

THE AMERICAN CHAMBER OF COMMERCE IN HONG KONG

Intellectual Property Committee

Position Paper

NEED FOR GREATER COPYRIGHT PROTECTION IN THE PRC

The Issue

Since the trade disputes with the United States in 1995 and 1996, China has made notable progress in enhancing the protection of intellectual property rights, including copyrighted works. This process has accelerated since China's entry into the World Trade Organization. Nonetheless, nearly a year after WTO entry, it is clear that much more needs to be done to reduce the extraordinarily high levels of copyright piracy.

Position

China should take immediate steps to improve both civil and criminal enforcement against copyright infringement, consistent with international standards and China's obligations under the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) administered by the WTO. These steps should include, at a minimum, measures to: (1) facilitate the criminal prosecution of copyright infringers; (2) address the serious problem of corporate end user software piracy; (3) tackle the growing problem of Internet piracy; (4) restrict the manufacture, distribution and sale of devices primarily designed or adapted to circumvent copy protection technologies; (5) clarify that temporary copies are protected to the same degree as other copyrighted works; and (6) curb the still massive problem of the counterfeiting of copyrighted works.

Specific Points

- *Criminal Enforcement Against Copyright Infringement*: Under TRIPs, China is obliged to provide effective criminal remedies against copyright infringement, including "effective action" against infringement that creates a "deterrent to future infringement." Current regulations and judicial interpretations are ambiguous with respect to the conditions for establishing a criminal offense of copyright infringement. In late 1998, the Supreme People's Court issued an interpretation providing that "illegal publication" is a criminal offense only when the "illegal income" of an individual exceeds RMB50,000, and of an entity exceeds RMB200,000. This threshold is too high, particular because the phrase "illegal income" is unclear and in certain cases (e.g., corporate end user piracy, discussed below) may be difficult to prove. The PRC should clarify existing law to ensure TRIPs-compatible criminal remedies. At a minimum, this should include effective criminal procedures against copyright piracy on a commercial scale.

- Corporate End User Software Piracy: In 2001, the level of business software piracy in the PRC in 2001 exceeded 90%. High levels of business piracy – which is estimated to account for well over half of all piracy-related losses suffered by the software industry – eliminate the economic incentives developers must have to invest time, energy and resources into the creation of innovative programs, and are the single greatest barrier to the development of the software industry around the world. The criminalization of business end user piracy (as well as effective mechanisms for civil and/or administrative enforcement) is therefore of critical importance to addressing this problem. In order to satisfy its treaty obligations under TRIPs and international standards of protection in this area, China should:
 - Confirm that corporate end user software piracy is illegal under all circumstances and subject to effective civil, administrative, and criminal sanctions. (NB: The “Regulations on the Protection of Computer Software,” introduced in January 2002, fail to explicitly prohibit this form of piracy.)
 - Dedicate adequate resources for administrative enforcement against businesses using pirated software -- including, if necessary, by allowing the National Copyright Administration to draw upon the resources of other agencies (e.g., local AICs) to carry out enforcement activities.
 - Facilitate civil actions against infringers, including by lowering the requirements for obtaining evidence preservation orders in advance of litigation (e.g., by allowing applicants to introduce circumstantial evidence that infringement may be taking place).
 - Facilitate criminal prosecutions where appropriate.

- Internet Piracy: It is increasingly important for governments to address the problem of groups or individuals who engage in forms of software piracy that are seriously prejudicial to the business interests of copyright owners but not necessarily carried out for financial gain or in a typical commercial setting. Recent cases illustrate the massive damage that can be caused to industry by hackers who, via the Internet, make cracked code and pirated works (e.g., software, music, and movies) available to the public at large without an expectation of monetary gain. The PRC should review existing civil and criminal legislation to ensure coverage for this form of software piracy.

- Anti-circumvention: Related to Internet piracy is the broader need to protect technological measures to prevent unauthorized access to or use of copyrighted material, or the illicit dissemination of protected works. For every developer of technical protection measures, there are multiple individuals or groups trying to break or bypass such measures. Regardless of whether these individuals or groups have a commercial motive, their activities permit the theft of intellectual property and the disruption of e-commerce. It is therefore important that the integrity of technical protection measures be protected by prohibiting the manufacture, trade in or use of devices or software that are primarily designed to circumvent them. This is consistent with the WIPO Copyright Treaty (which the PRC likely will sign in the future), which requires signatories to “provide adequate legal protection and effective legal remedies

against the circumvention of effective technological measures” that copyright owners use to “restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law.” China’s existing law concerning circumvention devices contains a number of significant potential gaps. The law should be clarified to ensure that it:

- Prohibits the manufacture and trade in circumventing technology (and not just the use of such technology);
 - Covers devices (as well as components of other items) that are predominantly, as opposed to solely, used to circumvent technological protection measures;
 - Provides for criminal sanctions in addition to civil and administrative relief.
- Temporary Copies: In today’s digital, networked environment, it is critical that copyright owners have the clear ability to control the making of temporary copies of their works – a right that is affirmed in both the Berne Convention (to which the PRC is a signatory), TRIPs, and the WIPO Copyright Treaty (to which the PRC is likely to accede in the future). Networking allows consumers to access and enjoy digital content without needing a permanent copy of a particular work (for example, by making a temporary copy of the work in a PC’s random access memory (RAM) when using the work dynamically. Current Chinese law in this area is ambiguous and should be clarified to make clear that temporary copies fall within the scope of the reproduction right.
 - Production and Distribution of Counterfeit Product: The counterfeiting of copyrighted works remains a massive problem in China. Pirated products of all types are produced in huge quantities, both for domestic consumption and for export to other markets. To address this problem, the PRC should take the following steps at a minimum:
 - Dedicate additional resources toward criminal investigations and prosecutions of counterfeiters (e.g., by creating specialized IPR units within Public Security Bureaus);
 - Take steps to ensure the effective transfer of appropriate cases from administrative to civil authorities;
 - Increase the level of cross-border cooperation among enforcement officials. For example, the National Copyright Administration and the Hong Kong Customs & Excise Department recently entered into a Memorandum of Understanding to facilitate information sharing in copyright cases. Efforts should be made to further expand the relationship to include operational cooperation (particularly in key border areas in Southern China).

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