese authorities to tackle the piracy problem.

We further conclude that it is only through steps designed to deter piracy – including lowering the threshold in order to bring criminal actions in China against copyright piracy, and commencing coordinated efforts to enforce against all forms of piracy – combined with steps to open the Chinese market, that China can hope to meet its

³ As examples of anecdotal evidence, IIPA knows of one seizure by Hong Kong Customs on June 10, 2003 in which over 5,000 pirated DVDs were seized in a transshipment originating from Fuzhou, China. In another example, on June 6, 2003, Macau Customs intercepted a suspected shipment from China, seizing almost 13,000 optical discs including 3,600 VCDs, 3,200 DVDs and more than 5,000 music CDs.

WTO commitments. My testimony today will focus on how China has fared with respect to these two key steps. In closing, I will note some positive developments, particularly regarding the areas of academic journals publishing, and in the growing expertise of the specialized intellectual property panels of the courts in China – two areas which at least offer narrow rays of hope for copyright owners wishing to achieve commercial progress in China.

PIRACY AND CHINA'S RESPONSES IN 2003

The market in China remains dominated by piracy. Piracy levels (which reflect the percentage of product sold in a market that is illegal) remained at 90% or above in 2002 for all copyright industries. The Chinese enforcement system has failed to significantly lower such piracy levels, and therefore, cannot be said to provide adequate procedures and effective legal remedies to protect copyright, as is required by the TRIPS enforcement provisions. Estimated losses due to piracy of copyrighted materials (excluding entertainment software) were over \$1.8 billion dollars in 2002. This combination of debilitating levels of piracy and huge economic losses to America's creative industries serves as a tremendous *de facto* barrier to entry into the Chinese market for U.S. firms.

Optical media plants in China continue to produce pirate CDs, VCDs and DVDs, and there is increasing evidence that pirate producers in China have once again begun exporting product out from China. This is a very disturbing development. Imports of pirate product from other territories in Asia remain a most significant problem.

Internet piracy is an ever-growing phenomenon in China today, including the latest problems involving Internet piracy at so-called 'cyber-cafes'.⁴ It is quite

⁴ The Chinese government has recently directed greater attention on the activities occurring at Internet cafes. While content blocks (i.e., on pornography, news sites, and the like) have been commonly required in such premises, less attention has been paid to possible infringing uses of copyrighted materials, including illegal uses of pirated entertainment software. IIPA hopes the

disappointing that the latest law in conjunction with the new implementing regulations failed to solidify the legal framework necessary to protect copyright on the Internet. We understand that China is reviewing the 2001 Internet regulations, and we look forward to reviewing the draft Internet regulations due out in the fall of 2003. At present, these regulations are the most important legislative development in China. We urge the U.S. government to seek an opportunity for transparent review of these regulations prior to their issuance.

There is no effective administrative enforcement system against end-user piracy of software and other copyrighted materials in China,⁵ and few court-ordered preservation measures under TRIPS Article 50 have been carried out in practice. The evidentiary standards for obtaining such an ‘evidence preservation’ order remain unclear. Courts have been reluctant to issue decisions in end-user piracy cases, and have instead, urged parties to settle.

Piracy affects the markets for every copyright sector, including movies, recorded music, business software, entertainment software, and book publishing. Pirate versions of academic textbooks and bestsellers such as the newest Harry Potter[®] book,⁶ and the latest first-run motion pictures, for example, *Uptown Girls*, *Freddy vs Jason*, *American Wedding 2003* and *Pirates of the Carribbean*, continue to decimate the markets in China for those products. Even local Chinese directors such as Zhang Yimou have struggled against piracy in China to attempt to secure a decent return on their investments.⁷

Internet regulations will address this legal deficiency and ensure that Internet cafes strictly adhere to the copyright law, including ensuring that its customers do not engage in the unauthorized use of copyrighted materials, including entertainment software products.

⁵ Unauthorized copying within companies (end-user piracy) and government entities continues to cause the greatest losses to the business software industry. The Chinese government has issued Decrees and Orders to the local copyright administrations to investigate end-user piracy, but they have failed to self-start such efforts without the filing of complaints from copyright owners. This failure to address end-user piracy implicates China’s compliance with its TRIPS obligations.

⁶ Satoshi Saeki, Harry Potter Latest Victim of China’s Lucrative Piracy Mart, Yomiuri Shimbun, August 9, 2003.

⁷ A Shanghai Daily article from January 18, 2003 documented the fruitless efforts of famed Chinese director Zhang Yimou to protect his latest film *Hero*. On January 8, 2003, a cinema in Xi’an reported losing a print of the film. The police cooperated

A crucial TRIPS deficiency in the Chinese legal system remains the excessively high thresholds set for bringing criminal actions. The high thresholds translate to difficulties convincing Chinese authorities to prosecute commercial piracy cases under the copyright provisions of the Criminal Law. Article 41 of TRIPS requires countries to provide “effective action” against infringements that actually creates a “deterrent to further infringements.” Article 61 of TRIPS requires that criminal procedures be available (in practice) at least against copyright piracy “on a commercial scale.” While there were several successful criminal prosecutions in 2003, those involved local right holders. Because of high thresholds and a lack of prosecutions in practice, it is clear that foreign right holders do not enjoy a WTO-compatible criminal remedy in China. One very recent conviction in Shanghai involving U.S. motion picture product resulted in strict penalties being meted out against several defendants. However, the prosecution was brought for commission of a crime other than criminal copyright infringement – ‘illegal business operations’ – so while this was a very positive result, it does not go to satisfy China’s TRIPS obligations, since Article 61 of TRIPS requires China to provide a criminal remedy at least in cases of commercial piracy.

For foreign right holders, enforcement in 2003 continued to involve mostly administrative enforcement actions, chiefly aimed at seizing infringing materials, but such efforts remain largely *ad hoc* and lack coordination. Administrative enforcement has generally been an ineffective basis for enforcement in China, since administrative

and interviewed the theater’s employees, one of whom killed 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 a low-quality, cheap format to compete with the pirates. An article appeared in the New York Times on November 1, 2002 regarding this struggle for Mr. Zhang. In that article, the head of New Pictures (the distributor of *Hero*), Jiang Wei, said, “[a]fter the release [of a film], 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.” See <http://nytimes.com/2002/11/01/business/01PIRA.html>.

cases result in notoriously low fines, no imprisonment, and thus no real deterrence to further piracy.

For example, one entertainment software company reports that some Chinese factories engaged in the illegal manufacture of counterfeit entertainment software products have been able to continue their operations even after their premises have been raided and infringing goods seized. In addition, shutting down a factory often does not deter further piracy, since in many instances, the same entity merely shifts operations to another location under a different corporate name.⁸ The Chinese government must carry out criminal investigations, focusing on organized criminal operations such as those mentioned, and must initiate prosecutions with deterrent penalties against egregious pirates in order for China to meet its TRIPS enforcement obligations.

In the business software industry's experience, the copyright administrations have not been successful exercising their administrative authority to conduct surprise audits of companies suspected of 'institutional piracy' of business software, so-called 'end-user piracy.' Raids against institutions are conducted rarely and only reluctantly, with no deterrent results – only demands by the authorities that the company legalize its software usage! In order for these administrative remedies to be deterrent, fines must be increased dramatically and imposed, and authorities must be given adequate resources to conduct proper inspections, including surprise inspections.

MARKET ACCESS: A NECESSARY INGREDIENT TO FIGHT PIRACY IN CHINA

⁸ For example, in October 2002 and January 2003, Chinese administrative agencies raided the "Electronic Dragon" production facilities at which over 49,000 counterfeit *Game Boy Advance* cartridges and components were confiscated. During post-raid surveillance, the company found that the factory had resumed operations in a different location under a new company name. A subsequent raid on the new location was conducted in July 2003 and more than 78,000 counterfeit *Game Boy Advance* cartridges and semiconductor chips were seized. The principals all fled China and authorities have been able to take no further action against them. Such actions by the pirates and difficulties enforcing against them indicates how well-developed and sophisticated these manufacturers and distributors have become. Such organized criminal behavior demands a coordinated national response from the Chinese government.

Providing market access to allow more legitimate product into China is an essential element of an effective anti-piracy strategy in the country. It is significant that China, through its WTO commitments, has agreed to open its market in various ways to different copyright industry sectors. For example, it is noteworthy that China has agreed to open its market to wholesale and retail distribution by foreign book publishers. Other commitments, particularly in the audio and audiovisual sectors, are less helpful, but since they are minimum commitments, it is possible for China to effectuate further market opening at any time. It is now of paramount importance that the U.S. government work to secure the commitments made through any necessary changes to China's legal system, and to ensure that the gains that were promised are not stymied by continued restrictive commercial practices in China with respect to publishing. It is also equally important for the U.S. government to continue to press for greater market opening, since it is only with market opening that the problem of piracy can be addressed in a fundamental way.

For example, policies such as China's WTO commitment to allow in a minimum of 20 films annually under standard commercial terms (revenue sharing) essentially provide pirates with a monopoly in the Chinese market for the six-month period between theatrical release of a motion picture and the release of the product in home video formats. If delays are permitted to occur in the censorship process for home video entertainment, then pirates have an even longer period in which they can operate before legitimate product enters the market. For other industries, for example, the book publishing industry, the WTO commits China to gradually open retail (beginning in December 2002) and wholesale distribution to foreign entities (both without restrictions except as to "chain" retail stores no later than December 2004). Unfortunately, continued severe restrictions on activities of paramount importance to U.S. publishers, such as

importation (which remains “prohibited”) and printing (which is “restricted”) call into doubt whether China can meet its WTO obligations under the current system.⁹

The record industry faces serious market access hurdles (for every essential activity to their business in China) that result in limiting China's ability to effectively fight piracy. The WTO commitments oblige China to open wholesale and retail distribution to foreign [record] companies in contractual joint ventures with Chinese firms (but not wholly-owned foreign entities).¹⁰ Other essential activities such as the signing of recording artists, artist management, and producing sound recordings, are left out of WTO commitments. Chinese guidelines make it clear that “publishing, producing, master issuing and importing” of records in China are prohibited foreign investment activities, as is broadcasting,¹¹ while distributing and selling records is a “restricted” activity. In practice, certain “cooperative” agreements (not joint ventures) may allow foreign entities to publish and produce in China, and there also apparently are no restrictions on a foreign entity signing and managing artists as long as they have proper permits. Nonetheless, the overall restrictive nature of the recording business in China makes it impossible for China to effectively fight piracy of foreign content. More important to the Chinese people and the Chinese economy, failure to open the Chinese market to those with the bulk of the wherewithal and know-how to make records makes it impossible for the vast majority of record producers worldwide to bring local Chinese

⁹ One crucial question left unclear in the WTO commitments is whether the commitments allow foreign entities to “import” published materials into China for distribution. As discussed below, such activities are apparently not permitted at all according to China’s current legal framework. While the word “importation” is absent in describing the activities to be permitted under the WTO commitments, the additional commitment allowing an FIE to immediately (upon accession) distribute books “manufactured in China” seems to imply that the phase-in commitments refer to other books, namely, books that are not manufactured in China – imported books.

¹⁰ World Trade Organization, Report of the Working Party on the Accession of China, Addendum, Schedule CLII—The People’s Republic of China, Part II—Schedules of Specific Commitments on Services, List of Article II MFN Exemptions, WT/MIN(01)/3/Add.2, Nov. 10, 2001.

¹¹ The chief piece of legislation governing the record industry in China is the Administrative Regulations on Audio-Visual Products, State Council Order No. 341, Approved December 12, 2001 at the 50th session of the State Council’s Standing Committee, signed and promulgated December 25, 2001 by Premier Zhu Rongji, and effective from February 1, 2002).

content to the Chinese people and to make those artists and the music known to the world.

We urge the U.S. government to continue its vigilance in seeking greater market opening for all U.S. copyright owners in China, as a necessary step in addressing the problem of piracy in a fundamental way.

SOME PROGRESS NOTED IN 2003 IN CHINA FOR PUBLISHERS, IN IPR COURTS

Despite the many problems and deficiencies in the enforcement system in China, the Chinese government remains serious about reducing piracy and government ministers appear to be sincerely concerned about the problem. Indeed, Chinese government officials have admitted in recent years that piracy is serious, and both the problem and the government's awareness of it have been reported in the Chinese press.¹² Periodic crackdowns during 2002 and 2003 have resulted in seizures of tens of millions of pirated products. In addition, between January of 2002 and July of 2003, 18 VCD/DVD factories (2 of which were registered) were raided, yielding seizures of 45 VCD/DVD production lines. Regarding retail raids, the Ministry of Culture has stated that in the same time period, more than 5,000 retail shops were raided nationwide. The seizure numbers indicate both the resolve of Chinese authorities to continue trying to rid the markets of some product but also the sheer magnitude of the problem. Simply stated, it

¹² See, e.g., Weifeng Liu, *42 Million Discs Smashed in Nationwide Crackdown, Guangdong Key Target in Drive Against Audiovisual Smugglers*, China Daily, August 13, 2003 (in which Gui Xiaofeng, Deputy Director of the Press & Publications Administration and Deputy Commissioner of the National Anti Piracy & Pornography Working Committee said that pirated products have become a big problem for China, adding that the smugglers were not only breaching China's copyright laws but are also tax evaders); see also *Copyright Law Solid But Needs Fortifying*, China Daily, Sept. 14, 2000, at http://search.chinadaily.com.cn/isearch/i_textinfo.exe?dbname=cndy_printedition&listid=15654&selectword=COPYRIGHT%20PIRACY (quoting then National Copyright Administration Commissioner Yu Youxian as saying that the Copyright Law in China needed amending because “[a]nti-piracy regulations are not strong enough, since piracy was not serious when the law first took effect,” and that “more provisions must be added because piracy has become rampant [in China] today”).

will be impossible for the Chinese government to rid the market of piracy based on periodic anti-piracy campaigns and without a more coordinated, sustained effort.

We also acknowledge some progress in the area of publishing. Through immediate implementation of a State Council Decree issued in late 2001, the pirating of academic journals has been largely diminished. As a result, foreign publishers have been able to negotiate arrangements with customers to legitimately purchase or license use of academic journals. This positive development is an excellent example of how the Chinese government can open a market that was previously closed due to piracy. We sincerely hope that the progress made with regard to academic journals will be mirrored in future efforts to combat piracy of other types of products, both within and outside the field of publishing.

China should also be acknowledged for the continued development of the specialized IPR courts. These courts handling IP cases in China continue to mature in their expertise of copyright issues and appear to be working well in deciding copyright cases.¹³ In the most recent cases, relatively large civil damages were awarded to foreign plaintiffs for infringement of plaintiff's copyrighted materials, in addition to the court enjoining further infringement and requiring the defendants to issue public apologies and be subject to severe sanctions if they repeated the infringement. We are also pleased to be able to report that foreign copyright owners are generally receiving good cooperation from government and judicial authorities in bringing civil cases (except as noted earlier in the case of applications for preservation orders in end-user software piracy cases). In some instances, foreign right holders are also receiving positive press regarding their

¹³ For example, on March 24, 2003, the Shanghai No 2 Intermediate People's Court ordered three copyright violators to pay a combined 500,000 Yuan (US\$60,241) in compensation to the Shanghai Lexicographical Publishing House for pirating "Cihai," the most popular encyclopedia in the Chinese language. Some recent cases involved uses of copyrighted works in the digital environment, and were decided in accordance with the laws and with reasoned decisions in writing. *See, e.g.*, Guangdong Taixin Co Ltd. v. EMI (HK) Group Ltd., Guangdong Province People's High Court Civil Judgment (2001, Guangdong Province People's High Court IP Case No. 153).

actions against alleged infringers. These developments are noted by those on the ground in China as fundamental changes in the legal landscape in China since it joined the WTO.

CONCLUSION

Despite enormous seizures of pirate product, periodic “campaigns” by local governments against piracy, and progress noted against journals piracy and in the courts as noted, the piracy situation in China remains largely unchanged in 2003 – that is, it remains dire. With the timetable for China’s other WTO commitments (as distinguished from its TRIPS commitments which were immediate upon accession to the WTO) drawing close, the time is now for the Chinese government to acknowledge the nexus between practicable market access and the ability to effectively fight piracy. Piracy in China cannot be defeated or effectively deterred by enforcement alone – it must be accompanied by market-opening measures. Some of the necessary steps are reflected in China’s WTO commitments. Others, such as allowing greater distribution of motion pictures in China by foreign companies, or allowing essential activities related to record production or book publishing by foreign companies, have not occurred, but must begin to occur if China is to have any hope of effectively curtailing copyright piracy. The continuous vacuum left by China’s closed market will always be neatly filled by pirates who, by the very nature of their illegal activities, do not adhere to legitimate market rules. The time is now for the U.S. government to engage with the Chinese government to expand understanding of the nexus between increased market access and effective approaches the enormous piracy problem in China.

Again, I wish to thank you for giving us the opportunity to share the copyright industries’ experiences in China, and to chart a road forward to tackle copyright piracy in China.

