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1724 F Street, NW  
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**Re: China’s WTO Compliance – “Request for Comments Concerning China’s Compliance With World Trade Organization (WTO) Commitments” (86 Fed. Reg. 46066, August 17, 2021)**

To the Trade Policy Staff Committee:

The International Intellectual Property Alliance (IIPA)—a coalition of five member associations each of which represents a significant segment of the U.S. copyright industries<sup>1</sup>—appreciates this opportunity to submit these written comments in response to the above-captioned Federal Register Notice on China’s compliance with its World Trade Organization (WTO) commitments.

China is a significant market for the creative industries. China’s online marketplace continues to expand, and China now leads the world in cinemas with over 70,000 movie screens, most of which support 3D and many of which offer enhanced formats such as IMAX and China Giant Screen. Further, China is now the seventh largest music market, the fourth largest music streaming market in the world by revenue, and the largest market for video games with an estimated 743.5 million gamers and revenues estimated to reach \$46.4 billion in 2021. Yet China’s market for legitimate content continues to be hampered by piracy, discriminatory and restrictive market access policies, and long-standing unfulfilled international obligations.

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<sup>1</sup>IIPA is a private sector coalition, formed in 1984, of trade associations representing U.S. copyright-based industries working to improve copyright protection and enforcement abroad and to open foreign markets closed by piracy and other market access barriers. Members of the IIPA include Association of American Publishers ([www.publishers.org](http://www.publishers.org)), Entertainment Software Association ([www.theesa.com](http://www.theesa.com)), Independent Film & Television Alliance ([www.ifta-online.org](http://www.ifta-online.org)), Motion Picture Association ([www.motionpictures.org](http://www.motionpictures.org)), and Recording Industry Association of America ([www.riaa.com](http://www.riaa.com)). Collectively, IIPA’s five member associations represent over 3,200 U.S. companies producing and distributing copyrightable content. The materials produced and distributed by IIPA member companies include: entertainment software (including interactive video games for consoles, handheld devices, personal computers and the Internet) and educational software; motion pictures, television programming, DVDs and home video and digital representations of audiovisual works; music recorded in all formats (from digital files to CDs and vinyl) for streaming and other online services as well as broadcasting, public performance and synchronization in audiovisual materials; and fiction and non-fiction books, educational instructional and assessment materials, and professional and scholarly journals, databases and software in all formats.

In a positive development, China's recently passed amendments to its Copyright Law include the introduction of rights of broadcasting and public performance for producers of sound recordings, which are critical protections for the music industry; enforcement reforms, including a ten-fold increase in maximum "punitive" damages and the ability to shift the burden of proof to the accused infringer; protections for technological protection measures (TPMs), which enable digital trade of copyrighted works; and the elevation of certain elements of the three-step test into the law to appropriately confine exceptions and limitations.

While the aforementioned amendments are laudable, it is critical that the implementing measures, expected in 2021, meet global best practices and China's international commitments. Additionally, the amendments did not include a number of reforms that remain necessary to bring the standard of copyright protection and enforcement in line with global norms and best practices to effectively meet the challenges of the digital age. China should fully implement its commitments under the *Guidelines on Strengthening the Protection of Intellectual Property Rights (Guidelines)*, including to regulate websites to remove pirated materials, and under the Phase One agreement, including to make a meaningful increase in purchasing audiovisual products for video-on-demand (VOD) services. Following through on these commitments would help China address its growing piracy problems, and remove barriers that prevent U.S. creative industries from fully accessing the Chinese market.

Unfortunately, in many respects, China has been moving in the opposite direction, introducing a number of measures intended to restrict its growing market for creative works from foreign competition and maintaining tight national control over content and distribution. China's implementation of its WTO obligations—including the outcomes of the 2009 WTO dispute settlement decisions—remain inadequate, incomplete or delayed. These comments spell out some of these problems, with particular focus on the following:

- (1) Increased market access barriers to the distribution of creative content, including online, and ongoing production and investment restrictions;
- (2) Continued gaps and deficiencies in China's legal regime, including both copyright law and enforcement measures;
- (3) Need for enhanced enforcement to address existing and evolving online piracy threats, including a continued focus on online journal piracy, emerging forms of piracy such as apps that facilitate infringement, the proliferation of Piracy Devices and circumvention devices, unauthorized camcording, and infringing content on unlicensed streaming platforms;
- (4) Continued piracy of printed books and other hard goods, and the need to take measures to prevent the production and distribution, including export, of such pirated products; and
- (5) Need for an immediate and full implementation of the U.S.-China Film Agreement signed in 2012 by then-Vice President Biden and then-Vice President Xi, including the review obligations outstanding since 2017.

IIPA believes that progress on these issues is crucial to a successful U.S. trade and economic policy with China. As far back as the 2012 round of the U.S.-China Strategic and Economic Dialogue (S&ED), the Chinese government recognized the importance of increasing sales of legitimate intellectual property-intensive products and services in line with China's status as a globally significant marketplace. It follows from this recognition that real progress on copyright protection and enforcement, as well as on market access for copyright-dependent goods and services, must be measured based on whether there have been significant increases in sales and licensing of those copyright-intensive products. For IIPA members, this has yet to be fully realized. IIPA appreciates the inclusion of intellectual property (IP) licensing in the Phase One purchasing commitments and encourages the Chinese government to move expeditiously to meet its Phase One obligations to expand trade. We urge that progress in China continue to be measured based on results related to legitimate industry sales and licensing in the country. We appreciate the efforts already undertaken by the U.S. government to develop appropriate sales metrics measuring progress on key commitments, and ensuring they translate into tangible results for U.S. industries and U.S. economic and job growth.

Previous IIPA comments and testimony have well documented the challenges faced by the motion picture and television, music, publishing, and entertainment software industries, and the 2021 IIPA Special 301 country report on China (submitted as an attachment to this submission) provides details on these challenges as they stood in February 2021. The following discussion highlights both potential WTO compliance issues in China, and how addressing the five key areas of change noted above can secure positive commercial gains for the creative industries going forward, which remains the ultimate goal of IIPA members' efforts in China.

## **I. Increasing Discrimination Against Foreign Creative Content**

The development of a robust marketplace for copyrighted works in China requires that foreign rights holders have the legal right to enter that market on a non-discriminatory basis. Unfortunately, U.S. and other foreign rights holders have long faced certain restrictions and prohibitions on core copyright activities in China. For example, China is still not in compliance with the WTO's ruling in the landmark market access case (DS 363) brought by the U.S. regarding many market access barriers in music, audiovisual products, and publications.<sup>2</sup> After the case concluded in 2009, China eased several market access restrictions,<sup>3</sup> but many core activities of copyright industries remain restricted or prohibited. For instance, the Negative Investment List, revised in 2020, continues to prohibit, among other things, foreign investment in the "publication and editing of books, newspapers, journals, audiovisual products and electronic publications," and foreign investment in audiovisual production studios, movie distribution, and online video

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<sup>2</sup>*China—Measures Affecting Trading Rights And Distribution Services For Certain Publications And Audiovisual Entertainment Products*, WT/DS363/AB/R, December 21, 2009, at <https://www.wto.int>.

<sup>3</sup>China eased investment restrictions for some sectors in amendments to the Catalogue of Industries for Guiding Foreign Investment. In late 2013, the Shanghai Free Trade Zone (FTZ) was opened to foreign investment, allowing the introduction of game consoles into China for the first time, and easing restrictions on foreign audio and audiovisual product distribution (although confirmation that distribution of "music videos" is permissible, and that a foreign-invested entity established in the Shanghai FTZ may distribute music throughout China, would be helpful, as it remains unclear whether these activities are permitted). In 2015, China eliminated most restrictions on gaming consoles, paving the way for video game companies to manufacture consoles in all of China, although manufacturers and publishers must still comply with strict regulations including those for pre-sale content review. China also agreed to allow foreign entities to choose their licensees for online music distribution, and to engage in content self-review of music for the first time. New incentives were also introduced for more film co-productions in China.

services. While the prohibition of foreign investment in audiovisual production studios is also a barrier facing U.S. record labels in China, Item 17 of the 2020 Negative Investment List permits foreign investment in online music services, which is a welcome and positive step.

Unfortunately, the Government of China has recently introduced a variety of measures that appear intended to further undermine market access of the U.S. creative industries. For example, China appears to have extended the reach of its content review regime to content intended for other markets. Previously, publications/books that might include material deemed sensitive by the government, but which were intended for distribution outside the Chinese market, were allowed to be printed in China and subsequently exported. It now appears that even books that were previously allowed to be printed in China without issue are subject to stringent review. Extending the reach of its burdensome content review regime to books printed in China but otherwise intended for distribution in other markets places an arbitrary and unjustified discriminatory burden on foreign publishers, who for decades have used printing partners in China, and is arguably a disguised restriction on international trade.

Additionally, there are some signs that China may extend its onerous content review system for audio-visual content (discussed further below) to Hong Kong. Such a system would result in a deterioration of existing market access for U.S. audio-visual exports to that market.

#### ***A. Online Market Access Concerns***

As we have previously noted, the 2016 Online Publishing Rules, which appear to expand the scope of longstanding restrictions on the involvement of foreign entities in online publishing activities, are having a chilling effect on foreign investment in online publishing services where, prior to the rules, some latitude appeared to have been granted.<sup>4</sup> Furthermore, although China's June 2019 revision of its Foreign Investment Catalogue lifted certain restrictions, production and distribution of audiovisual products and "network publication services" remained on the "Prohibited" list. In 2017, the Ministry of Industry and Information Technology (MIIT) implemented regulations that, among other things, would require all Internet domain names available in China to be registered through a licensed, domestic service provider. The regulations have unfortunately led to increased use of reverse proxy services by most piracy services targeting China. In 2019, China's State Administration of Press and Publication (SAPP) tightened the approval process for the publication of video games, reducing the number of low-quality copycat games, but also creating a new burden for U.S. video game developers.<sup>5</sup> SAPP should increase the number of approvals for foreign video games to match the number of approved domestic games.

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<sup>4</sup>Among other things, these rules unfortunately restrict the distribution of foreign audiovisual content on online video platforms, even if the distributor has received a home entertainment permit from the former General Administration of Press and Publication (GAPP).

<sup>5</sup>The number of video games approved by the State Administration of Press and Publication (SAPP) has been reduced from more than 9,000 game titles in 2015, to less than 1,500 titles in 2019. A foreign video game company must work with a domestic video game publisher to commercialize a video game in China. In order to receive SAPP approval, the foreign video game submitted for approval must have a certificate from NCAC, and the domestic video game publisher should have a Telecommunication and Information Services Business License (ICP Certificate). The domestic video game publisher must also ensure that changes have been made to the game so that it complies with all content regulations and other regulations governing loot box systems and game spending by minors.

In a potential positive development, in August 2019, China's Ministry of Commerce (MOFCOM) issued the Beijing 3-year Action Plan ("Plan") to liberalize by the end of 2021 certain service sectors where foreign investment was previously prohibited or restricted. The Plan will only be implemented in Beijing. While online video game services are not specifically included in the Plan, reports indicate the Plan could open the online video game industry to foreign investment because a pilot program under the Plan includes the "internet information services" sector, which could potentially encompass online video game services. China should implement the Plan, including liberalization of online video game services, and expand such pilot programs to the entire country.

China has implemented a number of discriminatory measures to restrict the online distribution of foreign audiovisual content and software. For example, in 2014, the Chinese Government adopted rules capping the online distribution of foreign films and TV dramas at 30% (and this cap was made more restrictive through application on a genre-specific and by-country basis), and requiring online distributors to register content, obtain permits, and submit content for review, resulting in extended delays and further uncertainty.<sup>6</sup> Furthermore, there are only two opportunities to submit content for registration and review per year, which, for example, because of the nature of television production, does not allow for submission of a full season of a television series when that season is current. These rules have substantially reduced the number of U.S. film and television programs licensed in China for online distribution and in practice further reduced the foreign content caps to less than 30%.

Chinese distributors have delayed or decreased licensing activity through multiple layers of restrictions under a non-transparent content review system, significantly delaying and limiting Chinese consumers' ability to access the most valuable current U.S. television content within a reasonable period of the U.S. release, which has created fertile ground for increased piracy. To help ensure the content review process is transparent, predictable, expeditious, and does not have a disparate impact on U.S. content, China should adopt a voluntary, age-based classification system. China should also shorten the time for content review to provide certainty of release, increase frequency of content review windows, remove the burden of resubmitting film and television programs that have already been approved, and establish a fast-track system for content review under special circumstances. A transparent, predictable, and expeditious content review process will reduce commercial uncertainty, attract investment, and lead to more choice for Chinese consumers.

China has also introduced several alarming draft measures that, if implemented, would discriminate against U.S. producers and distributors of creative content. For example, in May 2016, the State Administration of Press, Publication, Radio, Film and TV (SAPPRFT) proposed policies that, if implemented, would provide state-owned media companies with voting control over leading online platforms for films and TV content.<sup>7</sup> Also in June 2016, China published new

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<sup>6</sup> In September 2014, the then State Administration of Press, Publication, Radio, Film and TV (SAPPRFT) issued the Notice on Further Implementation of Provisions Concerning the Administration of Online Foreign Films and TV Dramas requiring foreign films and TV dramas to obtain permits and submit content for censorship review, and capping foreign content to 30% on online platforms.

<sup>7</sup> The proposal was for leading online video platforms to sell up to a 10% "special management stake" and cede at least one board seat to a selected state-owned media company. While this proposal was suspended due to significant opposition from online platforms, there is concern that it may reemerge.

content approval regulations for mobile video games that would make it extremely difficult for foreign publishers of mobile games to access the Chinese market.

### ***B. Other Audiovisual Market Access Concerns***

China continues to introduce additional impediments to its market for U.S. audiovisual content, limiting the U.S. industry's ability to compete fairly and inhibiting its potential growth in this massive and fast-growing market. In September 2018, the National Radio and Television Administration (NRTA) proposed two draft regulations regulating the production and distribution of foreign audiovisual content, including further tightening the content review process and expanding the 30% cap on foreign content (expanding on the cap for online distribution discussed above) applied on a genre and by-country basis to film, TV, animations, documentaries, and "other" programs," effectively reducing U.S. content to less than 10%.<sup>8</sup> While these regulations have not been officially promulgated, provisions to further tighten the content review process for imported content have been implemented and IIPA is concerned that industry-wide application of the genre-based and by-country restrictions began in early 2020, in particular for animation, further exacerbating the uncertainty and uneven playing field faced by U.S. audiovisual companies.

In addition, the 2016 Rules clearly intended to promote indigenous Chinese radio and television programs at the expense of foreign content have negatively impacted U.S. producers and appear to contravene China's WTO obligations.<sup>9</sup> A March 2016 Notice allowing refunds from the Film Development Fund to cinemas that report favorable annual box office receipts from the screening of Chinese films incentivizes cinemas to screen more Chinese domestic films, further damaging the competitiveness of foreign films in the Chinese market.<sup>10</sup> Another obstacle for U.S. producers in China is that private Chinese distributors, including VOD platforms, arbitrarily, without clear explanation, request from U.S. producers an excessive and particularly burdensome amount of legalized documentation regarding production and distribution in order to complete a license agreement or obtain government approvals that permit access to China's online marketplace. These types of onerous documentation requests (unique to China's marketplace) cause uncertainty and additional expense that slow or kill negotiations for licensing films to China.

China also maintains a number of longstanding discriminatory restrictions in the audiovisual sector that continue to harm the U.S. industry. For example, China prohibits foreign-owned investment in online video services, which would appear to violate China's GATS

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<sup>8</sup>The "Administrative Provisions on the Importation and Broadcasting of Overseas Audiovisual Programs" would further tighten regulations on foreign broadcasting, banning foreign films, TV dramas and animation from broadcasting during prime time, putting a 30% maximum cap on foreign audiovisual content in certain circumstances, and restricting content that can be disseminated online. The "Administrative Provisions on Overseas Personnel Participation in the Production of Radio and Television Programs" seeks to regulate the participation of foreigners in the production of radio and TV programs by, for example, banning the employment of foreigners as broadcast TV presenters or newscasters, and banning programs having both a foreign screenwriter and a foreign director.

<sup>9</sup>The June 2016 Statement and Rules on Importing TV Formats, among other things, established a procedure for filing/registration of foreign content by satellite television channels that would apply to jointly developed programs or programs with foreign personnel playing a "major guiding role" in production if the Chinese party does not "fully obtain intellectual property rights" in the program. Only two of these "foreign" programs are permitted to be broadcast in prime time per year; and no more than one new foreign program may be broadcast at any time per year, but it cannot be broadcast in prime time for that first year.

<sup>10</sup>According to the Notice, if 66% of a cinema's total annual gross box office comes from Chinese films, that cinema will receive a refund of half of the money generated from Chinese films within the 5% of box office that the cinema contributed to the Film Development Fund.

commitments. China also prohibits foreign investment in audiovisual production studios and distribution. As noted above, the June 2020 revision of the Negative Investment List maintained these prohibitions.<sup>11</sup> U.S. firms are highly competitive globally in these sectors, and these restrictions, including against direct-to-consumer audiovisual online services, undermine the ability of U.S. content creators and distributors to compete in the Chinese marketplace, hurting their growth.

In addition to all of these longstanding and more recent barriers (and the theatrical market access barriers discussed below), since mid-2019, without any official announcement, Chinese government agencies and distribution platforms have significantly slowed the processing and licensing of new U.S. content intended for Chinese online streaming platforms. This so-called “soft ban” dramatically decreases available U.S. content online in China. U.S. content has also been blocked from online distribution through a combination of Chinese government delays and censorship failures. Without a prior censorship certificate from theatrical release—which most independent and many other U.S. titles fail to receive—there is no avenue to reach online distribution in China. Finally, Chinese private distributors are inhibited from risking any investment in new U.S. content due to uncertainty about their government’s measures and intent. As a result, U.S. producers are largely shut out of the second largest market, and one of the fastest growing, in the world and are also increasingly unable to make significant investments in U.S.-origin content.

China needs to change course from its current protectionist path and open its marketplace to U.S. producers. It is critical to send a strong U.S. government-wide message that these policies are unacceptable—particularly at a time when China’s creative marketplace holds the potential for explosive and mutually beneficial growth—and should be reversed. China should instead focus its attention on complete implementation of the 2012 U.S.-China Film Agreement, and other market opening steps for the motion picture and television, music, publishing, and video game industries.

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<sup>11</sup>China does allow co-productions for specific projects. Other examples of discriminatory market access barriers include: China limits foreign investment in cinemas and in-home video distribution companies to 49% and prohibits all foreign investment in television; local cable networks cannot carry foreign satellite channels without government approval or landing permits, which are limited to Guangdong and a handful of foreign channels; foreign satellite channels beaming into China are required to downlink from a government owned encrypted satellite platform and may only be shown in three-star hotels and above and in foreign institutions, and the annual fee for each channel remains excessively high (US\$100,000); foreign television and film programming are limited to no more than 25% of total airtime, and other foreign programming to no more than 15% of total air time; foreign programming is banned during prime time and may not constitute more than 30% of pay television channels; foreign TV series and movies are limited to 50 episodes; foreign animation is restricted to no more than 40% of total airtime, and importers of foreign animation must produce a like amount of domestic animation; under State Council regulations as well as the 2017 Film Promotion Law, public screening of foreign films must not exceed one-third of the total annual screen time; China requires home-video license agreements to be for a duration of at least three years, an unnecessary intrusion into copyright owners’ contractual rights; and China continues to require digital film prints to be replicated in local laboratories, impeding rights holders’ ability to control the print quality or trace the source of camcording piracy.

## II. Legal Reforms

### A. Copyright Law

After years of IIPA and other stakeholders pressing for progress on amendments to the Copyright Law, in November 2020, the National People's Congress (NPC) passed amendments that entered into force in June 2021.

IIPA is pleased that the amendments include rights of public performance and broadcasting for producers of sound recordings. This critical reform is vital for the future of the music industry in China, including both foreign and domestic rights holders, reflecting that these traditional “secondary uses” have become critical aspects of core revenue for record companies as the industry has transitioned from sale of products to licensing of uses. It is vital that China swiftly and effectively implement these new performance rights, including securing protection for foreign sound recordings, appointing an appropriate collecting society representing recording industry right holders in accordance with international best practices, and establishing tariffs reflecting the economic value of the use of the rights in trade.<sup>12</sup> The amendments also include some positive reforms that will improve the enforcement environment in China, including increasing the maximum for “punitive” damages ten-fold and shifting the burden of proof to the accused infringer upon a showing of *prima facie* evidence.<sup>13</sup> In addition, the amendments elevate certain elements of the three-step test (e.g., TRIPS Article 13) into the law to appropriately confine exceptions and limitations. China should implement all exceptions to and limitations on copyright protection in the Copyright Law to ensure they are appropriately narrow in scope and otherwise consistent with the three-step test.

IIPA is also encouraged that the amendments include protections against the circumvention of TPMs, including prohibitions against the act of circumvention as well as trafficking in circumvention devices or components. It is critical that China properly implements these amendments to ensure these protections are adequate and effective. For example, protections should apply to both TPMs that control and manage authorized access to copyright works (“access controls”) and TPMs that protect rights (including against unauthorized copying) in those works (“copy controls”). As China is the world's leading exporter of video game circumvention devices and software components, the law should prohibit the “export” of circumvention devices or components, which drives significant amounts of online video game piracy around the world. Furthermore, certain exceptions—including for educational or scientific research, encryption research, and reverse engineering—appear overbroad (*i.e.*, broader than those found in U.S. law). Implementation of these exceptions should ensure they do not undercut protections. China should also ensure that circumvention devices or components are effectively removed from the channels of commerce, and that rights holders have standing to bring suit in cases in which the TPM was employed by a licensee platform. Lastly, China should clarify that criminal liability is available for circumvention of TPMs and for the manufacture, distribution, and exportation of

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<sup>12</sup> Unfortunately, China maintains its reservation of Article 15 of World Intellectual Property Organization (WIPO) Performers and Phonograms Treaty (WPPT). This reservation remains an obstacle for the protection of international sound recordings in China. It is urgent that China withdraw this reservation to ensure Article 45 of the new Copyright Law is effectively implemented.

<sup>13</sup> Amended Article 54 increased the maximum pre-established damages amount from 500,000 RMB to 5 million RMB. Article 59 shifts the burden of proof to the accused infringer to show the accused infringer has received permission from the rights holder or is able to use the intellectual property without permission under the Copyright Law.



circumvention devices and software components. If necessary, China should further revise the Copyright Law to address these issues and ensure adequate and effective protections of TPMs.

While there are other positive aspects of the draft amendments—including a ten-fold increase in maximum “punitive” damages and the ability to shift the burden of proof to the accused infringer—the amendments do not address a number of deficiencies in China’s legal framework. To address these deficiencies, China should further revise its legal framework to:

- ensure adequate and effective enforcement against apps, websites, and other digital services that facilitate unauthorized access to copyrighted works stored on remote servers by clarifying the right of “communication over information networks” to reject the “server principle”;<sup>14</sup>
- provide a clear legal basis under which Internet Service Providers (ISPs), including online content sharing platforms, may be held liable for copyright and trademark infringements, including the making available to the public of copyrighted content, carried out by third parties using their services or networks;<sup>15</sup>
- provide protection against unauthorized retransmissions of copyrighted content over the Internet (including live streaming);
- update China’s outdated term of copyright protection to align it with evolving global norms;<sup>16</sup>
- consistent with the requirements of the *Guidelines*, clarify the legal basis for no-fault injunctions against online intermediaries whose services are used to infringe copyright, including against access providers, requiring them to stop providing access to websites and other online services offering unlicensed copyrighted content, especially in cases where the sites are operated outside of China or where the identities or locations of the website owners are unknown;<sup>17</sup> and
- clarify that only passive and neutral intermediaries that do not contribute to IP infringing activities are eligible for the safe harbors from ISP liability and that, upon notice or otherwise obtaining knowledge of infringement, intermediaries promptly take reasonable steps to limit, stop, and prevent the infringement, including expeditious takedown of infringing content and other measures demonstrated effective in preventing or restraining infringement.<sup>18</sup>

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<sup>14</sup>Certain Chinese IP judges have unfortunately embraced the “server principle,” interpreting current law to require that infringement only occurs when the infringing content resides on the server or device of the operator of the app.

<sup>15</sup>While secondary liability for IP infringement is available under Chinese law, the basis for such liability should be clarified to ensure more predictable liability decisions by Chinese judges.

<sup>16</sup>China should align its term of protection with the majority of the Organization for Economic Cooperation and Development (OECD) countries and the international trend (to 70 years after the death of the author, or in cases in which term is calculated based on publication, to the U.S. term of 95 years, but in any case, no less than 70 years). Not only would this ensure Chinese creators receive the full global benefits from their creations, it would provide greater incentives for the production and dissemination of creative works, and provide all producers with a stronger incentive to invest in local industry. This in turn would spur economic growth and tax revenues and enable producers to continue offering content to local consumers in the latest formats. More than 80 countries protect some or all creative materials in line with the international trend, including 30 out of the 32 member countries of the OECD, and nine out of the top ten music markets.

<sup>17</sup>Once enacted, the government should monitor test cases brought to ensure the law operates effectively and fairly to all parties.

<sup>18</sup>Safe harbors regarding IP under the current ISP liability framework are being misapplied to user-uploaded content (UUC) and other sites and services that are not neutral or passive intermediaries, which has negatively impacted the music and audiovisual markets and contributed to the proliferation of pirated content, such as motion picture and television content and music videos, available for streaming on these services. Clarification of the 2012 Judicial Rules on Several Issues Concerning the Application of Law in Hearing Civil Dispute Cases Involving Infringement of the Right to Network Dissemination of Information (Network Rules), which established the current ISP liability framework in China, is needed.

## ***B. Enforcement Reforms***

IIPA welcomed the recent conclusion of the U.S.-China Economic and Trade Agreement (Phase One) signed by the United States and China on January 15, 2020. In the Phase One agreement, China made a number of enforceable commitments that address certain concerns identified in these comments, particularly regarding intellectual property rights (IPR) enforcement. While implementation is ongoing, in August 2020 the State Council took an encouraging step by clarifying that, in accordance with Article 1.26 of the Phase One agreement, transfers of administrative intellectual property cases for criminal enforcement are required upon “reasonable suspicion” that the criminal thresholds have been met. The practice of asking rights holders to show that criminal damage thresholds are likely to have been met in order for a case to be transferred to criminal authorities has been a longstanding enforcement concern for IIPA members, and IIPA is hopeful that this new rule will be effectively applied by both transferring administrative authorities and receiving criminal authorities. IIPA is also encouraged by recent measures enacted or proposed by the Supreme People's Court (SPC) and the National Copyright Administration of China (NCAC) to implement aspects of the agreement that we hope will improve the enforcement framework in China.<sup>19</sup> IIPA urges China to follow through on its Phase One commitments, and encourages the U.S. government to ensure that China fully implements them.

The Phase One agreement also includes purchasing requirements that, among other things, cover IP licensing, and specifically licensing of audiovisual products. If meaningfully implemented, this requirement could improve market access for the U.S. film and television industry by increasing the licensing of U.S. audiovisual products for VOD services within China's 30% quota, as well as increasing revenue share.

IIPA is also hopeful that China will follow through on full implementation of the *Guidelines* introduced in 2019 to improve the legal framework to meet the challenges of copyright enforcement in the digital environment. In particular, China should meet its obligations in the WTO TRIPS Agreement by revising the criminal threshold to ensure that criminal penalties are available for all online piracy on a “commercial scale.”<sup>20</sup>

## ***C. Other Instruments***

China's “e-commerce” law, which entered into force in January 2019, applies only to online transactions involving infringing goods, while copyright liability limitations for digital content platforms continue to be decided exclusively in the framework of the existing copyright

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<sup>19</sup>For example, Official Reply on Issues of Application of Laws for Disputes Related to Internet IP Infringement (Fa Shi [2020] No.9), enacted by the SPC on Aug.24, 2020, entered into force on Sept.14, 2020; Interpretation on Several Issues of Application of Law in Handling Criminal Cases about IP Infringement (III) (Fa Shi [2020] No.10), enacted by the SPC on Aug.31, 2020, entered into force on Sept.14, 2020; Guiding Opinions on Hearing Cases about IP Disputes Involving E-Commerce Platforms (Fa Fa [2020] No.32), enacted by the SPC, entered into force on Sept.10, 2020; Draft Guidelines on Enforcement of IP Judgments was released by the SPC on Mar.15, 2020 for public comments; Provisions on Evidence in Civil Litigation Related to IP (Fa Shi [2020] No. 12), enacted by the SPC on Nov. 9, 2020, entered into force Nov. 18, 2020; Opinions on Strengthening the Protection of the Copyright and Copyright-Related Rights (Fa Fa [2020] No. 42), released by the SPC Nov. 16, 2020; Notice on Evidence Examination and Determination in Copyright Administrative Enforcement (Guoban Fa [2020] No. 2), released by the NCAC on Nov. 15, 2020; and Opinions on Increasing Sanctions against IP Infringements (Fa Fa [2020] No.33), released by SPC, entered into force on Sept.14, 2020.

<sup>20</sup>China should clarify that a single episode of a television program counts as one copy toward the threshold.

law and related regulations.<sup>21</sup> The law requires platform operators to take “necessary measures” against infringing goods or services and, importantly, the standard of knowledge for a platform operator to take action is that the platform “knows or should know” that the good is infringing. Unfortunately, Article 43 does not explicitly adopt effective practices for handling counter-notices, raising the concern that sellers of infringing products could avoid responsibility by merely objecting to rights holders’ notices of infringement. Furthermore, it is critical that implementation of the e-commerce law supports rights holders’ actions to prevent illegal trafficking of infringing goods on e-commerce platforms,<sup>22</sup> and does not upset existing voluntary arrangements between rights holders and some e-commerce platforms where there is already meaningful cooperation.

In May 2020, China enacted a new Civil Code, which took effect in January 2021.<sup>23</sup> The Civil Code includes provisions on liability and takedown procedures for platforms that are similar to the e-commerce law. However, the provisions in the Civil Code permit rights holders to take action “within a reasonable period of time” of the filing of a counternotice while the measures to prevent the alleged infringement remain in place, whereas the e-commerce law required such action within 15 days. In August 2020, the SPC enacted the Official Reply on Issues of Application of Laws for Disputes Related to Internet IP Infringement (Fa Shi [2020] No.9) (“Reply”), which entered into force on Sept.14, 2020. The Reply provides for takedown procedures for online IP infringement consistent with Article 1.13 of the Phase One agreement, including: prescribing that the period for rights holders to take further action in response to a counternotice may not exceed 20 working days; eliminating liability for erroneous takedown notices submitted in good faith; providing for the availability of punitive damages for erroneous counter-notifications submitted in bad faith; and providing for the availability of preliminary injunction orders requiring platforms to take special measures including, but not limited to deleting, blocking and disconnecting links. The Government of China should implement the takedown procedures in the e-commerce law and in the new Civil Code consistent with these requirements.

In October 2019, Chinese Premier Li Keqiang issued State Council Decree No. 722, which included Regulations on Optimizing the Business Environment and entered into force in January 2020. According to the Regulations, China will enhance IP protection by establishing a punitive damages system for IP infringement, promoting the establishment of a rapid protection mechanism for IPR, and improving the settlement mechanism for IP disputes. While the Government of China has taken certain positive steps, including increasing “punitive” damages ten-fold as part of the Copyright Law amendments, more can be done, including reducing the burdensome and time-consuming procedural requirements for proving ownership and standing in copyright cases.

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<sup>21</sup>The interpretation and implementation of this new law should be monitored closely, including with respect to its stated scope of coverage as well as any expansion of such explicit coverage.

<sup>22</sup>High-quality Chinese counterfeit goods remain a problem for some creative industry sectors internationally, and effective enforcement action is required to prevent the supply of such goods to online marketplaces. Likewise, as discussed above, Piracy Devices and circumvention devices, both used primarily to access pirated content, remain significant problems in China.

<sup>23</sup>While the Civil Code does not have a specific chapter on intellectual property, some articles in the Chapter of Contract, Right of Personality, and Tort Liability may apply to IPR-related disputes. For example, Article 1185 encouragingly enables IP rights holders to claim punitive damages against intentional IPR infringement with severe circumstances. IIPA is hopeful that given the core role of the Civil Code in China's legal system, the principle of punitive damages will be reflected in subsequent judicial interpretations and laws regarding IPR protection, consistent with the Phase One agreement.

### III. Improvements, But Need for Enhanced Enforcement to Combat Substantial Piracy

#### A. *Overcoming a Legacy of Non-Enforcement*

As we have previously highlighted, in recent years China has increased its IPR enforcement efforts, contributing to improved protection and development of the legitimate marketplace for some creative sectors. However, these actions, while helpful, are not enough to deter widespread piracy. China's growing Internet user base creates potential opportunities for rights holders; but China's enforcement deficiencies, including application of the "server principle" and broad interpretation of ISP safe harbor rules, as well as a historic toleration for piracy, have kept the creative marketplace from reaching its potential, and have hampered the development of legitimate services.<sup>24</sup> The impact of the COVID-19 pandemic has strained China's enforcement resources and hindered the progress of piracy investigations in China. As noted above, IIPA is hopeful that China will fully implement commitments under the Phase One agreement to improve its enforcement framework, which would make progress on some of the concerns identified below.

China has been operating its annual "Sword Net" anti-piracy campaign for 15 years. While these administrative enforcement campaigns have been important, notably following NCAC's 2015 Notice requiring online storage service providers to take proactive measures to prevent users from uploading copyright infringing content, these unsustained campaigns—on their own—are not enough to deter widescale piracy. The 2020 campaign, which was delayed from April until June due to the COVID-19 pandemic, included a focus on a number of priorities primarily focused on combatting various forms of online infringement. While China has stated an intention to increase administrative enforcement efforts, penalties remain low and, unless the source of the piracy can be definitively established to be located in China, are unlikely to be imposed.

It is often very difficult to identify those responsible for piracy sites because many infringers use fake registration information to register their websites.<sup>25</sup> These rogue services effectively cannot be sued. The NCAC should establish a mechanism with MIIT and ISPs to shut down infringing sites operating without a business license, and the government should, consistent with the *Guidelines*, take immediate steps to guide and regulate management of all types of websites to "remove infringing content, block or disconnect pirated website links, [and] stop the dissemination of infringing information."

Even when it is possible to identify piracy operations, rights holders attempting to enforce their rights are stymied by: burdensome evidentiary procedures slowing and/or hindering case development (including the restrictions on foreign investigations in China); high costs; often high burdens of proof (notwithstanding the recent Copyright Law amendments and ancillary regulations intended to address this problem); and high risks for foreign rights holders to seek enforcement actions in an environment of limited commercial opportunities for foreign rights holders (as discussed above). Moreover, civil suits, while helpful, are ultimately insufficient to address major

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<sup>24</sup>It is important to understand the broader context in which U.S. creative industries operate in China. In addition to causing exceedingly low licensing revenues, this market failure compounds current enforcement challenges in China because, for example, compensatory damages are calculated at inordinately low levels, and numerical and monetary thresholds triggering criminal liability remain difficult to reach and are not high enough to encompass all "commercial scale" piracy.

<sup>25</sup>All websites in China must register with *milbeian.gov.cn*, and the owners of websites can be identified through searches using their registration numbers, domain names, IP addresses, or "Whois" data.

piracy problems because damages are awarded on a per-title basis and are relatively low and non-deterrent due also to the general difficulty of obtaining injunctive relief, while civil litigation costs are high for rights holders, especially foreign ones.<sup>26</sup> In a positive development, in April 2020, the Higher People's Court of Guangdong Province released (Interim) *Guidelines for Adjudicating Civil Intellectual Property Rights Dispute Cases Concerning Online Video Games* to bring more predictability and establish criteria for granting preliminary or interim injunctions in such cases.<sup>27</sup>

Criminal enforcement is inadequate mainly because thresholds required to bring a criminal case are too high.<sup>28</sup> Nevertheless, several criminal enforcement actions are currently pending or were successfully concluded in 2020.<sup>29</sup> In one notable example, a case against the piracy app *Daquian Vision* resulted in criminal fines and imprisonment against the operators.<sup>30</sup> Another welcome development is that China has created a dedicated criminal department within the Ministry of Public Security (MPS), the Food and Drug Crime Investigation Department (FDCID), tasked with, among other things, the investigation and prosecution of all IPR cases. It is hoped that this will lead to enhanced administrative and criminal enforcement.

The Chinese government should be encouraged to expand enforcement resources and capability, commensurate with the scale of the evolving online piracy problem. Given the ongoing

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<sup>26</sup>As previously reported, the motion picture studios prevailed in a lawsuit (originally filed in January 2015) against Shenzhen Xunlei Networking Technologies Co. (Xunlei) for infringement of 28 studio titles. Xunlei withdrew its appeals and paid the civil damages awards plus costs of nearly US\$250,000. As indicated above, Xunlei continues to run a service called Thunder, through which unauthorized motion picture and television content remains available in and outside China. Xunlei has been sued multiple times for copyright infringement by various stakeholders, but low damage awards and lack of meaningful injunctive relief hinder the effectiveness of civil enforcement against Xunlei and other platforms that facilitate piracy.

<sup>27</sup>While these guidelines only apply to courts in Guangdong province, over 10,000 video game companies, accounting for about 75% of national revenue for the whole industry, are located there, and the guidelines will apply when any of these companies file or defend IP cases involving video games. In addition, courts in Guangdong province, which heard about 28% of all IP cases involving video games in 2019, have more experience than other Chinese courts with IP cases involving video games; as a result, the guidelines will likely also be considered authoritative by courts located outside Guangdong.

<sup>28</sup>Currently, in cases of Internet piracy, the criminal threshold of "500 copies" is interpreted as 500 titles. As a result, a single television episode is not considered a "title"; rather an entire season or even all seasons of a television program is calculated as a single title. However, for local rights holders, authorities have recently been more flexible with this threshold or have used a 50,000 click threshold (or a combination of thresholds under the Criminal Law and judicial interpretations) to bring criminal enforcement actions against piracy websites that clearly have high visitations or piracy apps that clearly have large numbers of downloads.

<sup>29</sup>For example, since late 2018, the Tianjin Cultural Task Force and Tianjin Police have investigated a case in Zhuhai City, Guangzhou Province involving the illegal replication of pirate DVDs for distribution within China and export to the U.S., Canada, Europe, and Australia. The police have arrested 24 suspects and seized one master production line, 11 optical disc replication lines, 7 printing machines, and 500,000 pirated DVDs (including 130,000 DVDs infringing the copyrights of major motion picture studios). In July 2020, the police of Shanghai Jing'an District raided Shanghai Sigan Network Technology Co., Ltd., the operator of pirated app *Diyidan*, which, according to the police, has disseminated over 20,000 episodes of infringing audiovisual materials from which the operators have collected membership fees of RMB 9.92 million and advertisement fees of RMB 24.26 million, for total illegal gains of RMB 32.18 million (US\$4.94 million). Of the 35 people detained in the raid, 22 criminal suspects have been arrested: 16 for criminal copyright infringement and 6 for criminal copyright infringement and facilitating criminal activities on an information network. The case has been transferred to the Jing'an District People's Procuratorate. On July 10, the police of Shanghai Minhang District arrested four operators of a piracy website, [www.dilidili.com](http://www.dilidili.com), which has provided pirated Japanese animation since 2015. Criminal cases regarding video games mostly involve illegal gambling relating to video card games, with a minority of cases involving unauthorized private servers and plug-ins.

<sup>30</sup>In 2019, the motion picture industry referred *Daquian Vision*, a mobile piracy app for pirating movies, to the NCAC, which referred the case to the Shenzhen Market and Supervision Administration (MSA) and local police for criminal investigation of the operator. Police executed a raid at the operators' premises in January 2020, and the case was then transferred to the local procuratorate. In November 2020, the case was heard in the Shenzhen Nanshan District Court, which imposed a criminal fine on the company operating the app (Shenzhen Daquian Vision Cultural Media Co., Ltd) and meted out custodial sentences against four of its executives.

prohibition on foreign rights holder investigations into piracy, it becomes even more incumbent upon the Chinese government to enhance its own resources.

## ***B. Enforcement Must Meet Evolving Piracy Challenges***

### **1. Piracy Landscape in China**

Online piracy in China—including illegal streaming and downloading of IIPA members' copyright content through piracy websites, apps, and devices—has evolved extensively in recent years, and remains a serious concern. For example, in 2021, China ranked 19<sup>th</sup> in the world in number of connections by peers participating in the unauthorized file-sharing of select video game titles on public peer-to-peer (P2P) networks, and, according to this same metric, 13<sup>th</sup> in the world for mobile game titles. Contributing to the problem, many online services financially benefit from overbroad ISP safe harbor rules, allowing such services to avoid seeking licenses to the copyrighted material available on their platforms. As discussed above, a more holistic enforcement response is needed to effectively combat the entire online piracy ecosystem, which poses the greatest threat to the continued growth of legitimate businesses in China.

Piracy websites remain a serious concern, including illegal download sites; P2P piracy sites; deep linking sites; “hybrid” sites, such as *3dmgame.com*, which offer both hosting and torrenting services; cyberlockers; BitTorrent indexes, trackers, or clients; forums; streaming sites; social media websites; and online marketplace/auction sites selling pirated goods, Piracy Devices, circumvention devices, high quality counterfeits, USB flash drives containing a high volume of infringing sound recordings, and video game machines containing hundreds or thousands of infringing video games.

Piracy over cloud storage services is also causing significant problems in China. Large quantities of infringing content are stored on cloud storage services, such as Baidu Pan, with links to the content disseminated through popular Chinese social media platforms and piracy linking sites.<sup>31</sup> Given its market dominance, it is critical that Baidu cooperate fairly and transparently with rights holders and put in place rigorous content protection standards and practices to set the right example for other Internet businesses in China. Instead, rights holders in China have been forced to bring legal actions against Baidu Pan for facilitating infringement.<sup>32</sup> Unfortunately, Baidu's services continue to be used for piracy, and their notice and takedown system has been

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<sup>31</sup>USTR identified *Baidu Pan* in its 2020 Review of Notorious Markets for Counterfeiting and Piracy (January 2021), available at [https://ustr.gov/sites/default/files/files/Press/Releases/2020%20Review%20of%20Notorious%20Markets%20for%20Counterfeiting%20and%20Piracy%20\(final\).pdf](https://ustr.gov/sites/default/files/files/Press/Releases/2020%20Review%20of%20Notorious%20Markets%20for%20Counterfeiting%20and%20Piracy%20(final).pdf). Baidu is the most popular search engine in China with over 75% of the market, and the second largest search engine in the world by user base.

<sup>32</sup>In 2018, a local stakeholder, Sohu, won a first-instance lawsuit against *Baidu Pan* for indirectly facilitating copyright infringement of third parties, but that decision was overturned on appeal in January 2020. The Supreme People's Court (SPC) accepted Sohu's application for retrial and is reviewing the case. Sohu has filed two additional cases against Baidu for copyright infringement of additional licensed content. In 2017, Youku sued *Baidu Pan* over the unauthorized availability on the service of a popular local television drama series, prevailing in a first instance case heard by the Beijing Haidian District People's Court. An appeal is pending at the Beijing Intellectual Property Court, and may depend on SPC's decision in the Sohu retrial. The Chinese affiliate of a Hong Kong television station, TVB, filed suit against Baidu for copyright infringement, losing a first instance case in the Guangzhou Tianhe District People's Court, but prevailing on appeal at the Guangzhou Intermediate People's Court.

ineffective.<sup>33</sup> China's government should encourage Baidu to do more, including improving implementation of its takedown tools, applying rigorous filtering technology to identify infringing content, and taking more effective action to suspend or terminate repeat infringers to ensure infringing content and links are removed expeditiously.

A significant problem for the video game industry is “plagiarism,” or “game cloning.” This form of infringement, which is rampant in China, refers to the unauthorized copying of important game elements, including underlying gameplay rules, user interfaces, maps, and/or categories of weapons/skills, without copying key character images soundtracks and voices. The video game industry is encouraged by two recent judicial decisions—*Blizzard & NetEase v. 4399* by Shanghai Pudong District Court and *Suzhou Snail Digital Technology Co. Ltd. v. Beijing Aiqiyi Technology Co., Ltd. and Chengdu Tianxiang Interactive Technology Co., Ltd.* by the Jiangsu High Court—finding infringement against entities engaged in plagiarism of video games. As discussed above, China needs to enhance its enforcement framework to effectively address this problem.

The piracy app ecosystem, which facilitates piracy on a range of devices (including mobile and handheld devices as well as televisions) remains a serious concern. Apps that aggregate infringing content hosted on remote servers are proliferating and there remains legal uncertainty regarding the “server principle.” China is a leading manufacturer of media hardware and accessories that can be modified to support the installation of third-party infringing apps, often, pre-loaded onto the device, allowing users to access pirated content (i.e., Piracy Devices). A prominent example is the “Ubox,” which is manufactured and distributed by Unblock Tech (unblocktech.com).<sup>34</sup> Android devices allow third-party app distribution and installation, enabling users to download free apps onto their devices to access infringing content by bypassing the major app stores altogether.<sup>35</sup> Many third-party app stores carry a multitude of piracy apps, which are generally not subject to enforcement action because new ones are constantly emerging, making it very difficult for rights holders to effectively monitor the vast landscape of third party stores.<sup>36</sup> An example of such an app is *Tian Kian Kan*, which facilitates infringement of audiovisual content. There are also Chinese-developed or operated apps that target foreign music markets. China must do more to combat the growing threat of the app piracy ecosystem.

Online streaming of pirated content is a growing concern for the music, film and television, and video game industries. Some music streaming services, including *yym3.com*, were hosted in China but now use a U.S.-based reverse proxy service to obscure their locations and have stopped responding to takedown request notices. Other sites have begun to adopt the same strategy.

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<sup>33</sup>Takedown rates on Baidu's services are inconsistent and removal of infringing links can take too long (from one day for one of its services to as long as 15 days for another). Moreover, rights holders must send up to thousands of infringement notices for a single piece of infringing content proliferating on Baidu Pan because of its enormous size.

<sup>34</sup>Ubox runs on Android and incorporates peer-to-peer (P2P) technology as well as branded apps to enable access to pirated video-on-demand (VOD) and live channel content. It appears that Unblock Tech has more than 500 agents and distributors worldwide, and sellers and users of the device can be found across Asia Pacific, Europe, and the U.S. and Canada. Unblock Tech's set top boxes have continued to be among the most popular in the Asia Pacific region, particularly for Chinese speaking users.

<sup>35</sup>The Google Play Store is not officially available in China.

<sup>36</sup>Piracy apps are sometimes advertised and distributed through traditional websites that provide a portal allowing users to download the app to their devices. App operators may also advertise and distribute their apps through bulletin boards, social media, or other chat functions through apps.

Infringement of music videos is also a problem for the music industry.<sup>37</sup> In addition, many piracy streaming sites that undermine the Chinese music market are hosted outside of China.

Licensed streaming and digital piracy compete side by side in China, with nine in ten Internet users consuming licensed audio streaming and nine in ten users engaging in piracy. In recent years, music piracy has shifted primarily to streaming of pirated content, including short videos, from user-uploaded content (UUC) sites (such as *weibo.com*, *miaopai.com*, and *bilibili.com*); but more traditional music piracy, including illegal downloads through cyberlockers (such as *Baidu Pan*),<sup>38</sup> domestic and international P2P sites (such as *ThePirateBay* and *Nyaa*), forums, and streaming sites, remains a problem. As noted above, the misapplication of safe harbors from monetary liability to UUC sites that are not neutral or passive intermediaries has contributed to the proliferation of unlicensed music content available for streaming on UUC sites. The music industry reports that the takedown rate of infringing links is high; however, infringing content reappears quickly as there is no requirement for UUC sites and other hosting providers to ensure this content stays down permanently.<sup>39</sup> There is hope that new regulations issued by the Cyberspace Administration of China (CAC), the Ministry of Culture and Tourism, and the NRTA<sup>40</sup> to strengthen the responsibility of ISPs to review and manage UUC will be helpful in combatting online piracy.

The problem of online journal piracy remains a significant challenge. The unfortunate lack of deterrence in the marketplace allows entities engaged in providing unauthorized access to journals to continue to operate.<sup>41</sup> Several online platforms that facilitate access to unauthorized copies of journal articles and academic textbooks, including *syyyj.com*, *Keyandi*,<sup>42</sup> *UReader*, and *Baidu Paperhelp*, continue unhindered. These platforms host unauthorized pdf copies of academic monographs, edited collections, and textbooks. They also facilitate access to infringing content online in a number of other ways, including by providing users with search tools, through the use of Internet bots, and by bypassing TPMs to gain unauthorized access to legitimate online services. It remains the case that administrative enforcement measures appear to have no lasting impact, with administrative authorities unwilling to act against previously sanctioned entities absent a new complaint from rights holders.<sup>43</sup>

In addition, pirated print publications and compromised log-in credentials continue to be widely available on e-commerce sites, which also serve as platforms through which producers of pirated and counterfeit textbooks advertise and sell the illegal products to overseas buyers. In part

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<sup>37</sup>The music industry reports that based on their monitoring, 68% of the 342,246 infringing links they discovered in 2019 were to infringing audiovisual content.

<sup>38</sup>Three cyberlockers continue to provide for file sharing in China: *pan.baidu.com*, *ctdisk.com*, and *115.com*.

<sup>39</sup>From January to November 2020, 261 notices with 13555 links were sent to Baidu, and all were removed.

<sup>40</sup>Regulations on the Administration of Online Audio and Video Information Services, which came into effect on January 1, 2020.

<sup>41</sup>Although the *KJ Med* entity has been defunct for some years, a number of similar entities engaged in providing access to unauthorized copies of journal articles and other reading materials have emerged in China over the last few years. None of these unauthorized services has been effectively shut down, despite referrals to enforcement authorities.

<sup>42</sup>*Keyandi* is an online entity that makes illegal profits by providing English-language e-books for download without publisher authorization and charging a membership subscription fee or a fee for each download by a user. The content on the *Keyandi* site appears to have migrated to a new site, *www.bbs.keyanmi.com*, and the relationship between these two entities is unclear.

<sup>43</sup>For example, in 2017, the Beijing Copyright Enforcement Department issued an administrative penalty against the *UReader* entity, but the platform re-emerged, although it now infringes titles that were not the subject of the prior action. Absent the filing of a new complaint, the enforcement authorities are not inclined to take further action against the platform, which, as a repeat infringer, is acting in direct contravention of the previous finding of illegal conduct.



due to China's inadequate online enforcement framework, sending notifications of infringement to remove these products remains unduly complicated.<sup>44</sup>

## 2. Adapting and Prioritizing Enforcement for Emerging Forms of Piracy

In addition to taking effective action against infringing online and mobile services such as those described above, China must adapt and prioritize its enforcement efforts to deter other forms of infringement that contribute directly to online and mobile piracy. For example, as the world's leading manufacturer, producer, supplier, and exporter of video game circumvention devices and software components, China drives significant amounts of online video game piracy around the world. Circumvention devices targeted toward video game, including game copiers and modification chips (or "mod chips") are devices commonly used to bypass TPMs in a video game console in order to download and play infringing video games on "modded" consoles. These devices allow infringing games distributed over the Internet to be played on handhelds or consoles. The harm they cause is not limited to console makers because almost all games developed for play on consoles, including those developed and published by third parties, can be illegally downloaded from the Internet. These devices are sold by thousands of vendors in webshops and online marketplaces, and constant monitoring and scrutiny is required to achieve a modicum of enforcement. More targeted and transparent enforcement actions, and deterrent-level criminal sanctions and penalties against the manufacturers, suppliers, and exporters of circumvention devices and software components are necessary to meaningfully stem the downloading of infringing video games.

China remains a source of illicit camcording in the region, though in 2020 there was a notable decrease in illicit camcording in China and globally because of theater closures and the delay in releasing many films due to the COVID-19 pandemic. In general, the quality of camcorded films from China has improved over the years, threatening the legitimate theatrical and home entertainment markets.<sup>45</sup> Live-streaming of theatrical broadcasts of films online is a growing concern. In 2020, several Chinese courts handed down criminal sentences for illegal camcording, including to members of a major piracy syndicate, to a cinema manager who made camcords and sold them to mini-VOD cinemas, and to a cinema employee and an accomplice for selling illegal camcords to major piracy websites.<sup>46</sup> A more comprehensive solution requires enactment of a specific criminal law against using, or attempting to use, an audiovisual recording device to make or transmit a copy, in whole or in part, of audio and/or video of a cinematographic/audiovisual work, from a performance in an exhibition facility. Further, as discussed above, to address live-

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<sup>44</sup>An e-commerce site that proved the exception was *DHgate.com*. Following its inclusion in USTR's 2017 Out-of-Cycle Review (OCR) of Notorious Markets, the site worked with publishers to address the sale of infringing copies of textbooks on the platform.

<sup>45</sup>During 2019, a total of 29 camcords (13 audio and 16 video) were forensically matched to cinemas in China, compared to 24 camcords (11 audio and 13 video) in 2018. The 2020 camcord statistics are anomalous due to the widescale closure of theaters in relation to the COVID-19 pandemic.

<sup>46</sup>As we reported last year, in 2019, Yangzhou Police of Jiangsu Province broke up a film piracy syndicate, and seized a cloned server dubbed "phantom number one" (No. A15591). In September 2020, the Yangzhou Intermediate People's Court found four principal defendants criminally liable for copyright infringement, and issued custodial sentences ranging from four to six years, as well as fines. Also in 2020, the Court of Huishui County issued a fine and a two-year prison sentence against a cinema manager who made camcords at Haohuahong Cinema, Huishui County, Guizhou Province, and sold them to mini-VOD cinemas. In August 2020, the court of Pingluo County sentenced an employee of the Golden Phoenix Cineplex Pingluo, Shizuishan City, Ningxia Hui Autonomous Region and an accomplice for using a theater surveillance camera to camcord new release films, including "Avengers: Endgame," "Captain Marvel," and "Shazam!," and selling the camcorded copies to piracy websites, including *www.415.net*, *80ys.net*, *90sdy.com*, and *tqys.net.cn*.

streaming, the Copyright Law should be revised to prohibit the unauthorized retransmission of content online. In addition, the Chinese government, theater owners, and others associated with the chain of theatrical distribution of films must make still stronger efforts to deter unauthorized camcording under current law.

Regulations on mini-VOD cinemas and chains entered into force in March 2018, but an estimated 14,000 of these entities are still operating in different cities across China without proper licenses, and are routinely screening U.S. content without authorization. In early 2019, China's investigation of four illegal camcording syndicates revealed that most illegal camcorded copies were destined for mini-VOD theaters. In August 2019, the China Film Administration (CFA) clarified that mini-VOD cinemas and chains are classified as entertainment premises and must license rights for theatrical screening, not for online VOD. Instead of legitimizing the operations of these facilities, China should severely penalize or shut down these businesses if they violate the Copyright Law. A related problem is that Chinese entities that contract for the rights to distribute film and television content in various home video formats often ignore the differentiation between rights for home use and those for public use. As a result, U.S. content is frequently used for unauthorized public performances.<sup>47</sup>

The emergence of these new technologies for enabling mass infringement, especially in the online and mobile environments, requires a vigorous enforcement response.

#### **IV. Book and Hard Goods Piracy**

The copyright industries continue to report piracy of hard goods, which harms both the domestic and foreign markets. Production of pirated/counterfeit textbooks and trade books remains a concern, with, unauthorized children's books and academic textbooks marketed and sold through e-commerce sites. China remains an export center for pirated music CDs as well, feeding the global market with an onslaught of illegal copies of foreign and Chinese music products, including High Quality Counterfeit (HQC) box sets of music content, often through popular Chinese and international e-commerce platforms. China must implement an effective, non-burdensome program to stop and prevent future production and supply of HQC optical discs.<sup>48</sup> Online sales of USB flash drives containing high volumes of infringing sound recordings have become a growing concern, particularly since these flash drives are exported to other Asian markets, including Taiwan and Hong Kong.<sup>49</sup> Video game machines, originating from China, containing hundreds or thousands of infringing video games have been seized by customs agencies around the world. These machines are found in kiosks and shopping malls in many countries and are sold through a number of online marketplaces

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<sup>47</sup>One example is that some Chinese pay-TV operators or digital licensees distribute U.S. content to hotels for public viewing.

<sup>48</sup>Shenzhen Optical Media Lab has previously worked with rights holders to help identify the source of seized products, but ongoing changes in management structure have made communication difficult so it is presently not clear what its operational and enforcement capabilities are.

<sup>49</sup>On major online shopping platforms, such as *Taobao.com*, *jd.com*, and *pinduoduo* (a mobile shopping app), more than 2000 sellers are selling an estimated 500,000 USB flash drives per month containing unlicensed music content, including 500 to 1000 tracks in a single flash drive.

## V. Full Implementation of the U.S.-China Film Agreement

China still has not implemented certain key provisions of the 2012 U.S.-China Film Agreement signed by then-Vice President Biden and then-Vice President Xi. Hailed as a “breakthrough,” the Agreement promised to economically uplift U.S. and Chinese producers and distributors.<sup>50</sup> Unfortunately, more than nine years after its signing, China has failed to meet its obligations under the Agreement.

As part of the Film Agreement, China committed that in 2017 it would make a meaningful increase to compensation for revenue sharing theatrical releases, as the current 25% U.S. share of revenue is far below comparable markets. Furthermore, the official quota on revenue sharing releases through the designated state-owned enterprises of 20-plus-14 (enhanced format) remains. However, review and additional compensation has never occurred, and China must be pressed to comply with its obligations. In addition, China has imposed artificial limits on market access for imported films, despite the huge increases in cinema screens in China since 2012, and the growing number of domestic productions, which were at an all-time high in 2019.<sup>51</sup> In the case of “flat fee films,” which are imported by private distributors outside of the box office revenue sharing quota system, China has enforced restrictions, including an unrealistically low informal cap on the number of these films that can be imported. Furthermore, China has retained governmental control of key elements of distribution, severely limiting the ability of private Chinese distributors to import and distribute any foreign content. These barriers virtually eliminated U.S. independent films from its theatrical marketplace with only 13 such films theatrically released in China in 2019, for 2.6% of the theatrical release slots, the lowest percentage of slots allocated for independent films recorded by IFTA.<sup>52</sup> U.S. producers who rely on private distributors and the payment of minimum guaranteed license fees to raise production financing and secure distribution have seen their licensing revenues plummet.

China further committed in the Agreement (and reconfirmed in commitments at the June 2015 S&ED) to promote and license privately-owned Chinese distributors to engage in national theatrical distribution of imported films without the involvement of any State-Owned Enterprise, including China Film Group (CFG) and Huaxia Film Distribution Company Ltd. This requirement has also not been implemented. The newly formed CFA, which replaced SAPPRT in 2018, still permits only one film importer (CFG) and two distributors of foreign films: CFG and Huaxia. While China affirmed in the Agreement that any properly licensed Chinese enterprise may distribute imported films, CFA has yet to approve any private Chinese distributors. CFG also still dictates the release dates and length of theatrical runs of foreign films, often restricting the ability of the U.S. producer to market and obtain the full value of the film.

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<sup>50</sup>According to a 2012 White House Press Release:

“This agreement with China will make it easier than ever before for U.S. studios and independent filmmakers to reach the fast-growing Chinese audience, supporting thousands of American jobs in and around the film industry,” said Vice President Biden, who spent the day in the Los Angeles area with Vice President Xi Jinping of China. “At the same time, Chinese audiences will have access to more of the finest films made anywhere in the world.”

See <https://obamawhitehouse.archives.gov/the-press-office/2012/02/17/united-states-achieves-breakthrough-movies-dispute-china>.

<sup>51</sup>IFTA Research and Analysis, “China Theatrical Market 2010–2019.” Data on the China theatrical market during the COVID 19 pandemic are not useful due to theaters closures, but all import and distribution obstacles for theatrical exhibition remain in place.

<sup>52</sup>*Id.*

IIPA recommends that China immediately take action on the following issues, which have been long delayed: 1) immediately and fully implement all the terms of the 2012 U.S.–China Film Agreement, including the requirement to enhance compensation in 2017, liberalize the distribution market for private third party Chinese distributors, and finalize a new MOU; 2) substantially increase U.S. producers' share of revenues for the box office revenue share films from the current 25% to a level consistent with international norms; 3) allow U.S. producers more control over release dates, address the problem of U.S. films being locked out from the prime release dates, and end the practice of “double booking” theatrical releases; 4) eliminate informal restrictions on the number of imported “flat fee” films so that independent producers have unimpeded access to the Chinese market; 5) further relax the quota for revenue sharing films and VOD products for online video websites so filmmakers and audiovisual companies may have substantially better access to the rapidly growing marketplace for films and TV in China; 6) ensure U.S. producers receive timely responses to quota allocations and content review determinations, and effective access to ticketing system information to ensure proper reporting of revenues; 7) do not delay or restrict film and TV imports for theatrical and online distribution through layers of a non-transparent content review system and unofficially-mandated genre-based limit; and 8) streamline the payment of deposits, guarantees, and royalties by local distributors to U.S. producers, and establish no regulation or policy that impedes the collection of license fees by American intellectual property owners.

## **VI. Conclusion**

IIPA appreciates this opportunity to provide USTR and the Trade Policy Staff Committee our views on China's compliance with its WTO commitments. As discussed above, the motion picture and television, music, publishing, and entertainment software industries continue to face significant challenges in China. It is critical that China fully implements its WTO obligations, including by dismantling the barriers that prevent U.S. creative industries from fully accessing the Chinese market and taking the necessary steps to adequately address China's growing piracy problems. We look forward to with you to meet the goals identified in this submission.

Respectfully submitted,

/Kevin M. Rosenbaum/

Kevin M. Rosenbaum  
Executive Director  
International Intellectual Property Alliance

ATTACHMENT

# CHINA (PRC)

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2021 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that USTR maintain China on the Priority Watch List in 2021 and that China be monitored under Section 306 of the Trade Act.<sup>1</sup>

**Executive Summary:** Supported by the largest Internet user base in the world, China's online marketplace continues to expand, and China now leads the world in cinemas with over 70,000 movie screens, most of which support 3D, and many of which offer enhanced formats such as IMAX and China Giant Screen. China is now the seventh largest music market, and the fourth largest music streaming market, in the world by revenue, and the largest market for video games, with revenues estimated to reach \$41 billion in 2020. Yet persistent and evolving piracy and growing market access concerns hamper, or block altogether, rights holders' ability to distribute copyrighted content and prevent rights holders from seeing their investments reach their full potential in China.

Serious problems in China include piracy applications (apps) and devices, piracy websites, unauthorized camcording, piracy on cloud storage services (e.g., *Baidu Pan*) and social media platforms (e.g., *Baidu Tieba*, *WeChat*, and *Weibo*), unlicensed content available on user-uploaded content (UUC) platforms (e.g., *Bilibili*, *Miaopai*), including short-video streaming websites (e.g., *Douyin*, *xigua*, *Kuaishou*), unauthorized distribution of journal articles, and the proliferation of thousands of "mini Video-On-Demand (VOD)" locations that show unauthorized audiovisual content. While several enforcement actions moved forward in 2020, including a successful criminal case against the piracy app *Daquian Vision*, criminal enforcement efforts generally remain stunted by burdensome evidentiary requirements (particularly application of the "server principle"), and high thresholds that are ill suited to effectively combat piracy in the digital environment. Civil litigation, even when successfully brought against blatant piracy services, is generally non-deterrent and insufficient, given the scale of the piracy problem and the limitations of civil litigation in China (e.g., lack of meaningful injunctive relief, relatively low per-title damage awards, and costly litigation procedures). The National Copyright Administration of China (NCAC), in cooperation with rights holders, continues to helpfully pursue administrative actions against certain online services that facilitate piracy, but these actions alone are not sufficient to meaningfully deter widespread online piracy. Overall, much more is needed to ensure China's online marketplace reaches its full potential for rights holders and licensed businesses, in the face of evolving piracy challenges.

In a positive development, China's recently passed amendments to its Copyright Law include the introduction of rights of broadcasting and public performance for producers of sound recordings, which are critical protections for the music industry; enforcement reforms, including a ten-fold increase in maximum "punitive" damages and the ability to shift the burden of proof to the accused infringer; protections for technological protection measures (TPMs), which enable digital trade of copyrighted works; and the elevation of certain elements of the three-step test into the law to appropriately confine exceptions and limitations. It is critical that the implementing measures, expected in 2021, meet global best practices and China's international commitments. A number of reforms, however, were not included in the amendments that remain necessary to bring the standard of copyright protection and enforcement in line with global norms and best practices and meet the challenges of the digital age. While China made some notable improvements to its enforcement framework in 2020, China should fully implement its commitments under the *Guidelines on Strengthening the Protection of Intellectual Property Rights (Guidelines)*, including to regulate websites to remove pirated materials, and under the Phase One agreement, including to make a meaningful increase in purchasing audiovisual products for VOD services, all of which would help address a number of the concerns raised in this report.

<sup>1</sup>For more details on China's Special 301 and Section 306 monitoring history, see previous years' reports at <https://iipa.org/reports/reports-by-country/>. For the history of China's Special 301 placement, see <https://iipa.org/files/uploads/2021/01/2021SPEC301HISTORICALCHART.pdf>.



China should eliminate the market access barriers highlighted in this report, including the prohibition against online publishing by foreign entities and foreign investment and ownership restrictions in the cultural and entertainment sectors, which exacerbate the piracy problem by impeding access to sought-after U.S. content. IIPA seeks further reforms and enforcement of China's existing obligations under the 2012 U.S.–China Film Agreement, which mandated review and additional compensation in 2017, to improve access for U.S. film producers to China's well-established theatrical film market, including increasing theatrical revenue share and allowing private Chinese distributors the ability to distribute films to cinemas without interference from state owned enterprises, or the imposition of unofficial quotas. Unfortunately, as detailed below, the ability of U.S. producers to compete in the Chinese marketplace for all audiovisual content continued to be curtailed during 2020, with licensing opportunities on all distribution platforms significantly hampered, through opaque regulations, obscure content review processes, and a “soft ban” on new or never released U.S. imports. This has effectively prevented access by U.S. producers to one of the largest consumer markets in the world. Building on the Phase One agreement's principles of reciprocity and national treatment, China should remove restrictions that have hindered market access of U.S. content.

## **PRIORITY ACTIONS REQUESTED IN 2021**

### **Enforcement:**

- Improve effectiveness of administrative enforcement, including by:
  - taking measures demonstrated effective in preventing or restraining infringement, including imposing sanctions that deter infringement;
  - imposing enhanced penalties against repeat infringers and infringers that make available massive amounts of infringing content and, where penalties have already been issued against an infringer, issuing penalties for subsequent infringements without requiring rights holders to issue a new complaint;
  - continuing to increase transparency (e.g., notifying rights holders of the results of administrative actions);
  - facilitating more efficient transfer of copyright cases between administrative and criminal authorities, making clear that such transfers are required upon “reasonable suspicion” that criminal thresholds are met; and
  - NCAC establishing a mechanism with Ministry of Industry and Information Technology (MIIT) and Internet service providers (ISPs) to shut down infringing sites operating without a business license (consistent with the *Guidelines*).
- Take further effective action, with increased transparency, against the online piracy ecosystem, including against:
  - piracy websites, whether operating from within or outside China, such as *dsdlove.com*, *dytt8.net*, *dy2018.com*, *dygod.net*, *ygdy8.com*, *gaoqing.la*, *mp4ba.com*, *btbt.co*, *piahua.com*, *vodxc.com*, *lbdly.com*, *yym3.com*, *musicool.cn*, *xh127.com*, *rrys.tv*, *5movies.to*, *btbtdy.net*, *92flac.com*, *sq688.com*, *51ape.com*, *2btbt.co*, *sudhd.tv*, *panduoduo.net*, *keyandi.com*, *bjhyx.com*, *xxswitch.com*, and *feilongshanzhuang.com*;
  - piracy facilitated through cloud based services that foster piracy, such as *Baidu Pan*, including by encouraging such services to provide prompt and consistent processing of takedown requests, apply rigorous filtering technology to identify infringing content, and take more effective action to suspend or terminate repeat infringers;
  - unauthorized content available on UUC platforms (e.g. *Bilibili* and *Miaopai*), including short video-sharing platforms (e.g., *Douyin*, *Kuaishou*, and *xigua*); and
  - apps such as *Tian Kian Kan*, and *Tian Lai K Ge*.
- Bring more targeted and deterrent enforcement actions, including criminal actions, with transparency, against:
  - the manufacture, distribution, and exportation of Piracy Devices (including against dedicated piracy apps);
  - the manufacture, distribution, and exportation of circumvention devices and software components;
  - unauthorized movie broadcasts in mini VOD locations;
  - unauthorized camcording;
  - unauthorized broadcasting of movies and music;

- services trafficking in, or providing access to, unauthorized copies of journal articles; and
- hard goods piracy (including against production and supply of high quality counterfeit books and optical discs, USB flash drives containing high volumes of infringing sound recordings, and video game machines containing hundreds or thousands of infringing video games).

### Legislation:

- Implement the copyright law amendments in line with international best practices and China's international commitments, including regarding broadcast and public performance rights for sound recordings, imposing "punitive" damages in line with the increased maximums, providing adequate and effective protections for TPMs, shifting the burden of proof to the accused infringer, and ensuring exceptions and limitations to copyright protections comply with the three-step test.
- Enact additional reforms to enhance the development of the creative industries in China, incorporating changes recommended by IIPA and member associations in various past filings including, in particular:
  - ensuring a remedy against apps facilitating infringement (especially where infringing content is hosted remotely), including by rejecting the "server principle";
  - prohibiting unauthorized Internet retransmission of live broadcasts;
  - clarifying that only passive and neutral intermediaries that do not contribute to infringing activities are eligible for the safe harbors from monetary liability;
  - providing a term of protection in line with the international trend;
  - implementing the *Guidelines*, which include important measures to improve copyright protection and enforcement, including lowering criminal thresholds, streamlining evidence processes, establishing a blacklist of repeat infringers, and regulating websites to "remove infringing content, block or disconnect pirated website links, [and] stop the dissemination of infringing information";
  - revising the 2011 Criminal IPR Opinions to enable more effective and more frequent criminal investigations and prosecutions;
  - revising the criminal threshold to ensure deterrent-level criminal penalties are available against all instances of commercial scale piracy (consistent with the *Guidelines*);
  - separately defining criminal violations regarding circumvention of TPMs or trafficking in circumvention products, including devices and software components; and
  - Consistent with the *Guidelines*, providing a legal basis for no-fault injunctions against ISPs in copyright cases, including against access providers, requiring them to stop providing access to unlicensed copyrighted content in cases where the content is hosted outside of China or where the identities or locations of the website owners are unknown.
- Ensure proper implementation of the e-commerce law, including ensuring that implementation of Article 43 does not result in sellers of infringing products avoiding responsibility by merely objecting to rights holders' notices of infringement.

### Market Access:

- Take action on the following long-delayed issues to improve the marketplace for U.S. films and TV programs: 1) immediately and fully implement all the terms of the 2012 U.S.–China Film Agreement, including the requirement to enhance compensation in 2017, liberalize the distribution market for private third party Chinese distributors, and finalize a new MOU; 2) substantially increase U.S. producers' share of revenues for the box office revenue share films from the current 25% to a level consistent with international norms; 3) allow U.S. producers more control over release dates, address the problem of U.S. films being locked out from the prime release dates, and end the practice of "double booking" theatrical releases; 4) eliminate informal restrictions on the number of imported "flat fee" films so that independent producers have unimpeded access to the Chinese market; 5) further relax the quota for revenue sharing films and VOD products for online video websites so filmmakers and audiovisual companies may have substantially better access to the rapidly growing marketplace for films and TV in China; 6) ensure U.S. producers receive timely responses to quota allocations and content review determinations, and effective access to ticketing system information to ensure proper reporting of revenues; 7) do not delay or restrict film and TV



imports for theatrical and online distribution through layers of a non-transparent content review system and unofficially-mandated genre-based limit; and 8) streamline the payment of deposits, guarantees, and royalties by local distributors to U.S. producers, and erect no regulation or policy that impedes the collection of license fees by American intellectual property owners.

- Open key elements of the entertainment and cultural sectors to foreign investment, particularly regarding film and TV production and distribution companies, and online video game services; reconsider the Negative Investment List, Online Publishing Rules as well as other measures prohibiting foreign involvement in online publishing activities, and allow distribution of audiovisual content on online video platforms where the distributor has received a home entertainment permit from the former General Administration of Press and Publication (GAPP); implement the Beijing 3 Year Action Plan to liberalize online video game services and expand such pilot programs to the entire country; State Administration of Press and Publication (SAPP) should increase the number of approvals for foreign video games to match the number of domestic approved video games; revoke all other measures—including the 2014 Notice on Further Implementation of Provisions Concerning the Administration of Online Foreign Films and TV Dramas, Notice and Measures on Administration of Online Foreign Films, the Statement and Rules on Importing TV Formats, and content approval regulations for mobile video games—that discriminate against foreign content by imposing requirements such as registration, onerous, opaque, and *de facto* discriminatory content review procedures, restrictions on foreign content on broadcast, pay-TV, and online video, and strict quotas on foreign films and television programming, with further limitation by genre-basis; adopt a voluntary, age-based classification system to help eliminate disparate treatment of U.S. content and ensure that China's content review process is transparent, predictable, and expeditious; abandon efforts to extend China's burdensome content review regime to books printed in China but otherwise intended for distribution in other markets; and abandon the slew of proposals that discriminate against U.S. producers and distributors of creative content, including the recent proposals by China's National Radio and Television Administration (NRTA) for further regulating the production and distribution of foreign audiovisual content.

## **CHINA'S ONLINE MARKETPLACE AND COPYRIGHT PIRACY UPDATES**

China's expanding online marketplace provides consumers with access to a vast array of legitimate music, video games, movies, TV programming, and other works available through an increasing number of licensed digital services. Chinese companies are investing heavily in content and media, with greater numbers of co-productions and financing from China. The seventh largest music market in the world, the music industry estimates that in 2019 Chinese consumers spent almost 18 hours listening to music each week, with nearly three-quarters of that engagement through social media sites or apps.<sup>2</sup> Yet serious piracy concerns persist. The music industry reports that 74% of Internet users in China admitted to downloading pirated music in the previous month, with stream-ripping from unauthorized content on UUC sites a particular problem. The COVID-19 pandemic exacerbated China's online piracy challenges in 2020, resulting in substantially increased Internet traffic to both legitimate sites as well as known piracy websites. Prior IIPA submissions in the Special 301 docket, as well as IIPA filings in WTO compliance reviews and other fora, have provided detailed accounts of the many piracy and enforcement challenges and issues in China. This year's Special 301 filing serves as a supplement to those, and is not meant to provide an exhaustive review of all issues.<sup>3</sup>

**Evolving Online Piracy Remains Serious:** Online piracy in China—including illegal downloading and streaming of IIPA members' copyright content through piracy websites, apps, and devices—has evolved extensively in recent years, and remains a significant concern. For example, in 2019, China ranked 25<sup>th</sup> in the world in number of connections by peers participating in the unauthorized file-sharing of select video game titles on public peer-to-peer (P2P) networks, and, according to this same metric, 21<sup>st</sup> in the world for mobile game titles. Contributing to the problem, many online services financially benefit from broad ISP safe harbor rules, allowing such services to avoid seeking

<sup>2</sup>See IFPI Music Listening in 2019, P23, available at <https://www.ifpi.org/wp-content/uploads/2020/07/Music-Listening-2019-1.pdf>.

<sup>3</sup>See, e.g., IIPA's 2020 Special 301 submission on China ("IIPA 2020"), available at <https://www.iipa.org/files/uploads/2020/02/2020SPEC301CHINA.pdf>; IIPA, *China's WTO Compliance – "Request for Comments Concerning China's Compliance With World Trade Organization (WTO) Commitments"* (85 Fed. Reg. 50864, August 18, 2020), September 16, 2020, available at <https://www.iipa.org/files/uploads/2020/09/2020-09-16-IIPA-Comments-on-Chinas-WTO-Compliance.pdf>; IIPA *Written Submission in Response to: 2020 Review of Notorious Markets for Counterfeiting and Piracy: Comment Request*, 85 Fed. Reg. 62006 (October 1, 2020), November 20, 2020, available at [https://www.iipa.org/files/uploads/2021/01/IIPA\\_2020-Notorious-Markets.pdf](https://www.iipa.org/files/uploads/2021/01/IIPA_2020-Notorious-Markets.pdf).

licenses to the copyrighted material available on their platforms. As discussed below, a more holistic enforcement response is needed to effectively combat the entire online piracy ecosystem, which poses the greatest threat to the continued growth of legitimate businesses in China.

Piracy websites remain a major concern, including illegal download sites; P2P piracy sites; deep linking sites; “hybrid” sites, such as *3dmgame.com*, which offer both hosting and torrenting services; cyberlockers; BitTorrent indexes, trackers, or clients; forums; streaming sites; social media websites; and online marketplace/auction sites selling pirated goods, Piracy Devices, circumvention devices, high quality counterfeits, USB flash drives containing a high volume of infringing sound recordings, and video game machines containing hundreds or thousands of infringing video games. Notorious piracy sites that disrupt the music and audiovisual marketplaces include *rrys.tv*, *5movies.to*, *btbtdy.net*, *92flac.com*, *sq688.com*, *51ape.com*, *2btbtt.co*, *subhd.tv*, *dsdlove.com*, *dytt8.net*,<sup>4</sup> *dy2018.com*, *dygod.net*, *ygdy8.com*, *gaoqing.la*, *mp4ba.com*, *btbtt.co*, *piaohua.com*, *vodxc.com*, *lbdly.com*, *yyp3.com*, *musicool.cn*, *xh127.com*, *panduoduo.net*, *bjhyx.com*, *xxswitch.com*, and *feilongshanzhuang.com*. An increasing number of pirate sites use CK Player, an online media player that facilitates infringement of audiovisual content, including video games. The video game industry reports that three popular Chinese websites largely ignore takedown requests: *bthaha.bizz*, *ciligou.top*, and *btdoor.cc*. Short video-sharing platforms, such as *Douyin*, *Kuaishou*, and *xigua*, have become a means for piracy of popular movies, television series, and video games. Users break up the content into short videos and distribute them on these platforms.

Piracy over cloud storage services is also causing significant problems in China. Large quantities of infringing content are stored on cloud storage service services, such as *Baidu Pan*, with links to the content disseminated through popular Chinese social media platforms and piracy linking sites.<sup>5</sup> Given its market dominance, it is critical that Baidu cooperate fairly and transparently with rights holders and put in place rigorous content protection standards and practices to set the right example for other Internet businesses in China. Instead, rights holders in China have been forced to bring legal actions against *Baidu Pan* for facilitating infringement.<sup>6</sup> Unfortunately, Baidu’s services continue to be used for piracy and their notice and takedown system remains ineffective.<sup>7</sup> China’s government should encourage Baidu to do more, including improving implementation of its takedown tools, applying rigorous filtering technology to identify infringing content, and taking more effective action to suspend or terminate repeat infringers to ensure infringing content and links are removed expeditiously.

A significant problem for the video game industry is “plagiarism,” or “game cloning.” This form of infringement, which is rampant in China, refers to the unauthorized copying of important game elements, including underlying gameplay rules, user interfaces, maps, and/or categories of weapons/skills, without copying key character images soundtracks and voices. The video game industry is encouraged by two recent judicial decisions—*Blizzard & NetEase v. 4399* by Shanghai Pudong District Court and *Suzhou Snail Digital Technology Co. Ltd. v. Beijing Aiqiyi Technology Co., Ltd. and Chengdu Tianxiang Interactive Technology Co., Ltd.* by the Jiangsu High Court—finding infringement

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<sup>4</sup>USTR identified *Dytt8.net* in its 2020 Review of Notorious Markets for Counterfeiting and Piracy (January 2021), available at [https://ustr.gov/sites/default/files/files/Press/Releases/2020%20Review%20of%20Notorious%20Markets%20for%20Counterfeiting%20and%20Piracy%20\(final\).pdf](https://ustr.gov/sites/default/files/files/Press/Releases/2020%20Review%20of%20Notorious%20Markets%20for%20Counterfeiting%20and%20Piracy%20(final).pdf) (“2020 Notorious Markets Report”). *Dytt8.net* receives around 9.5 million visits per month, and is ranked 480 on Alexa and 328 on SimilarWeb. The site, which uses a user-friendly interface to provide direct links to third party storage providers, remains a particular threat to legitimate services both within and outside of China.

<sup>5</sup>USTR identified *Baidu Pan* in its 2020 Notorious Markets Report. Baidu is the most popular search engine in China with over 75% of the market, and the second largest search engine in the world by user base.

<sup>6</sup>In 2018, a local stakeholder, Sohu, won a first-instance lawsuit against *Baidu Pan* for indirectly facilitating copyright infringement of third parties, but that decision was overturned on appeal in January 2020. The Supreme People’s Court (SPC) accepted Sohu’s application for retrial and is reviewing the case. Sohu has filed two additional cases against Baidu for copyright infringement of additional licensed content. In 2017, Youku sued *Baidu Pan* over the unauthorized availability on the service of a popular local television drama series, prevailing in a first instance case heard by the Beijing Haidian District People’s Court. An appeal is pending at the Beijing Intellectual Property Court, and may depend on SPC’s decision in the Sohu retrial. The Chinese affiliate of a Hong Kong television station, TVB, filed suit against Baidu for copyright infringement, losing a first instance case in the Guangzhou Tianhe District People’s Court, but prevailing on appeal at the Guangzhou Intermediate People’s Court.

<sup>7</sup>Takedown rates on Baidu’s services are inconsistent and removal of infringing links can take too long (from one day for one of its services to as long as 15 days for another). Moreover, rights holders must send up to thousands of infringement notices for a single piece of infringing content proliferating on *Baidu Pan* because of its enormous size.

against entities engaged in plagiarism of video games. As discussed below, China needs to enhance its enforcement framework to effectively address this problem.

The piracy app ecosystem, which facilitates piracy on a range of devices (including mobile and handheld devices and televisions), remains a serious concern. Apps that aggregate infringing content hosted on remote servers are proliferating and there remains legal uncertainty regarding the “server principle.”<sup>8</sup> China is a leading manufacturer of media hardware and accessories that can be modified to support the installation of third-party, pre-loaded, or post-purchase infringing apps, allowing users to access pirated content (i.e., Piracy Devices).<sup>9</sup> A prominent example is the “Ubox,” which is manufactured and distributed by Unblock Tech (unblocktech.com).<sup>10</sup> Android devices allow third-party app distribution and installation, enabling users to download free apps onto their devices to access infringing content by bypassing the major app stores altogether.<sup>11</sup> Many third-party app stores carry a multitude of piracy apps, which are generally not subject to enforcement action because new ones are constantly emerging, making it very difficult for rights holders to effectively monitor the vast landscape of third party stores.<sup>12</sup> An example of such an app is *Tian Kian Kan*, which facilitates infringement of audiovisual content. There are also Chinese-developed or operated apps that target foreign music markets. An infringing Karaoke app that is extremely popular in China and Hong Kong is *Tian Lai K Ge*. China must do more to combat the growing threat of the app piracy ecosystem.

Online streaming of pirated content is a growing concern for the music, film and television, and video game industries. Some music streaming services, including *yym3.com*, were hosted in China but now use a U.S.–based reverse proxy service to obscure their locations and have stopped responding to takedown request notices. Other sites, such as *666c.com*, have begun to adopt the same strategy. Infringement of music videos is also a problem for the music industry.

Licensed streaming and digital piracy compete side by side in China, with nine in ten Internet users consuming licensed audio streaming and nine in ten users engaging in piracy. In recent years, music piracy has shifted primarily to streaming of pirated content, including short videos, from UUC sites (such as *weibo.com*, *miaopai.com*, and *bilibili.com*); but more traditional music piracy, including illegal downloads through cyberlockers (such as *Baidu Pan*),<sup>13</sup> domestic and international P2P sites (such as *ThePirateBay* and *Nyaa*), forums, and streaming sites, remains a problem. As discussed below, the misapplication of safe harbors from monetary liability to UUC sites that are not neutral or passive intermediaries has contributed to the proliferation of unlicensed music content available for streaming on UUC sites. The music industry reports that the takedown rate of infringing links is high; however, infringing content reappears quickly as there is no requirement for UUC sites and other hosting providers to ensure this content stays down permanently.<sup>14</sup> There is hope that new regulations issued by the Cyberspace Administration of China (CAC), the Ministry of Culture and Tourism, and the National Radio and Television Administration to strengthen the responsibility of ISPs to review and manage UUC will be helpful in combatting online piracy.<sup>15</sup>

**Book and Journal Piracy:** The problem of online journal piracy remains a significant challenge. The unfortunate lack of deterrence in the marketplace allows entities engaged in providing unauthorized access to journals to continue to operate.<sup>16</sup> Several online platforms that facilitate access to unauthorized copies of journal articles and

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<sup>8</sup>Certain Chinese IP judges have unfortunately embraced the “server principle,” interpreting current law to require that infringement only occurs when the infringing content resides on the server or device of the operator of the app.

<sup>9</sup>IIPA has provided extensive information on Piracy Devices in prior reports. See, e.g., IIPA 2019 at 19.

<sup>10</sup>Ubox runs on Android and incorporates P2P technology as well as branded apps to enable access to pirated VOD and live channel content. It appears that Unblock Tech has more than 500 agents and distributors worldwide, and sellers and users of the device can be found across Asia Pacific, Europe, and the U.S. and Canada. Unblock Tech’s set top boxes have continued to be among the most popular in the Asia Pacific region, particularly for Chinese speaking users.

<sup>11</sup>The Google Play Store is not officially available in China.

<sup>12</sup>Piracy apps are sometimes advertised and distributed through traditional websites that provide a portal allowing users to download the app to their devices. App operators may also advertise and distribute their apps through bulletin boards, social media, or other chat functions through apps.

<sup>13</sup>Three cyberlockers continue to provide for file sharing in China: *pan.baidu.com*, *ctdisk.com*, and *115.com*.

<sup>14</sup>From January to November 2020, 261 notices with 13555 links were sent to Baidu, and all were removed.

<sup>15</sup>Regulations on the Administration of Online Audio and Video Information Services, which came into effect on January 1, 2020.

<sup>16</sup>Although the *KJ Med* entity has been defunct for some years, a number of similar entities engaged in providing access to unauthorized copies of journal articles and other reading materials have emerged in China over the last few years. None of these unauthorized services has been effectively shut down, despite referrals to enforcement authorities.

academic textbooks, including *syyyj.com*, *Keyandj*,<sup>17</sup> *UReader*, and *Baidu Paperhelp*, continue unhindered. These platforms host unauthorized pdf copies of academic monographs, edited collections, and textbooks. They also facilitate access to infringing content online in a number of other ways, including by providing users with search tools, through the use of Internet bots, and by bypassing TPMs to gain unauthorized access to legitimate online services. It remains the case that administrative enforcement measures appear to have no lasting impact. For example, in 2017, the Beijing Copyright Enforcement Department issued an administrative penalty against the *UReader* entity, but the platform re-emerged, although it now infringes titles that were not the subject of the prior action.<sup>18</sup> Absent the filing of a new complaint, the enforcement authorities are not inclined to take further action against the platform, which, as a repeat infringer, is acting in direct contravention of the previous finding of illegal conduct.

It remains the case that pirated print publications and compromised log in credentials continue to be widely available on e-commerce sites, which also serve as platforms through which producers of pirated and counterfeit textbooks advertise and sell the illegal products to overseas buyers. In part due to China's inadequate online enforcement framework, sending notifications of infringement to remove these products remains unduly complicated.<sup>19</sup>

**Circumvention Devices:** As the world's leading manufacturer, producer, supplier, and exporter of video game circumvention devices and software components, China drives significant amounts of online video game piracy around the world. Game copiers or modification chips are devices commonly used to bypass TPMs in a video game console in order to download and play infringing video games on "modded" consoles. These devices allow infringing games distributed over the Internet to be played on handhelds or consoles. The harm they cause is not limited to console makers because almost all games developed for play on consoles, including those developed and published by third parties, can be illegally downloaded from the Internet. These devices are sold by thousands of vendors in webshops and online marketplaces, and constant monitoring and scrutiny is required to achieve a modicum of enforcement. More targeted and transparent enforcement actions, and deterrent-level criminal sanctions and penalties against the manufacturers, suppliers, and exporters of circumvention devices and software components are necessary to meaningfully stem the downloading of infringing video games.

**Unauthorized Camcording Remains a Problem:** China remains a source of illicit camcording in the region, though in 2020 there was a notable decrease in illicit camcording in China and globally because of theater closures and the delay in releasing many films due to the pandemic. In general, the quality of camcorded films from China has improved over the years, threatening the legitimate theatrical and home entertainment markets.<sup>20</sup> Live-streaming of theatrical broadcasts of films online is a growing concern. In 2020, several Chinese courts handed down criminal sentences for illegal camcording, including to members of a major piracy syndicate, to a cinema manager who made camcords and sold them to mini-VOD cinemas, and to a cinema employee and an accomplice for selling illegal camcords to major piracy websites.<sup>21</sup> A more comprehensive solution requires enactment of a specific criminal law against using, or attempting to use, an audiovisual recording device to make or transmit a copy, in whole or in part, of audio and/or video of a cinematographic/audiovisual work, from a performance in an exhibition facility. Further, as discussed below, to address live-streaming, the Copyright Law should be revised to prohibit the unauthorized retransmission of content online. In addition, the Chinese government, theater owners, and others associated with the

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<sup>17</sup>*Keyandj* is an online entity that makes illegal profits by providing English e-books for download without publisher authorization and charging a membership subscription fee or a fee for each download by a user. The content on the *Keyandj* site appears to have migrated to a new site, [www.bbs.keyanmi.com](http://www.bbs.keyanmi.com), and the relationship between these two entities is unclear.

<sup>18</sup>In June 2017, following a referral by the publishing industry, the Beijing Copyright Enforcement Department took down the *UReader* platform, finding it was infringing, and imposing a fine of RMB 400,000 (US\$58,000).

<sup>19</sup>An e-commerce site that proved the exception was *DHgate.com*. Following its inclusion in USTR's 2017 Out-of-Cycle Review (OCR) of Notorious Markets, the site worked with publishers to address the sale of infringing copies of textbooks on the platform.

<sup>20</sup>During 2019, a total of 29 camcords (13 audio and 16 video) were forensically matched to cinemas in China, compared to 24 camcords (11 audio and 13 video) in 2018. The 2020 camcord statistics are anomalous due to the widescale closure of theaters due to the COVID-19 pandemic.

<sup>21</sup>As we reported last year, in 2019, Yangzhou Police of Jiangsu Province broke up a film piracy syndicate, and seized a cloned server dubbed "phantom number one" (No. A15591). In September 2020, the Yangzhou Intermediate People's Court found four principal defendants criminally liable for copyright infringement, and issued custodial sentences ranging from four to six years, as well as fines. Also in 2020, the Court of Huishui County issued a fine and a two-year prison sentence against a cinema manager who made camcords at Haohuahong Cinema, Huishui County, Guizhou Province, and sold them to mini-VOD cinemas. In August 2020, the court of Pingluo County sentenced an employee of the Golden Phoenix Cineplex Pingluo, Shizuishan City, Ningxia Hui Autonomous Region and an accomplice for using a theater surveillance camera to camcord new release films, including "Avengers: Endgame," "Captain Marvel," and "Shazam!," and selling the camcorded copies to pirate websites, including [www.415.net](http://www.415.net), [80ys.net](http://80ys.net), [90sdyy.com](http://90sdyy.com), and [tqys.net.cn](http://tqys.net.cn).

chain of theatrical distribution of films must make still stronger efforts to deter unauthorized camcording under current law.

**Pirate/Counterfeit Books and Hard Goods, Including for Export, Remain a Concern:** The copyright industries continue to report piracy of hard goods, which harms both the domestic and foreign markets. Production of pirate/counterfeit textbooks, consumer books, and trade books remains a concern, with, in particular, unauthorized children's books and academic textbooks marketed and sold through e-commerce sites, including into foreign markets. China remains an export center for pirate music CDs as well, feeding the global market with an onslaught of illegal copies of foreign and Chinese music products, including High Quality Counterfeit (HQC) box sets of music content, often through popular Chinese and international e-commerce platforms. China must implement an effective, non-burdensome program to stop and prevent future production and supply of HQC optical discs.<sup>22</sup> Online sales of USB flash drives containing high volumes of infringing sound recordings have become a growing concern, particularly since these flash drives are exported to other Asian markets, including Taiwan and Hong Kong.<sup>23</sup> Video game machines, originating from China, containing hundreds or thousands of infringing video games have been seized by customs agencies around the world and found in kiosks and shopping malls in many countries.

**Unauthorized Mini-VOD Locations:** Regulations on mini-VOD cinemas and chains entered into force in March 2018, but an estimated 14,000 of these entities are still operating in different cities across China without proper licenses, and are routinely screening U.S. content without authorization. In early 2019, China's investigation of four illegal camcording syndicates revealed that most illegal camcordered copies were destined for mini-VOD theaters. In August 2019, the China Film Administration (CFA) clarified that mini-VOD cinemas and chains are "entertainment premises" and, therefore, must license rights for theatrical screening, not for online VOD. Instead of legitimizing the operations of these facilities, China should severely penalize or shut down these businesses if they violate the copyright law. A related problem is that Chinese entities that contract for the rights to distribute film and television content in various home video formats often ignore the differentiation between rights for home use and those for public use. As a result, U.S. content is frequently used for unauthorized public performances.<sup>24</sup>

## **ENFORCEMENT UPDATES IN CHINA**

As highlighted in past filings, in recent years China has increased its enforcement efforts, contributing to improved protection and development of the legitimate marketplace for some creative sectors; but these actions, while helpful, are not enough to deter widescale piracy. China's growing Internet user base creates opportunities for rights holders; but China's enforcement deficiencies, including application of the "server principle" and broad interpretation of ISP safe harbor rules, as well as an historic toleration for piracy, have kept the creative marketplace from reaching its potential, and have hampered the development of legitimate services.<sup>25</sup> In 2020, the impact of the COVID-19 pandemic strained China's enforcement resources and hindered the progress of investigations in China. IIPA is hopeful that China will fully implement commitments under the Phase One agreement to improve its enforcement framework, which would make progress on some of the concerns identified below.

**Administrative Actions Helpful, But Insufficient:** China has been operating its annual "Sword Net" anti-piracy campaign for 15 years. While those administrative enforcement campaigns have been important, notably following NCAC's 2015 Notice requiring online storage service providers to take proactive measures to prevent users from uploading copyright infringing content, the campaigns on their own are not enough to deter widescale piracy.<sup>26</sup> The 2020 campaign, which was delayed from April until June due to the COVID-19 pandemic, included a focus on a

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<sup>22</sup>Shenzhen Optical Media Lab has previously worked with rights holders to help identify the source of seized products, but on going changes in management structure have made communication difficult so it is presently not clear what its operational and enforcement capabilities are.

<sup>23</sup>On major online shopping platforms, such as *Taobao.com*, *jd.com*, and *pinduoduo* (a mobile shopping app), more than 2000 sellers are selling an estimated 500,000 USB flash drives per month containing unlicensed music content, including 500 to 1000 tracks in a single flash drive.

<sup>24</sup>One example is that some Chinese pay-TV operators or digital licensees distribute U.S. content to hotels for public viewing.

<sup>25</sup>It is important to understand the broader context in which U.S. creative industries operate in China. In addition to causing exceedingly low licensing revenues, this market failure compounds current enforcement challenges in China because, for example, compensatory damages are calculated at inordinately low levels, and numerical and monetary thresholds triggering criminal liability remain difficult to reach and are not high enough to encompass all "commercial scale" piracy.

<sup>26</sup>For a summary of recent Sword Net campaigns, see prior IIPA China country reports (e.g., IIPA 2020 at 21).

number of priorities primarily focused on combatting various forms of online infringement.<sup>27</sup> While China has stated an intention to increase administrative enforcement efforts, penalties remain low and, unless the source of the piracy can be definitively established to be located in China, are unlikely to be imposed.

**Identifying Infringers Problematic:** It is often very difficult to identify those responsible for piracy sites because many infringers use fake registration information to register their websites.<sup>28</sup> These rogue services effectively cannot be sued. The NCAC should establish a mechanism with MIIT and ISPs to shut down infringing sites operating without a business license, and the government should, consistent with the *Guidelines*, take immediate steps to guide and regulate management of all types of websites to “remove infringing content, block or disconnect pirated website links, [and] stop the dissemination of infringing information.”

**More Sustained, Holistic Enforcement Approach Needed:** Even when it is possible to identify piracy operations, rights holders attempting to enforce their rights are stymied by: burdensome evidentiary procedures slowing and/or hindering case development (including rigid formality requirements for evidence originating from outside of China and restrictions on foreign investigations in China); high costs; often high burdens of proof (notwithstanding the recent Copyright Law amendments and ancillary regulations intended to address this problem); and political influences that make it difficult to seek enforcement against highly-connected individuals and risky for foreign rights holders to seek enforcement actions in an environment of limited commercial opportunities for them (discussed below in the Market Access section). When these challenges can be overcome, civil suits can be helpful.<sup>29</sup> But even when successfully litigated, civil suits are ultimately insufficient to address major piracy problems because damages are awarded on a per-title basis and are relatively low and non-deterrent due also to the general difficulty of obtaining injunctive relief, while civil litigation costs are high for rights holders, especially foreign ones.<sup>30</sup> In a positive development, in April 2020, the Higher People’s Court of Guangdong Province released (Interim) *Guidelines for Adjudicating Civil Intellectual Property Rights Dispute Cases Concerning Online Video Games* to bring more predictability and establish criteria for granting preliminary or interim injunctions in such cases.<sup>31</sup>

Criminal enforcement is inadequate mainly because criminal thresholds are too high.<sup>32</sup> Nevertheless, several criminal enforcement actions are currently pending or were successfully concluded in 2020.<sup>33</sup> In one notable example,

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<sup>27</sup>The National Copyright Administration of China (NCAC), the Cyberspace Administration of China (CAC), the Ministry of Public Security (MPS), and the Ministry of Industry and Information Technology (MIIT) launched the official 2020 Sword Net campaign. According to the official announcement, the campaign focuses on the following five priorities: enforcement against piracy of audiovisual works, especially online streaming; piracy on e-commerce platforms, particularly against large-scale e-commerce platforms; enforcement against piracy on social media platforms; enforcement against unauthorized online education content; and enhanced protection and enforcement in focused fields, including online gaming, music licensing, and piracy on large-scale online platforms, including regarding literature, animation, cyberlockers, app stores, and online advertising.

<sup>28</sup>All websites in China must register with *milbeian.gov.cn*, and the owners of websites can be identified through searches using their registration numbers, domain names, IP addresses, or “Whois” data.

<sup>29</sup>A number of notable civil suits are ongoing or were concluded in 2020. For example, Youku sued both Shanghai Zhong Duo Mei Network Technology Co. Ltd. and its wholly controlled company Wuhan Image network Technology Ltd. for copyright infringement of five foreign drama series, including series from Korea and Thailand, licensed to Youku. The case is pending. In addition to the two cases involving plagiarism of video games discussed above, another case involving video games was concluded in 2020: the Guangzhou Internet Court found a video sharing platform streaming game-play videos of Tencent’s video game King of Glory constituted copyright infringement, holding that game-play graphics and videos are within the scope of copyrightable content created by means similar to cinematography.

<sup>30</sup>As previously reported, the motion picture studios prevailed in a lawsuit (originally filed in January 2015) against Shenzhen Xunlei Networking Technologies Co. (Xunlei) for infringement of 28 studio titles. Xunlei withdrew its appeals and paid the civil damages awards plus costs of nearly US\$250,000. As indicated above, Xunlei continues to run a service called Thunder, through which unauthorized motion picture and television content remains available in and outside China. Xunlei has been sued multiple times for copyright infringement by various stakeholders, but low damage awards and lack of meaningful injunctive relief hinder the effectiveness of civil enforcement against Xunlei and other platforms that facilitate piracy.

<sup>31</sup>While these guidelines only apply to courts in Guangdong province, over 10,000 video game companies, accounting for about 75% of national revenue for the whole industry, are located there, and the guidelines will apply when any of these companies file or defend IP cases involving video games. In addition, courts in Guangdong province, which heard about 28% of all IP cases involving video games in 2019, have more experience than other Chinese courts with IP cases involving video games; as a result, the guidelines will likely also be considered authoritative by courts located outside Guangdong.

<sup>32</sup>Currently, in cases of Internet piracy, the criminal threshold of “500 copies” is interpreted as 500 *titles*. As a result, a single television episode is not considered a “title”; rather an entire season or even all seasons of a television program are calculated as a single title. However, for local rights holders, authorities have recently been more flexible with this threshold or have used a 50,000-click threshold (or a combination of thresholds under the Criminal Law and judicial interpretations) to bring criminal enforcement actions against piracy websites that clearly have high visitations or piracy apps that clearly have huge numbers of downloads.

<sup>33</sup>For example, since late 2018, the Tianjin Cultural Task Force and Tianjin Police have investigated a case in Zhuhai City, Guangzhou Province involving the illegal replication of pirate DVDs for distribution within China and export to the U.S., Canada, Europe, and Australia. The police have arrested 24 suspects and seized one master production line, 11 optical disc replication lines, 7 printing machines, and 500,000 pirate DVDs (including 130,000 DVDs infringing the copyrights of major motion picture studios). In July 2020, the police of Shanghai Jing’an District raided Shanghai Sigan Network Technology Co., Ltd., the operator of pirated

a case against the piracy app *Daquian Vision* resulted in criminal fines and imprisonment against the operators.<sup>34</sup> Another welcome development is that China has created a dedicated criminal department within the Ministry of Public Security (MPS), the Food and Drug Crime Investigation Department (FDCID), tasked with, among other things, the investigation and prosecution of all IPR cases. It is hoped that this will lead to enhanced administrative and criminal enforcement.

To improve enforcement against Internet piracy, IIPA urges the Chinese government to undertake the following measures:

- Adopt further reforms to the Copyright Law (as detailed below) and follow through on implementation of the *Guidelines* to improve the legal framework to meet the challenges of copyright enforcement in the digital environment, including to guide and regulate management of all types of websites to “remove infringing content, block or disconnect pirated website links, [and] stop the dissemination of infringing information.”<sup>35</sup>
- Adopt reforms that address shortcomings in China’s Criminal Law that IIPA has identified in previous reports.<sup>36</sup> In particular, China should meet its obligations in the WTO TRIPS Agreement by revising the criminal threshold to ensure that criminal penalties are available for all online piracy on a “commercial scale” (which is addressed in the *Guidelines*),<sup>37</sup> and separately defining criminal violations regarding circumvention of TPMs or trafficking in circumvention technologies.
- Ensure prompt transfer for criminal investigation and prosecution.
- Issue deterrent-level civil and criminal penalties against operators of piracy websites that make available a massive amount of infringing content.
- Enhance transparency of administrative enforcement, including by providing rights holders with information regarding the process and the results of administrative actions.
- NCAC should establish a mechanism with MIIT and ISPs to shut down infringing websites operating without a business license.
- Ensure that an effective remedy exists against apps, websites, or services that facilitate copyright infringement, even if the infringing materials are located on remote servers (i.e., reject the “server principle”).
- Provide a full range of injunctive relief for civil enforcement, including injunctions against intermediaries, and ensure courts enforce injunctions in a timely manner, including simple and expeditious orders of contempt for failure to comply. Injunctions should be available against ISPs in copyright cases, including against access providers, requiring them to stop providing access to unlicensed copyrighted content that has been subject to administrative law enforcement action, but remains available.

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app *Diyidan*, which, according to the police, has disseminated over 20,000 episodes of infringing audiovisual materials from which the operators have collected membership fees of RMB 9.92 million and advertisement fees of RMB 24.26 million, for total illegal gains of RMB 32.18 million (US\$4.94 million). Of the 35 people detained in the raid, 22 criminal suspects have been arrested: 16 for criminal copyright infringement and 6 for criminal copyright infringement and facilitating criminal activities on an information network. The case has been transferred to the Jing’an District People’s Procuratorate. On July 10, the police of Shanghai Minhang District arrested four operators of a piracy website, [www.dilidili.com](http://www.dilidili.com), which has provided pirated Japanese animation since 2015. Criminal cases regarding video games mostly involve illegal gambling relating to video card games, with a minority of cases involving unauthorized private servers and plug-ins.

<sup>34</sup>In 2019, the motion picture industry referred *Daquian Vision*, a mobile piracy app for pirating movies, to the NCAC, which referred the case to the Shenzhen Market and Supervision Administration (MSA) and local police for criminal investigation of the operator. Police executed a raid at the operators’ premises in January 2020, and the case was then transferred to the local procuratorate. In November 2020, the case was heard in the Shenzhen Nanshan District Court, which imposed a criminal fine on the company operating the app (Shenzhen Daquian Vision Cultural Media Co., Ltd) and meted out custodial sentences against four of its executives.

<sup>35</sup>See IIPA 2020 at 23 for additional information on the *Guidelines*, which were issued jointly by the Communist Party of China’s Central Committee (CPCCC) and the State Council. The *Guidelines* would, among other things, direct the government to revise the criminal law, including “lowering the threshold for criminal prosecution of IPR offenses” and “enhance punishment[s]” (Clause 2.1); standardize criteria of evidence, lighten rights holders’ burden in giving evidence, establish efficiencies in the notarization process, including bringing costs down, and establish “e-notarization” (Clauses 2.2, 2.4); issue a “judicial interpretation on evidence rules for IPR infringement in the civil justice system” (Clause 2.2); establish a “blacklist” of repeat infringers (Clause 2.3); and guide and regulate management of all types of websites to “remove infringing content, block or disconnect pirated website links, [and] stop the dissemination of infringing information” (Clause 4.10).

<sup>36</sup>See, e.g., IIPA 2017 at 15. China’s Ninth Amendment to its Criminal Law (“Ninth Amendment”) in 2015 failed to address the intellectual property provisions, but added a potentially helpful offense of “assisting criminal activities over information networks.” Implementation of this provision should be monitored closely to ensure it provides effective secondary liability for criminal copyright infringement. In late 2019, the Supreme People’s Court and the Supreme People’s Procuratorate issued an Interpretation, which entered into force in November 2019, defining the conditions for “knowing others are using information networks to perpetrate crimes.” It is unclear what practical impact this Interpretation will have.

<sup>37</sup>China should clarify that a single episode of a television program counts as one copy toward the threshold.

- Consistent with measures by the Supreme People’s Court (SPC) implementing the Phase One Agreement, streamline procedures for civil and criminal enforcement, including by reducing documentation requirements to establish copyright ownership and infringement, and ensuring timely enforcement of monetary damages.
- Revise the 2011 IPR Opinions<sup>38</sup> to enable more effective and more frequent investigation and criminal prosecution of online copyright infringement cases, including ensuring MPS prioritizes criminal investigations.
- Enhance expertise among police throughout the country to bring effective criminal piracy investigations. There is an urgent need in China for police investigators who have the technical understanding and expertise necessary to investigate online piracy cases.

## **COPYRIGHT AND RELATED LAWS AND REGULATIONS UPDATE**

Prior IIPA filings have documented in detail developments in the Chinese legal system for the protection of copyright, including copyright and criminal law reform efforts.<sup>39</sup> These reform processes, including the ongoing implementation of the Phase One agreement, provide important opportunities to update the legal regime in China for more effective copyright protection and enforcement.

### **Copyright Law Amendments Welcome, but Implementation is Critical and Further Reforms Needed:**

After years of IIPA and other stakeholders pressing for progress on amendments to the Copyright Law, in November 2020, the National People’s Congress (NPC) passed amendments that will enter into force in June 2021.

IIPA is pleased that the amendments include rights of public performance and broadcasting for producers of sound recordings. This critical reform is vital for the future of the music industry in China, including both foreign and domestic rights holders, reflecting that these traditional “secondary uses” have become critical aspects of core revenue for record companies as the industry has transitioned from sale of products to licensing of uses. Swift implementation of these new performance rights, including the appointment of an appropriate collecting society in accordance with international best practices and the establishment of tariffs reflecting the economic value of the use of the rights in trade is vital. The amendments also include some positive reforms, including increasing the maximum for “punitive” damages ten-fold<sup>40</sup> and shifting the burden of proof to the accused infringer upon a showing of *prima facie* evidence,<sup>41</sup> that will improve the enforcement environment in China. In addition, the amendments elevate certain elements of the three-step test (e.g., TRIPS Article 13) into the law to appropriately confine exceptions and limitations. China should implement all exceptions to and limitations on copyright protection in the Copyright Law to ensure these exceptions and limitations are appropriately narrow in scope and otherwise consistent with the three-step test.

IIPA is also encouraged that the amendments include protections against the circumvention of TPMs, including prohibitions against the act of circumvention as well as trafficking in circumvention devices or components. It is critical that China properly implements these amendments to ensure these protections are adequate and effective. For example, protections should apply to both TPMs that control and manage authorized access to copyright works (“access controls”) and TPMs that protect rights (including against unauthorized copying) in those works (“copy controls”). As China is the world’s leading exporter of video game circumvention devices and software components, the law should prohibit the “export” of circumvention devices or components, which drives significant amounts of online video game piracy around the world. Furthermore, certain exceptions—including for educational or scientific research, encryption research, and reverse engineering—appear overbroad (*i.e.*, broader than those found in U.S. law). Implementation of these exceptions should ensure they do not undercut protections. China should also ensure that circumvention devices or components are effectively removed from the channels of commerce, and that rights holders have standing to bring suit in cases in which the TPM was employed by a licensee platform. Lastly, China should clarify that criminal liability is available for circumvention of TPMs, and for the manufacture, distribution, and exportation of

<sup>38</sup>Opinions of Supreme People’s Court, Supreme People’s Procuratorate and Ministry of Public Security on Several Issues Concern the Application of Law in Handling Criminal Cases Concerning the Infringement of Intellectual Property Rights (2011).

<sup>39</sup>See, e.g., IIPA 2020.

<sup>40</sup>Amended Article 54 increased the maximum pre-established damages amount from 500,000 RMB to 5 million RMB.

<sup>41</sup>Article 59 shifts the burden of proof to the accused infringer to show the accused infringer has received permission from the rights holder or is able to use the intellectual property without permission under the Copyright Law.



circumvention devices and software components. If necessary, China should further revise the Copyright Law to address these issues and ensure adequate and effective protections of TPMs.

There are other positive aspects of the amendments—including destruction or removal of the materials, tools, and equipment used to produce infringing copies from commercial channels without compensation; enabling “competent authorities” to investigate matters relating to the alleged illegal conduct, conduct on-site inspections of the premises where the alleged illegal conduct took place, inspect and copy documents or materials related to suspected illegal acts, and seal or seize premises and articles involving suspected illegal acts; providing new presumptions of ownership; and adding a pre-injunction remedy to prevent further harm to rights holders. However, the amendments did not address a number of deficiencies in China’s legal framework. To address these deficiencies, China should further revise its legal framework to:

- ensure adequate and effective enforcement against apps and websites that facilitate unauthorized access to copyrighted works stored on remote servers by clarifying the right of “communication over information networks” to reject the “server principle”;
- provide a clear legal basis under which ISPs may be held liable for IP infringements carried out by third parties using their services or networks;<sup>42</sup>
- provide protection against unauthorized retransmissions of copyrighted content over the Internet (including live-streaming);
- update China’s outdated term of copyright protection to bring it in line with evolving global norms;<sup>43</sup>
- consistent with the requirements of the *Guidelines* (as noted above), clarify the legal basis for injunctions against online intermediaries whose services are used to infringe copyright, including against access providers, requiring them to stop providing access to websites and other online services offering unlicensed copyrighted content, especially in cases where the sites are operated outside of China or where the identities or locations of the website owners are unknown;<sup>44</sup> and
- clarify that only passive and neutral intermediaries are eligible for the safe harbors from monetary liability and that, upon obtaining knowledge of infringement (including a notice) or otherwise becoming aware of circumstances of which the infringement is apparent, intermediaries promptly take steps to limit, stop, and prevent further infringement, including expeditious takedown of infringing content and other measures demonstrated effective in preventing or restraining infringement.<sup>45</sup>

**Fully Implement Phase One Agreement:** IIPA welcomed the conclusion of the Phase One economic and trade agreement signed by the United States and China on January 15, 2020. In the Agreement, China made a number of enforceable commitments that address certain concerns identified in these comments, particularly regarding IPR enforcement. While implementation is ongoing, in August 2020 the State Council took an encouraging step by clarifying that, in accordance with Article 1.26 of the Phase One agreement, transfers of administrative intellectual property cases for criminal enforcement are required upon “reasonable suspicion” that the criminal thresholds have been met. The practice of asking rights holders to show that criminal damage thresholds are likely to have been met in order for a case to be transferred to criminal authorities has been a longstanding enforcement concern for IIPA members, and IIPA is hopeful that this new rule will be effectively applied by both transferring administrative authorities and receiving criminal authorities. IIPA is also encouraged by recent measures enacted or proposed by the SPC and the NCAC to

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<sup>42</sup>While secondary liability for IP infringement is available under Chinese law, the basis for such liability should be clarified to ensure more predictable liability decisions by Chinese judges.

<sup>43</sup>China should bring its term of protection in line with the majority of the Organization for Economic Cooperation and Development (OECD) countries and the international trend (to 70 years after the death of the author, or in cases in which term is calculated based on publication, to the U.S. term of 95 years, but in any case, no less than 70 years). This would not only ensure Chinese creators receive the full global benefits from their creations, it would provide greater incentives for the production and dissemination of creative works, and provide all producers with a stronger incentive to invest in local industry. This, in turn, would spur economic growth and tax revenues and enable producers to continue offering content to local consumers in the latest formats. More than 80 countries protect some or all creative materials in line with the international trend, including 30 out of the 32 member countries of the OECD, and nine out of the top ten music markets.

<sup>44</sup>Once enacted, the government should monitor test cases brought to ensure the law operates effectively and fairly to all parties.

<sup>45</sup>Safe harbors from monetary liability regarding IP under the current ISP liability framework are being misapplied to user-uploaded content (UUC) and other sites and services that are not neutral or passive intermediaries, which has negatively impacted the music market and contributed to the proliferation of pirated content, such as music videos, available for streaming on these services. Clarification of the 2012 Judicial Rules on Several Issues Concerning the Application of Law in Hearing Civil Dispute Cases Involving Infringement of the Right to Network Dissemination of Information (Network Rules), which established the current ISP liability framework in China, is needed.

implement aspects of the agreement that we hope will improve the enforcement framework in China.<sup>46</sup> IIPA urges China to follow through on its Phase One commitments, and encourages the U.S. government to ensure that China fully implements them.

The Phase One agreement also includes purchasing requirements that, among other things, cover IP licensing, and specifically licensing of audiovisual products. If meaningfully implemented, this requirement could improve market access for the film and television industry by increasing the licensing of U.S. audiovisual products for VOD services within China's 30% quota, as well as increasing revenue share.

**Ensure Takedown Procedures Comply with SPC Implementation of Phase One Requirements:** China's "e-commerce" law, which entered into force on January 2019, applies only to online transactions of infringing goods, while copyright liability limitations for digital content platforms continue to be decided exclusively in the framework of the existing copyright law and related regulations.<sup>47</sup> The law requires platform operators to take "necessary measures" against infringing goods or services and, importantly, the standard of knowledge for a platform operator to take action is that the platform "knows or should know" that the good is infringing. Unfortunately, Article 43 does not explicitly adopt effective practices for handling counter-notices, raising the concern that sellers of infringing products could avoid responsibility by merely objecting to rights holders' notices of infringement. Furthermore, it is critical that implementation of the e-commerce law supports rights holders' actions to prevent illegal trafficking of infringing goods on e-commerce platforms,<sup>48</sup> and does not upset existing voluntary arrangements between rights holders and some e-commerce platforms where there is already good cooperation.

In May 2020, China enacted a new Civil Code, which took effect in January 2021.<sup>49</sup> The Civil Code includes provisions on liability and takedown procedures for platforms that are similar to the e-commerce law. However, the provisions in the Civil Code permit rights holders to take action "within a reasonable period of time" of the filing of a counternotice while the measures to prevent the alleged infringement remain in place, whereas the e-commerce law required such action within 15 days. In August 2020, the SPC enacted the Official Reply on Issues of Application of Laws for Disputes Related to Internet IP Infringement (Fa Shi [2020] No.9) ("Reply"), which entered into force on Sept.14, 2020. The Reply provides for takedown procedures for online IP infringement consistent with Article 1.13 of the Phase One agreement, including: prescribing that the period for rights holders to take further action in response to a counternotice may not exceed 20 working days; eliminating liability for erroneous takedown notices submitted in good faith; providing for the availability of punitive damages for erroneous counter-notifications submitted in bad faith; and providing for the availability of preliminary injunction orders requiring platforms to take special measures including, but not limited to deleting, blocking and disconnecting links. The Government of China should implement the takedown procedures in the e-commerce law and in the new Civil Code consistent with these requirements.

**Regulations on Optimizing the Business Environment and Opinions on Strengthening IP Protection:** State Council Decree No. 722, which included Regulations on Optimizing the Business Environment, entered into force

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<sup>46</sup>For example, Official Reply on Issues of Application of Laws for Disputes Related to Internet IP Infringement (Fa Shi [2020] No.9), enacted by the SPC on Aug.24, 2020, entered into force on Sept.14, 2020; Interpretation on Several Issues of Application of Law in Handling Criminal Cases about IP Infringement (III) (Fa Shi [2020] No.10), enacted by the SPC on Aug.31, 2020, entered into force on Sept.14, 2020; Guiding Opinions on Hearing Cases about IP Disputes Involving E-Commerce Platforms (Fa Fa [2020] No.32), enacted by the SPC, entered into force on Sept.10, 2020; Draft Guidelines on Enforcement of IP Judgments was released by the SPC on Mar. 15, 2020 for public comments; Provisions on Evidence in Civil Litigation Related to IP (Fa Shi [2020] No. 12), enacted by the SPC on Nov. 9, 2020, entered into force Nov. 18, 2020; Opinions on Strengthening the Protection of the Copyright and Copyright-Related Rights (Fa Fa [2020] No. 42), released by the SPC Nov. 16, 2020; Notice on Evidence Examination and Determination in Copyright Administrative Enforcement (Guoban Fa [2020] No. 2), released by the NCAC on Nov. 15, 2020; and Opinions on Increasing Sanctions against IP Infringements (Fa Fa [2020] No.33), released by SPC, entered into force on Sept.14, 2020.

<sup>47</sup>The interpretation and implementation of this new law should be monitored closely, including with respect to its stated scope of coverage as well as any expansion of such explicit coverage.

<sup>48</sup>High-quality Chinese counterfeit goods remain a problem for some creative industry sectors internationally, and effective enforcement action is required to prevent the supply of such goods to online marketplaces. Likewise, as discussed above, Piracy Devices and circumvention devices, both used primarily to access pirated content, remain significant problems in China.

<sup>49</sup>While the Civil Code does not have a specific chapter on intellectual property, some articles in the Chapter of Contract, Right of Personality, and Tort Liability may apply to IPR-related disputes. For example, Article 1185 encouragingly enables IP rights holders to claim punitive damages against intentional IPR infringement with severe circumstances. IIPA is hopeful that given the core role of the Civil Code in China's legal system, the principle of punitive damages will be reflected in subsequent judicial interpretations and laws regarding IPR protection, consistent with the Phase One Agreement.

in January 2020. According to the Regulations, China will enhance IP protection by establishing a punitive damages system for IP infringement, promoting the establishment of a rapid protection mechanism for IPR and improving the settlement mechanism for IP disputes. While the Government of China in 2020 took certain positive steps, including increasing “punitive” damages ten-fold as part of the Copyright Law amendments, more can be done, including reducing the burdensome and time-consuming procedural requirements for proving ownership and standing in copyright cases.

## **MARKET ACCESS UPDATES AND RELATED ISSUES**

The piracy and enforcement concerns outlined above are exacerbated by China’s pursuit of policies that have the effect of impeding foreign creators’ access to the Chinese marketplace, thereby restricting the supply of legitimate product to Chinese consumers. China is still not in compliance with the WTO’s ruling in the landmark market access case (DS 363) brought by the U.S. regarding many market access barriers in music, audiovisual products, and publications.<sup>50</sup> After the case concluded in 2009, China eased several market access restrictions,<sup>51</sup> but many core activities of copyright industries remain restricted or prohibited. For example, the Negative Investment List, revised in 2020, continues to prohibit, among other things, foreign investment in the “publication and editing of books, newspapers, journals, audiovisual products and electronic publications,” and foreign investment in audiovisual production studios, movie distribution, and online video services. While it had been hoped that China would address longstanding market access barriers, the Chinese government continues to move in the opposite direction.

**Increasing Online Market Access Barriers:** As we have noted in prior reports, the 2016 Online Publishing Rules, which appear to expand the scope of longstanding restrictions on the involvement of foreign entities in online publishing activities, are having a chilling effect on foreign investment in online publishing services where, prior to the rules, some latitude appeared to have been granted.<sup>52</sup> Furthermore, in June 2019, China revised the Foreign Investment Catalogue, lifting certain restrictions, but production and distribution of audio-visual products and “network publication services” remained on the “Prohibited” list. MIIT’s 2017 Regulations on Management of Internet Domain Names, among other things, requires all Internet domain names available in China to be registered through a licensed, domestic service provider. The regulations have unfortunately led to increased use of reverse proxy services by most piracy services targeting China. Since 2019, SAPP has tightened the approval process for the publication of video games, reducing the number of low-quality copycat games, but also burdening U.S. video game developers.<sup>53</sup> SAPP should increase the number of approvals for foreign video games to match the number of approved domestic games.

In a potential positive development, in August 2019, China’s Ministry of Commerce (MOFCOM) issued the Beijing 3-year Action Plan (“Plan”) to liberalize by the end of 2021 certain service sectors where foreign investment was previously prohibited or restricted. The Plan will only be implemented in Beijing. While online video game services are not specifically included in the Plan, reports indicate the Plan could open the online video game industry to foreign investment because a pilot program under the Plan includes the “internet information services” sector, which could

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<sup>50</sup>China—Measures Affecting Trading Rights And Distribution Services For Certain Publications And Audiovisual Entertainment Products, WT/DS363/AB/R, December 21, 2009, at <http://www.wto.int>.

<sup>51</sup>China eased investment restrictions for some sectors in amendments to the Catalogue of Industries for Guiding Foreign Investment. In late 2013, the Shanghai Free Trade Zone (FTZ) was opened to foreign investment, allowing the introduction of game consoles into China for the first time, and easing restrictions on foreign audio and audiovisual product distribution (although confirmation that distribution of “music videos” is permissible, and that a foreign-invested entity established in the Shanghai FTZ may distribute music throughout China, would be helpful, as it remains unclear whether these activities are permitted). In 2015, China eliminated most restrictions on gaming consoles, paving the way for video game companies to manufacture consoles in all of China, although manufacturers and publishers must still comply with strict regulations including those for pre-sale content review. China also agreed to allow foreign entities to choose their licensees for online music distribution, and to engage in content self-review of music for the first time. New incentives were also introduced for more film co-productions in China.

<sup>52</sup>Among other things, these rules unfortunately restrict the distribution of foreign audiovisual content on online video platforms, even if the distributor has received a home entertainment permit from the former General Administration of Press and Publication (GAPP).

<sup>53</sup>The number of video games approved by the State Administration of Press and Publication (SAPP) has been reduced from more than 9,000 game titles in 2015, to less than 1,500 titles in 2019. A foreign video game company must work with a domestic video game publisher to commercialize a video game in China. In order to receive SAPP approval, the foreign video game submitted for approval must have a certificate from NCAC, and the domestic video game publisher should have a Telecommunication and Information Services Business License (ICP Certificate). The domestic video game publisher must also ensure that changes have been made to the game so that it complies with all content regulations and other regulations governing loot box systems and game spending by minors.

potentially encompass online video game services. China should implement the Plan, including liberalization of online video game services, and expand such pilot programs to the entire country.

In addition to existing online barriers, China has introduced a number of alarming draft measures that, if implemented, would discriminate against U.S. producers and distributors of creative content. For example, in May 2016, the former State Administration of Press, Publication, Radio, Film and TV (SAPPRFT) proposed policies that, if implemented, would provide state-owned media companies with voting control over leading online platforms for films and TV content.<sup>54</sup> Also in June 2016, China published new content approval regulations for mobile video games that would make it extremely difficult for foreign publishers of mobile games to access the Chinese market.

This flurry of discriminatory measures follows other measures that China has implemented to restrict the online distribution of foreign audiovisual content and software. For example, in 2014, the government imposed rules capping the online distribution of foreign films and TV dramas at 30% (and this cap was made more restrictive by applying it on a genre-specific basis), and requiring online distributors to register content, obtain permits, and submit content for review, resulting in extended delays and further uncertainty. Furthermore, there are only two opportunities to submit content for registration and review per year, which, for example, because of the nature of television production, does not allow for submission of a full season of a television series when that season is current. These rules have substantially reduced the number of U.S. film and television programs licensed in China for online distribution and resulted in delays, effectively curtailing “day-and-date” releases,<sup>55</sup> and in practice, further reducing the foreign content caps to less than 30%.

Chinese distributors have delayed or decreased licensing activity through multiple layers of restrictions under a non-transparent content review system, significantly delaying and limiting Chinese consumers’ ability to access the most valuable current U.S. television content within a reasonable period of the U.S. release, which has created fertile ground for increased piracy. To help ensure the content review process is transparent, predictable, expeditious, and does not have a disparate impact on U.S. content, China should adopt a voluntary, age-based classification system. China should also shorten the time for content review to provide certainty of release, increase frequency of content review windows, remove the burden of resubmitting film and television programs that have already been approved, and establish a fast-track system for content review under special circumstances. A transparent, predictable, and expeditious content review process will attract investment and boost China’s potential as a regional film and television production hub.

**Extension of Content Review to Books Printed for Export:** In a recent development, China is reportedly extending the reach of its content review regime to content intended for other markets. Books merely being printed in China but otherwise intended for distribution in other markets are now also being subject to China’s burdensome content review regime. This appears to be the case even for books that were previously being printed in and exported from China without issue. Extending the reach of its burdensome content review regime to books printed in China but otherwise intended for distribution in other markets places an arbitrary and unjustified discriminatory burden on foreign publishers, who for decades have used printing partners in China, and is arguably a disguised restriction on international trade.

**Additional Audiovisual Market Access Concerns:** China continues to introduce additional impediments to its market for U.S. audiovisual content, limiting the U.S. industry’s ability to compete fairly and inhibiting its potential growth in this massive and fast-growing market. In September 2018, the NRTA proposed two draft regulations regulating the production and distribution of foreign audiovisual content, including proposing a broad 30% cap on foreign content (expanding on the cap for online distribution discussed above) applied on a genre-basis to film, TV, animations, documentaries, and “other” programs.<sup>56</sup> While these regulations have not been officially promulgated,

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<sup>54</sup>The proposal was for leading online video platforms to sell up to a 10% “special management stake” and cede at least one board seat to a selected state-owned media company. While this proposal was suspended due to significant opposition from online platforms, there is concern that it may reemerge.

<sup>55</sup>“Day and date” release refers to releasing a film in theaters and making it available on a Video-on-Demand service the same day.

<sup>56</sup>The “Administrative Provisions on the Importation and Broadcasting of Overseas Audiovisual Programs” would further tighten regulations on foreign broadcasting, banning foreign films, TV dramas and animation from broadcasting during prime time, putting a 30% maximum cap on foreign audiovisual content in certain

provisions to further tighten the content review process for imported content have been implemented and IIPA is concerned that industry-wide application of the genre-based restrictions began in early 2020, in particular for animation, further exacerbating the uncertainty and uneven playing field faced by U.S. audiovisual companies. In addition, 2016 Rules clearly intended to promote indigenous Chinese radio and television programs at the expense of foreign content have negatively impacted U.S. producers and appear to contravene China's WTO obligations.<sup>57</sup> A March 2016 Notice allowing refunds from the Film Development Fund to cinemas that report favorable annual box office receipts from the screening of Chinese films incentivizes cinemas to screen more Chinese domestic films, further disadvantaging the competitiveness of foreign films in the Chinese market.<sup>58</sup> Another obstacle for U.S. producers in China is that private Chinese distributors, including VOD platforms, arbitrarily, without clear explanation, request from U.S. producers an excessive and particularly burdensome amount of legalized documentation regarding production and distribution in order to complete a license agreement or obtain government approvals that permit access to China's online marketplace. These types of documentation requests (unique to China's marketplace) cause uncertainty and additional expense that slow or kill negotiations for licensing films to China. China also maintains a number of longstanding discriminatory restrictions in the audiovisual sector that continue to harm the U.S. industry such as, for example, prohibiting foreign-owned investment in online video services, and audiovisual production studios and distribution (and, as noted above, the June 2020 revision of the Negative Investment List maintained these prohibitions).<sup>59</sup> U.S. firms are highly competitive globally in these sectors, and these restrictions, including against direct-to-consumer audiovisual online services, undermine the ability of U.S. content creators and distributors to compete in the Chinese marketplace, hurting their growth.

In addition to all of these barriers (and the theatrical market access barriers discussed below), beginning mid-2019, without any official announcement, Chinese government agencies and distribution platforms significantly slowed the processing and licensing of new U.S. content intended for Chinese online streaming platforms. This so-called "soft ban" dramatically decreases available U.S. content online in China. U.S. content has also been blocked from online distribution by a combination of Chinese government delays and censorship failures. Without a prior censorship certificate from theatrical release—which most independent and many other U.S. titles fail to receive—there is no avenue to reach online distribution in China. Finally, Chinese private distributors are inhibited from risking any investment in new U.S. content due to uncertainty about their government's measures and intent. As a result, U.S. producers—shut out of the second largest market in the world and the number one market in terms of theatrical screens—are also increasingly unable to make significant investments in U.S.-origin content.

China needs to change course from its current protectionist path and open its marketplace to U.S. producers. It is critical to send a strong message that these policies are unacceptable, particularly at a time when China's creative marketplace holds the potential for explosive growth, and should be reversed. China should instead focus its attention

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circumstances, and restricting content that can be disseminated online. The "Administrative Provisions on Overseas Personnel Participation in the Production of Radio and Television Programs" seeks to regulate the participation of foreigners in the production of radio and TV programs by, for example, banning the employment of foreigners as broadcast TV presenters or newscasters, and banning programs having both a foreign screenwriter and a foreign director.

<sup>57</sup>The June 2016 Statement and Rules on Importing TV Formats, among other things, established a procedure for filing/registration of foreign content by satellite television channels that would apply to jointly developed programs or programs with foreign personnel playing a "major guiding role" in production if the Chinese party does not "fully obtain intellectual property rights" in the program. Only two of these "foreign" programs are permitted to be broadcast in prime time per year; and no more than one new foreign program may be broadcast at any time per year, but it cannot be broadcast in prime time for that first year.

<sup>58</sup>According to the Notice, if 66% of a cinema's total annual gross box office comes from Chinese films, that cinema will receive a refund of half of the money generated from Chinese films within the 5% of box office that the cinema contributed to the Film Development Fund.

<sup>59</sup>Other examples include: China limits foreign investment in cinemas and in-home video distribution companies to 49% and prohibits all foreign investment in television; local cable networks cannot carry foreign satellite channels without government approval or landing permits, which are limited to Guangdong and a handful of foreign channels; foreign satellite channels beaming into China are required to downlink from a government owned encrypted satellite platform and may only be shown in three-star hotels and above and in foreign institutions, and the annual fee for each channel remains excessively high (US\$100,000); foreign television and film programming are limited to no more than 25% of total airtime, and other foreign programming to no more than 15% of total air time; foreign programming is banned during prime time and may not constitute more than 30% of pay television channels; foreign TV series and movies are limited to 50 episodes; foreign animation is restricted to no more than 40% of total airtime, and importers of foreign animation must produce a like amount of domestic animation; under State Council regulations as well as the 2017 Film Promotion Law, public screening of foreign films must not exceed one-third of the total annual screen time; China requires home-video license agreements to be for a duration of at least three years, an unnecessary intrusion into copyright owners' contractual rights; and China continues to require digital film prints to be replicated in local laboratories, impeding rights holders' ability to control the print quality or trace the source of camcording piracy.

on complete implementation of the 2012 U.S.-China Film Agreement, and other market opening steps for the music, publishing, video game, and motion picture and television industries.

**U.S.–China Film Agreement Implementation:** China still has not implemented certain key provisions of the 2012 U.S.-China Film Agreement signed by then-Vice President Xi and the Vice President Biden. Hailed as a “breakthrough,” the Agreement promised to economically uplift U.S. and Chinese producers and distributors.<sup>60</sup> Unfortunately, more than eight years after its signing, China has failed to meet its obligations under the Agreement.

As part of the Film Agreement, China committed that in 2017 it would make a meaningful increase to compensation for revenue sharing theatrical releases, as the current 25% U.S. share of revenue is far below comparable markets. Furthermore, the official quota on revenue sharing releases of 20-plus-14 (enhanced format) remains. However, review and additional compensation has never occurred, and China must be pressed to comply with its obligations. In addition, China has imposed artificial limits on market access for imported films, despite the huge increases in cinema screens in China since 2012, and the growing number of domestic productions, which were at an all-time high in 2019.<sup>61</sup> In the case of “flat fee films,” which are imported by private distributors outside of the box office revenue sharing quota system, China has enforced restrictions, including an informal cap on the number of these films that can be imported. Furthermore, China has retained governmental control of key elements of distribution, severely limiting the ability of private Chinese distributors to import and distribute any foreign content. These barriers virtually eliminated U.S. independent films from its theatrical marketplace with only 13 films theatrically released in China, for 2.6% of the theatrical release slots, the lowest percentage of slots allocated for independent films recorded by IFTA.<sup>62</sup> U.S. producers who rely on private distributors and the payment of minimum guaranteed license fees to raise production financing and secure distribution have seen their licensing revenues plummet.

China further committed in the Agreement (and reconfirmed in commitments at the June 2015 U.S.–China Strategic and Economic Dialogue (S&ED)) to promote and license privately-owned Chinese distributors to engage in national theatrical distribution of imported films without the involvement of any State Owned Enterprise, including China Film Group (CFG) and Huaxia Film Distribution Company Ltd. This requirement has also not been implemented. The newly formed CFA, which replaced SAPPRFT in 2018, still permits only one film importer (CFG) and two distributors of foreign films: CFG and Huaxia. While China affirmed in the Agreement that any properly licensed Chinese enterprise may distribute imported films, CFA has yet to approve any new private Chinese distributors. CFG also still dictates the release dates and length of theatrical runs of foreign films, often restricting the ability of the U.S. producer to market and obtain the full value of the film.

IIPA recommends that China immediately take action on the following issues, which have been long delayed: 1) immediately and fully implement all the terms of the 2012 U.S.–China Film Agreement, including the requirement to enhance compensation in 2017, liberalize the distribution market for private third party Chinese distributors, and finalize a new MOU; 2) substantially increase U.S. producers’ share of revenues for the box office revenue share films from the current 25% to a level consistent with international norms; 3) allow U.S. producers more control over release dates, address the problem of U.S. films being locked out from the prime release dates, and end the practice of “double booking” theatrical releases; 4) eliminate informal restrictions on the number of imported “flat fee” films so that independent producers have unimpeded access to the Chinese market; 5) further relax the quota for revenue sharing films and VOD products for online video websites so filmmakers and audiovisual companies may have substantially better access to the rapidly growing marketplace for films and TV in China; 6) ensure U.S. producers receive timely responses to quota allocations and content review determinations, and effective access to ticketing system information to ensure proper reporting of revenues; 7) do not delay or restrict film and TV imports for theatrical and online distribution through layers of a non-transparent content review system and unofficially-mandated genre-based limit;

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<sup>60</sup>According to a 2012 White House Press Release: “This agreement with China will make it easier than ever before for U.S. studios and independent filmmakers to reach the fast-growing Chinese audience, supporting thousands of American jobs in and around the film industry,” said Vice President Biden, who spent the day in the Los Angeles area with Vice President Xi Jinping of China. “At the same time, Chinese audiences will have access to more of the finest films made anywhere in the world. See <https://obamawhitehouse.archives.gov/the-press-office/2012/02/17/united-states-achieves-breakthrough-movies-dispute-china>.

<sup>61</sup>IFTA Research and Analysis, “China Theatrical Market 2010–2019”.

<sup>62</sup>Id.

and 8) streamline the payment of deposits, guarantees, and royalties by local distributors to U.S. producers, and erect no regulation or policy that impedes the collection of license fees by American intellectual property owners.

## **COMPLIANCE WITH EXISTING OBLIGATIONS TO THE UNITED STATES**

As noted above, China is still not in full compliance with the WTO's market access case (DS 363) and many of the market access barriers discussed above raise concerns under China's international obligations, including under the General Agreement on Trade in Services (GATS), TRIPS Agreement, as well as Article 1.2 of the Phase One agreement to ensure fair and equitable market access to persons that rely upon intellectual property protection.<sup>63</sup>

Regarding copyright protection and enforcement, the deficiencies outlined above regarding criminal enforcement procedures (e.g. thresholds that are too high or unclear, limited criminal accomplice liability, uncertainties regarding increased penalties against repeat offenders) are inconsistent with enforcement obligations under TRIPS, including Articles 41, 42, and 61. Furthermore, the jurisdictional bar against foreign rights holders bringing a claim against those prosecuted for copyright crimes implicates TRIPS Article 3 on national treatment. In addition, China's civil compensation rules, which result in inadequate compensation for rights holders, run afoul of TRIPS Article 45 on civil damages.

Finally, China must follow through on commitments it has made in other bilateral engagements, including the recent Phase One agreement discussed above, the Comprehensive Economic Dialogue (CED), JCCT, and S&ED, addressing a number of the issues discussed above, including full implementation of the U.S.–China Film Agreement, enhanced enforcement against Piracy Devices, improved enforcement against online piracy, and enhanced protection of academic journals, including strengthening library copyright protection.

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<sup>63</sup>For example, in the *2019 Report to Congress on China's WTO Compliance*, USTR acknowledged that the *Network Publishing Service Management Regulations* raise concern "relative to China's GATS commitment." See A106, report available at [https://ustr.gov/sites/default/files/2019\\_Report\\_on\\_China%E2%80%99s\\_WTO\\_Compliance.pdf](https://ustr.gov/sites/default/files/2019_Report_on_China%E2%80%99s_WTO_Compliance.pdf).