

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE



1747 PENNSYLVANIA AVENUE, NW • SUITE 825 • WASHINGTON, DC • 20006-4604 • TEL (202) 833-4198 • FAX (202) 872-0546 • WWW.IIPA.COM • EMAIL: INFO@IIPA.COM

September 10, 2003

**BY ELECTRONIC MAIL ([FR0083@ustr.gov](mailto:FR0083@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: Comments Regarding Intellectual Property Rights (Including Intellectual Property Enforcement), and Services/Market Access in China, 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 filing 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 invites comments on China's compliance with the commitments it made in connection with its accession to the World Trade Organization (WTO). Specifically, the Request for Comments notes,

In accordance with section 421 of the U.S.-China Relations Act of 2000 (Pub. L. 106-286), USTR is required to submit, by December 11 of each year, a report to Congress on China's compliance with commitments made in connection with its accession to the WTO, including both multilateral commitments and any bilateral commitments made to the United States.

The Request for Comments states that "to assist USTR in preparing the report to Congress, USTR is hereby soliciting public comment," including on China's compliance with commitments in the area of intellectual property rights and services/market access that were made in connection with its accession to the WTO.<sup>1</sup>

<sup>1</sup> The terms of China's accession to the WTO are contained in the Protocol on the Accession of the People's Republic of China



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The International Intellectual Property Alliance ("IIPA") submits comments on key issues with respect to China's compliance with the TRIPS Agreement, and with respect to certain of China's other WTO commitments, particularly in the areas of services and market access. In order to provide a more detailed analysis of China's compliance with the substantive and enforcement obligations under the TRIPS Agreement, IIPA also takes this opportunity to append to this filing a report on China (see Appendix) that was submitted to the United States Trade Representative on February 14, 2003, as part of our filing in the annual Special 301 process.

#### **A. IIPA AND THE COPYRIGHT INDUSTRIES' INTEREST IN THIS FILING**

The International Intellectual Property Alliance (IIPA) is a private sector coalition formed in 1984 to represent the U.S. copyright-based industries in bilateral and multilateral efforts to improve international protection of copyrighted materials. IIPA is comprised of six trade associations, each representing a significant segment of the U.S. copyright community. These member associations represent over 1,300 companies<sup>2</sup> producing and distributing materials protected by copyright laws throughout the world — all types of computer software including business applications software and entertainment software (such as videogame CDs and cartridges, personal computer CD-ROMs and multimedia products); theatrical films, television programs, home videos and digital representations of audiovisual works; music, records, CDs, and audiocassettes; and textbooks, tradebooks, reference and professional publications and journals (in both electronic and print media). 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.

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(including its annexes) (Protocol) (WT/L/432, Nov. 10, 2001), at <http://www.mac.doc.gov/China/ProtocolandDecision.pdf>, the Report of the Working Party on the Accession of China (Working Party Report) (WT/MIN(01)/3, Nov. 1, 2001), at <http://www.mac.doc.gov/China/WPReport11-10-01.pdf>, and the WTO Agreement. Specific copyright commitments are made in Section 5 of the Working Party Report. Specific market access commitments are made in 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), at <http://www.mac.doc.gov/China/ServicesSchedule.pdf>.

<sup>2</sup> This number is updated as of September 10, 2003.



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In April 2002, the IIPA released an economic report entitled *Copyright Industries in the U.S. Economy: The 2002 Report*, the ninth such study written by Stephen Siwek of Economists Inc. This report details the economic impact and contributions of U.S. copyright industries to U.S. Gross Domestic Product, employment, and trade. The latest data shows that in 2001, the U.S. copyright industries accounted for 5.24% of U.S. Gross Domestic Product (GDP), or \$535.1 billion – an increase of over \$75 billion from 1999 and exceeding 5% of the economy and one-half trillion dollars for the first time. In addition, over the last 24 years (1977-2001), the U.S. copyright industries' share of the GDP grew more than twice as fast as the remainder of the U.S. economy (7% versus 3%). Between 1977 and 2001, employment in the U.S. copyright industries more than doubled to 4.7 million workers, which is now 3.5% of total U.S. employment; and the U.S. copyright industries' average annual employment grew more than three times as fast as the remainder of the U.S. economy (5% versus 1.5%). Finally, in 2001, the U.S. copyright industries achieved estimated foreign sales and exports of \$88.97 billion, again leading all major industry sectors, including: chemicals and allied products, motor vehicles, equipment and parts, aircraft and aircraft parts, and agriculture.

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 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.

It is essential to the continued growth and future competitiveness of these industries that China provides free and open markets and high levels of copyright protection. China made commitments to open its market during the WTO accession negotiations, as well as the commitment immediately to comply with TRIPS enforcement and substantive standards, the legal foundation for adequate and effective substantive levels of copyright protection and copyright enforcement. Meeting these commitments is essential to the copyright industries' and individual authors/creators' abilities to do business in China.



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**B. SUMMARY OF CONCLUSIONS WITH REGARD TO CHINA'S WTO COMMITMENTS, AND PARTICULARLY, TRIPS COMPLIANCE**

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. The second is market access restrictions which further exacerbate and limit the ability of Chinese authorities to tackle the piracy problem. 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 WTO commitments. The Appendix notes other continued TRIPS deficiencies, both substantive and enforcement-related, that China must address to fully comply with TRIPS.

One of the goals of the accession process with China was to ensure the immediacy of China's obligations to comply with TRIPS substantive and enforcement obligations.<sup>3</sup> This was achieved upon China's accession to the WTO on December 11, 2001. China also agreed to meet various schedules with respect to other commitments, including services and market access commitments for U.S. companies/service suppliers, that are the subject of comments below.

Before 2000, many countries had successfully amended their statutory law to bring them into compliance (or close to compliance) with their TRIPS obligations. China's outdated 1990 law had been supplemented by "International Treaties Regulations" in 1992 which satisfied some TRIPS requirements, but it was not until October 2001 that China revised its law with the intent to comply with all substantive requirements of TRIPS.<sup>4</sup> Unfortunately, certain problems remained even after the amendments, and subsequent regulations (computer software regulations

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<sup>3</sup> The TRIPS Agreement had already entered into force for the U.S. (and for all other WTO members that did not qualify for and take advantage of transition periods) on January 1, 1996, and even for WTO members that qualified for a transition period, the national treatment and MFN provisions of TRIPS applied fully as of January 1, 1996 (TRIPS, Article 65.2 provides that "any developing country Member is entitled to delay for a further period of four years [following the expiration of the one year period after the entry into force of the WTO generally] the date of application, as defined in paragraph 1 above, of the provisions of the Agreement other than Articles 3 [and] 4 . . . of Part I"; Articles 3 and 4 establish the national treatment and MFN obligations of the Agreement). On January 1, 2000, all TRIPS copyright obligations, including providing adequate enforcement procedures and effective remedies to deter piracy, entered into force for all the world's developing countries (except those classified by the U.N. as the "least" developed countries, which have until January 1, 2006 to comply).

<sup>4</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).



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and new implementing regulations to the copyright law) contained further problems.<sup>5</sup> Even more important, however, is compliance with TRIPS enforcement obligations (Articles 41-61), and China's record has been disappointing and accounts for the steady high levels of piracy and the billions of dollars in losses suffered by copyright owners. It is the promise of these new enforcement obligations that is essential to returning the commercial benefits that were envisioned at the conclusion of the Uruguay Round. China must therefore begin to demonstrate that its enforcement system is, in practice, effective in deterring piracy.

### C. **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 lower such piracy levels, and therefore, it 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.

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<sup>5</sup> We are disappointed that the Implementing Regulations (September 15, 2002) did not take steps to come into full TRIPS compliance. For example, the regulations significantly weakened the fine provisions, by changing the calculus of fines in the vast majority of cases (by the use of the term "three times the revenues," which could be higher than the previous maximum monetary fine but will be very difficult to prove) and by removing certainty as to the maximum administrative fine (which under the old Regulations was up to roughly US\$12,000). The Implementing Regulations also leave in place a compulsory license that, with respect to U.S. and other WTO members' subject matter, clearly violates TRIPS. It is disappointing that the Chinese government did not clarify that those provisions do not apply to foreign right holders in order to meet China's TRIPS obligations. The implementing regulations further failed, among other things, to clarify whether temporary copies are protected. They also fail to clarify that the reproduction right in Article 41 for sound recording producers extends to indirect reproductions, as required by TRIPS. The Computer Software Regulations (effective January 1, 2002) also contained many problems and deficiencies discussed in detail in the Appendix. For example, the Regulations failed to clarify whether temporary copies (of computer software) are protected. The Regulations also established a huge, TRIPS-incompatible exception to protection for software that goes well beyond what is permitted under the Berne Convention and TRIPS, as it may permit reproductions or other exercises of exclusive rights without authorization (such as in the context of reverse engineering). The Regulations further create a huge loophole allowing corporate end-user piracy, providing 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 the copyright law as amended, which puts the burden of proof in such cases of infringement on the possessor. If this exception is abused, it would so weaken enforcement against corporate end-user piracy that it would amount to a violation of TRIPS Article 41. The same exception also may extend beyond what is allowed by TRIPS by establishing a compulsory license (i.e., the remedy may be limited to paying a license fee) 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. These problems and others are detailed in the Appendix.



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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.<sup>6</sup> 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 Internet piracy at Internet cafes).<sup>7</sup> The rise of websites like listen4ever.com and chinamp3.com in recent years, which were giving away pirate MP3 files of whole songs or even trying to sell them, indicate that the convergence of a growing young consumer base in China and technologies like those employed in digital networks is causing increasing problems for copyright owners in China. While China has to date done a commendable job in trying to halt illegal activities over digital networks, it is quite 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.<sup>8</sup> We understand that China is now reviewing the 2001 Internet regulations, and we look forward to reviewing the draft Internet regulations expected to be issued in late 2003. We urge the U.S. government to seek an opportunity for transparent review of these important Internet regulations prior to their issuance.

For the business software industry, unauthorized copying within companies and government entities in China causes the greatest losses to that industry. As with all of the other copyright industries, the criminal and administrative systems have not been effective in curbing this problem, and civil redress has also proved to be ineffective against enterprise end user piracy

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<sup>6</sup> 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.

<sup>7</sup> 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 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.

<sup>8</sup> The tools are largely in place for the Chinese government to take down illegal websites and prosecute their operators. However, such vital protections, for example, protecting temporary copies as reproductions, are missing from China's copyright law. Also, while the copyright law established some legal tools to go after the manufacture of certain devices that circumvent technologies used by copyright owners to protect their works in the online environment, those provisions did not go far enough. It is disappointing that the latest implementing regulations did not cure these deficiencies. We note that the Chinese further failed to take this legislative opportunity to fully modernize their law. We note with great disappointment that the amendments did 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. A full right of importation applicable to both piratical and parallel imports should also have been included. Greater discussion of these points can be found in the Appendix.



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due to the reluctance of courts to issue preservation orders. There is no effective administrative enforcement system against end user piracy of software (corporate end-user piracy) and other copyrighted materials in China. 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. Simply put, the National Copyright Administration has not demonstrated that it has the political mandate, resources and experience to address the end-user piracy problem. This failure to address end-user piracy implicates China's compliance with its TRIPS obligations. Finally, to our knowledge, very few court-ordered preservation measures under TRIPS Article 50 have been carried out in practice.

Piracy affects the markets for every copyright sector, including movies, recorded music, business software, entertainment software, and book publishing. Pirate versions of the newest Harry Potter book,<sup>9</sup> and the latest first-run motion pictures, for example, *Uptown Girls*, *Freddy vs Jason*, *American Wedding 2003* and *Pirates of the Caribbean*, 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.<sup>10</sup>

Book publishers have experienced four major problems in 2003 that are worthy of note: (1) continued, unabated piracy of higher education textbooks; (2) illegal/unauthorized downloads of online journals and other materials; (3) an increase in pirated translations undertaken by so-called "secondary channel distributors" – often small, private entrepreneurs who distribute books outside the normal state run distribution channels; and (4) counterfeiting of well-known publisher trademarks and unauthorized use of well-known authors' names and trade dress.

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

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<sup>9</sup> Satoshi Saeki, Harry Potter latest victim of China's lucrative piracy mart, *Yomiuri Shimbun*, August 9, 2003.

<sup>10</sup> A Shanghai Daily article from January 18, 2003 documented the fruitless efforts of famed Chinese director Zhang Yimou and efforts 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 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>.



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61 of TRIPS requires that criminal procedures be available (in practice) against copyright piracy "on a commercial scale." While there were several successful criminal prosecutions for piracy in 2003, those mainly involved local right holders. 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. Simply put, thresholds for bringing criminal actions against those committing acts of copyright piracy must be lowered. The State Council, in the WTO Working Party document, has promised to recommend to the Supreme People's Court that it lower thresholds for bringing criminal actions; in addition, administrative fines must be raised, to make such actions truly effective and sustainable.

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 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.<sup>11</sup> 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.

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<sup>11</sup> 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.



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**D. MARKET ACCESS: A NECESSARY INGREDIENT TO FIGHT PIRACY IN CHINA**

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 as 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 problems 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 related activities, such as importation (which remains "prohibited") and printing (which is "restricted") call into doubt whether China can meet its WTO obligations (to allow unfettered distribution) 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.<sup>12</sup> 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

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<sup>12</sup> For a more detailed account of the serious market access problems faced by the recording industry, we refer you to the comments of the Recording Industry Association of America (RIAA), which were filed on September 9, 2003, in response to 68 Fed. Reg. 43247-8 (July 21, 2003).



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entities).<sup>13</sup> Other essential activities such as the signing of recording artists, artist management, and producing sound recordings, are not covered in 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,<sup>14</sup> 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 foreign entities may also apparently sign and manage artists as long as they have proper permits (again, the WTO commitments do not appear to cover these activities). Nonetheless, the overall restrictive nature of the recording business in China makes it impossible for China to effectively enter the market, and thus, fighting piracy of foreign content is virtually impossible. 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.

For publishers, the WTO Working Party Report, while it fails directly to address the permissibility of certain core activities carried out by foreign publishers, does set forth China’s commitments with respect to the distribution of books, newspapers and magazines. The “Schedule of Specific Commitments on Services” attached to the Working Party Report defines “Distribution Services” to include wholesale services, retail services, as well as commission agents’ services, franchise services and the like. With regard to “Distribution Services,”<sup>15</sup> China has committed to allow “foreign service suppliers” to “engage in the [wholesale] distribution of books, newspapers, [and] magazines” without market access restrictions no later than December 11, 2004, which is “three years after China’s accession.” By that time, there must also be no restrictions on foreign majority ownership and no geographic or quantitative restrictions.<sup>16</sup> With

<sup>13</sup> 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.

<sup>14</sup> 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).

<sup>15</sup> “Distribution Services” are defined in Annex 2 of the Working Party Report, which is adopted from Annex I of the Agreement on Market Access Between the People’s Republic of China and the United States of America, Nov. 15, 1999 (“China-US Market Access Agreement”).

<sup>16</sup> Restrictions on foreign majority ownership and geographic and quantitative restrictions will be lifted on December 11, 2003. Therefore, foreign service suppliers of books, newspapers and magazines will have unfettered access to the wholesale distribution market by December 11, 2004, when China is committed to lift market access limitations to such foreign service suppliers. In the China-US Market Access Agreement, China also agreed that “[s]tarting no later than January 1, 2003 there will be no restrictions on equity/form of establishment” with respect to commission agents’ and wholesale trade services. That commitment does not appear expressed in the Working Party Report, and we are interested to know whether this omission has a



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regard to “Retailing Services,” China committed that “[f]oreign service suppliers will be permitted to engage in the retailing of . . . books, newspapers and magazines within one year after accession,” or December 11, 2002. There are various geographic and equity ownership limitations in place until December 11, 2004, at which time all restrictions on commercial presence are lifted except as to “chain stores.”<sup>17</sup> In addition to the specific commitments on wholesale and retail distribution, immediately upon accession (December 11, 2001), “[f]oreign-invested enterprises” are permitted to distribute (both wholesale and retail) their products (including those listed in the commitments, which include books, newspapers and magazines) as long as they are “manufactured in China.” Both wholesalers and retailers may also, as of the date of China’s accession, December 11, 2001, “provide the full range of related subordinate services . . . for the products they distribute.”<sup>18</sup>

These market opening commitments for the distribution of published materials are extremely important, but they do not address core activities carried out by publishers, except in an ancillary way.<sup>19</sup> One crucial question left unclear in the WTO commitments is whether the commitments allow foreign entities to “import” published materials into China for distribution. 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. We urge the U.S. government to continue its vigilance in seeking greater market opening for U.S. publishers to engage in publishing activities (including printing, reproduction, binding and other manufacturing activities) in China, as well as the importation into China of published materials.<sup>20</sup>

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material impact on publishers (we suspect that the lifting of limitations on restrictions on foreign majority ownership may obviate the need for a separate provision regarding “equity” restrictions).

<sup>17</sup> The term “chain stores” is defined as stores “which sell products of different types and brands from multiple suppliers with more than 30 outlets.” For those stores, foreign majority ownership will not be permitted if they sell, among other products, books, newspapers, and magazines.

<sup>18</sup> The “subordinated services” are defined in Annex 2 of the Working Party Report Addendum as including “inventory management; assembly, sorting and grading of bulk lots; breaking bulk lots and redistributing into smaller lots; delivery services; . . . storage, warehousing and garage services; sales promotion, marketing and advertising . . . and after sales services including . . . training services.”

<sup>19</sup> For example, the commitments indicate that “foreign-invested enterprises” (FIEs) may distribute books “manufactured in China” upon the date of China’s accession. This clearly means a foreign distributor can sell Chinese books, but a respectable argument might also be that a foreign distributor might be able to engage a Chinese printing house to run a printing of copies of books in China in order to distribute them in China.

<sup>20</sup> In particular, we note that current Chinese law is ambiguous as to what foreign entities may and may not do. Recent Administrative Regulations on Publishing appear to permit foreign entities to apply to engage in certain activities related to



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## E. SOME PROGRESS NOTED IN 2003 IN CHINA

Despite the many problems and deficiencies in the enforcement system, 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.<sup>21</sup> Periodic crackdowns during 2002 and 2003 have resulted in seizures of tens of millions of pirated products. In addition, between January 1, 2002 and July 31, 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 more than 5,000 retail shops were raided nationwide from January 1, 2002 to July 31, 2003. 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 and how it 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, through central government will to address the problem – in this case, academic journals piracy.

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publishing and the U.S. government should confirm what activities are permitted and what activities remain restricted or prohibited and how those restrictions or prohibitions operate. It may be that the Regulations must allow foreign entities to engage in certain publication activities in China in order for China to meet its WTO services commitments. The U.S. government should further seek to lift ownership/equity restrictions for “publication importing entities” since the inability to import could directly or indirectly impair a foreign entities’ ability to distribute wholesale and/or retail in China.

<sup>21</sup> 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](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”).



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China should further 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.<sup>22</sup> 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 receiving good cooperation from government and judicial authorities in bringing civil cases. They are also receiving 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.

## F. **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; in other words, it remains dire. We conclude that much more needs to be done by China in order for it to meet its TRIPS obligations in the area of copyright, both with respect to the TRIPS enforcement and substantive obligations. With the timetable for China's other WTO commitments (as distinguished from its TRIPS commitment which was 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 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. We urge the United States and the rest of the international trading community to keep pressure on China through the WTO and other processes to provide a vehicle for opening the Chinese market to copyright, as a necessary step in also achieving improvements in the enforcement environment.

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<sup>22</sup> 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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IIPA appreciates the opportunity to provide its views on China's compliance with its obligations under the WTO and the TRIPS Agreement in the area of copyright. We look forward to our continued work with USTR and other U.S. agencies to bring about major improvements in copyright protection and enforcement worldwide.

Respectfully submitted,

Eric H. Smith  
President  
International Intellectual Property Alliance

**APPENDIX**  
**COUNTRY REPORT FOR THE PEOPLE'S REPUBLIC OF CHINA**

**FROM**

**IIPA 2003 SPECIAL 301 REPORT**  
**ON GLOBAL COPYRIGHT PROTECTION AND ENFORCEMENT**  
**SUBMITTED TO THE UNITED STATES TRADE REPRESENTATIVE**  
**FEBRUARY 14, 2003**