Independent Film & Television Alliance®

10850 Wilshire Boulevard / 9th Floor
Los Angeles, CA 90024-4321
310-446-1000 TEL / 310-446-1600 FAX
www.ifta-online.org / info@ifta-online.org

January 31, 2022

Mr. Daniel Lee
Acting Assistant United States Trade Representative
for Innovation and Intellectual Property
Office of the United States Trade Representative
600 17th Street, N.W.
Washington, D.C. 20508

Re: Written Submission in Response to USTR's Request for Comments and Notice of a Public Hearing Regarding the 2022 Special 301 Review [Docket No. USTR–2021–0021][1] via Regulations.gov

Dear Mr. Lee:

The Independent Film & Television Alliance® (IFTA®)[2] respectfully submits these written comments in response to the above-referenced matter as part of the annual "Special 301" review set out in Section 182 of the Trade Act of 1974, that requires the Trade Representative to identify countries that deny adequate and effective intellectual property (IP) protections or fair and equitable market access to U.S. persons who rely on IP protection.[3]

IFTA has also joined with the other members of the International Intellectual Property Alliance (IIPA)[4] to file collectively in this proceeding and fully endorses those comments and recommendations. This separate IFTA filing focuses specifically on China and the acts, practices, and policies of the Chinese government that have extreme effect on the U.S. independent film and television industry, effectively shutting our industry sector out of the world's largest exhibition market with nearly 70,000 theatrical screens and television and online platforms with the ability to reach an unprecedented number of consumers.

With this background, IFTA offers the following comments and recommends that USTR maintain China on the Priority Watch List in 2022 and that China be monitored under Section 306 of the Trade Act.

[1] *See* 86 Federal Register 70885 December 13, 2021 at https://www.federalregister.gov/documents/2021/12/13/2021-26899/request-for-comments-and-notice-of-a-public-hearing-regarding-the-2022-special-301-review.
[2] A complete list of IFTA Members is available online at: https://ifta-online.org/who-we-represent/.
[3] 19 U.S.C. 2242.
[4] The International Intellectual Property Alliance (IIPA) is a private sector coalition of trade associations representing U.S. copyright-based industries working to improve international protection and enforcement of copyrighted materials and to open foreign markets closed by piracy and other market access barriers. Members of the IIPA are the Association of American Publishers, Entertainment Software Association, Independent Film & Television Alliance, Motion Picture Association, and Recording Industry Association of America. See http://www.iipa.org.

About IFTA and its Member Companies

Headquartered in Los Angeles, IFTA is the trade association for the independent motion picture and television industry worldwide, representing more than 100 companies in 23 countries, the majority of which are small to medium-sized U.S.-based businesses, which have financed, produced, and distributed many of the world's most prominent films, including the majority of Academy Award® winners for "Best Picture" since 1980.

Independent films and television programs are made in every genre and budget level by companies that take on most of the financial risk for the production and also control the licensing of its distribution to third parties around the world. In 2019 (prior to COVID related production shutdowns), independent producers shot 520 feature films and countless hours of television programming in the U.S., accounting for 70% of our country's film production activity and supporting small businesses and tens of thousands of jobs.

As in other industries, the label "independent" refers to companies that operate without the safety net of a large, vertically integrated enterprise. U.S. Independents do not own and are not exclusively or preferentially affiliated with worldwide distribution channels. Consequently, independent film and television producers are completely reliant on third-party distributors to reach audiences worldwide, including in China.

Independents secure both financing and distribution in substantial part by entering into license agreements with these unaffiliated third-party distributors in key geographic territories in exchange for advance financial commitments to secure the exclusive right to exploit the finished product in the licensed territory. Such agreements are concluded by the parties well before any camera begins to roll and are collateralized by banks to secure loans to support the physical production (or are informally used to support private investment). Once revenue from exploitation of the film is generated, the production loan is repaid and the parties' endeavor to recoup their investment.

IFTA has a strong interest in fostering the growth of a safe, accessible, and competitive marketplace in China. As the largest theatrical exhibition market in the world, and with its expansive array of television channels and online distribution platforms to reach local consumers, China was part of the independent production finance model in the period 2012 to 2018. However, increasingly onerous, and opaque government restrictions, combined with market manipulation, and lack of implementation of the country's bilateral commitments, have effectively shut out the U.S. independent sector from access to the marketplace in China.

China's Theatrical Distribution System for Imported Films Shuts Out U.S. Independent Films

The 2019 statistics for the China theatrical market – prior to pandemic cinema closures - paint a stark picture of the independents' diminished access: the U.S. Independent industry already was at an all-time low with only 13 U.S. independent films granted theatrical release, generating only $115 million in box office revenue, corresponding to a paltry 1.29% share of China's box office. In 2020, the numbers are drastically worse: Independents' share of theatrical revenue dropping to a new low of 10 independent films and box office of $24 million for 0.8% of the total amount of theatrical box office revenue[5].

These results stem directly from the restrictive policies and practices of the Chinese government and state-owned entities. To understand how these barriers operate against U.S. independent producers, it is important to understand the country's two-tiered theatrical distribution system that remains firmly in place.

This two-tiered theatrical system is outlined in the terms of the 2012 U.S. China Film Agreement ("2012 Agreement")[6]. The 2012 Agreement enhanced the percentage of theatrical box office revenue the U.S. producer would receive if they received a "box office revenue" release from China Film Group, and it increased the number of films that could be imported and theatrically released in China on a box office revenue share basis, and it purported to allow any amount of theatrical release films from U.S. film producers as long as it was a "flat" license fee (and did not share in the box office revenue). The promised reform of the private theatrical distribution system so that the government would not interfere in the arrangements between private Chinese distributors and U.S. producers (mainly Independents) which license this way, never materialized.

In the two-tier system, revenue sharing films are imported and distributed to the theaters by State Owned Enterprises (SOEs), China Film Group (CFG) and sometimes Huaxia Film Distribution. U.S. Independent films are infrequently selected by CFG for a revenue sharing quota slot. Instead, their access is via "flat fee" licenses to private Chinese distribution companies (not tied to box office revenue), which must then secure import permits from CFG, obtain censorship clearance from a state agency, negotiate with CFG for assignment of a release date, pay a CFG affiliate to make digital keys available to the theaters so the film can be shown, and make all other arrangements necessary to market and secure distribution for the film. The vitality of the private distribution sector is critical to U.S. Independent access to the theatrical market and the 2012 Agreement required China to facilitate this sector's increased independence from the CFG system. China has failed to honor that commitment and, further, has operated a separate and unwritten quota system that reduced the number of imported flat fee films to accommodate increases in the revenue sharing film quota.

Access to the Chinese Marketplace Has Never Been More Restrictive

IFTA endorses the immediate and full implementation of the Film Agreement and formal action to compel China to expand market access for U.S. films, but broader reforms outside of the Film Agreement are necessary to achieve U.S. trade goals. IFTA's decade-long statistical analysis demonstrates that the U.S. Independents are in a worse position today than before the Film Agreement was signed. The total number of all U.S. films imported for theatrical release in China annually remains below pre-Agreement levels due to Chinese government informal cap of about 60 imported films each year, despite the meteoric rise of over 1000% from 6,256 screens in 2010 to nearly 70,000 screens in 2020, now representing the world's largest cinema market. During the same period, the total box office revenue in China has also skyrocketed from $1.4 billion to $8.9

[5] See **<u>Exhibit A</u>**, IFTA Research and Analysis China Theatrical Market 2010 – 2020.
[6] Original WTO commitments allowed China to continue its government control of and a numerical quota on the foreign films imported for exhibition in Chinese theaters for which the producer is paid a share of actual box office revenues ("revenue sharing films").

billion, with the U.S. Independents share of box office revenue dramatically decreased from 5.6% in 2010 to a near bottom 0.8% in 2020 ($24 million total box office for U.S. Independents).[7]

Private Chinese distributors have yet to be able to license and distribute U.S. films without the interference of CFG or Huaxia since both are the government owned, sole importer that also controls censorship review, release dates, cinema management, and processing facilities for digital prints. China continues to pursue policies and practices that undermine the purposes of the Film Agreement, including (1) failure to fully license private companies to distribute films theatrically *without any involvement by China's state-owned enterprises, including CFG*; (2) an informal import quota that has reduced the number of foreign flat fee films and ensures that Chinese films generate at least 51% of the annual box office revenue in the country; (3) introduction of informal or nontransparent policies which result in the inability of private Chinese distributors to secure censorship or release dates for U.S. origin films from the Chinese government and prevent payment of minimum guarantees for license fees to U.S. producers; (4) black-out periods that prevent U.S. films from screening during high holiday seasons; and (5) requiring producers to finance broad releases (10,000 screens) for all films and rely upon SOEs for digital key services, thus pushing costs to noncompetitive levels.

IFTA Members also report delays of up to a year between the U.S. theatrical release and the Chinese theatrical release of films, which impacts box office revenue and creates a vacuum for online piracy. Significant delays also dilute the effective marketing campaign launched by the producer at the time of its U.S. release. For example, Millennium's *Angel Has Fallen* was released theatrically in the U.S. on August 23, 2019 generating over $69 million in box office receipts, but despite efforts by the U.S. producers to obtain an earlier release date, the film was not released in Chinese theaters until December 31st and three weeks into a typical six week theatrical run had made $9 million[8] The producers at the time estimated that the film would generate at least $50 million dollars less at the Chinese box office than was reasonably forecast based on the past success in China of the producer's other film, *London Has Fallen*. That film had a United States' theatrical release in March 2016, and a Chinese release in April, making $62 million, and $53 million in box office, respectively[9].

New and Increasing Online Market Access Barriers

The IIPA filing outlines in detail the discriminatory regulations that have been erected over the past few years and that should be revoked or revised. It is important to note that the U.S. Independents are especially harmed by the collective impact of these new restrictions, including, the 2014 Notice on Further Implementation of Provisions Concerning the Administration of Online Foreign Films and TV Dramas"; the Notice and Measures on Administration of Online Foreign Films, the Statement and Rules on Importing TV Formats; and the discriminatory and unclear censorship approval process. This web of regulations imposes onerous, opaque, and *de facto* discriminatory requirements for U.S. Independents and their Chinese distributors for registration, censorship, as well as a 30% foreign content caps for broadcast, pay TV, and online video. Chinese distributors have delayed or decreased licensing activity through layers of unclear restrictions for censorship, resulting in increased piracy and lost commercial opportunities.

[7]See **Exhibit A**, IFTA Research and Analysis China Theatrical Market 2010 – 2020.
[8] Box Office Mojo.
[9] Box Office Mojo.

Another market impediment is the result of pressure on private Chinese distributors, including VOD platforms, without clear explanation, to require U.S. producers to obtain and deliver an excessive and particularly burdensome amount of legalized documentation regarding production and distribution to complete a license agreement or obtain government approvals that permit access to China's online marketplace. These documentation requests (unique to China's marketplace) and stemming from unknown government requirements cause uncertainty and additional expense that slow or kill negotiations for licensing films to China and have become yet another obstacle for U.S. producers to access the Chinese marketplace. For instance, the cost of delivering such legalized documentation can cost as much as the underlying licensee fee.

In addition to these barriers to the theatrical and online markets, beginning mid-2019, without any formal announcement, the Chinese government agencies and distribution platforms first halted the distribution of new U.S. content on Chinese online streaming platforms, in what the industry is considering a "soft ban." on the importation and distribution of U.S. films and television programming. This market disruption continues today with most U.S. content held up in censorship. Private Chinese distributors have been financially compromised by the inability to secure distribution through any channel for U.S. films, driving some out of business and discouraging any further acquisitions of U.S. films or programs for the Chinese market. For U.S. Independents in particular, this cuts to the heart of both production financing and long-term revenue prospects for any film.

Conclusion

The barriers in China for U.S. Independents today highlight China's failure to meet its commitments in the 2012 U.S.-China Film Agreement and its adoption of new and informal barriers to U.S. imports. Notwithstanding China's booming theatrical market and the rise of Chinese production, the U.S. film industry is severely limited in its access to this critical marketplace, with opportunities in China for U.S. Independents at historic lows. IFTA urges that China be designated Priority Watch List in 2022 and that China be monitored under Section 306 of the Trade Act.

Respectfully submitted by,

Independent Film & Television Alliance

Exhibit A

China Theatrical Market - 2010 - 2020

Figures by Year

China Box Office 2010- 2020By Country of Origin

Film Source	2010		2011		2012		2013		2014		2015		2016		2017		2018		2019		2020	
	US$M	*%*	*US$M*	*%*	*US$M*	*%*	*US$M*	*%*	*US$M*	*%*	*US$M*	*%*	*US$M*	*%*	*US$M*	*%*	*US$M*	*%*	*US$M*	*%*	*US$M*	*%*
US Majors	$593.11	39.9%	$822.90	40.7%	$1,117.01	42%	$1,237.48	37.1%	$1,823.48	41.1%	$2,107.97	30.0%	$1,999.55	28.8%	$2,816.19	35.0%	$2,988.23	33.7%	$2,723.73	30.5%	$344.20	11.0%
US Independent	$82.95	5.6%	$112.48	5.6%	$188.03	7%	$147.16	4.4%	$168.43	3.8%	$108.73	1.5%	$367.94	5.3%	$100.70	1.3%	$109.81	1.2%	$115.17	1.29%	$24.00	0.8%
Other Nationality**	$27.87	1.9%	$58.22	2.9%	$108.47	4%	$39.11	1.2%	$111.99	2.5%	$167.32	2.4%	$269.03	3.9%	$491.74	6.1%	$451.19	5.1%	$520.39	5.8%	$141.80	4.5%
Intl/China Co-Prod^	$43.28	2.9%	$18.73	0.9%	$38.30	1%	$100.50	3.0%	$45.35	1.0%	$513.78	7.3%	$800.61	11.5%	$858.75	10.7%	$190.50	2.1%	$41.42	0.46%	$266.80	8.5%
China & HK^^	$740.10	49.8%	$1,008.41	49.9%	$1,194.20	45%	$1,809.83	54.3%	$2,287.19	51.6%	$4,127.92	58.8%	$3,516.36	50.6%	$3,778.78	47.0%	$5,137.97	57.9%	$5,530.31	61.9%	$2,352.20	75.2%
Total	**$1,487.31**	**100%**	**$2,020.74**	**100%**	**$2,646.01**	**100%**	**$3,334.08**	**100%**	**$4,436.44**	**100%**	**$7,025.72**	**100%**	**$6,953.48**	**100%**	**$8,046.16**	**100%**	**$8,877.70**	**100%**	**$8,931.02**	**100%**	**$3,129.00**	**100%**

Soure: IFTA analysis of data from Artican Gateway; Baseline Studio Systems, Box Office Mojo; Chinesemov.com, ENT Group Box Office, Film Business Asia; IMDB Pro; Mayam Entertainment; Variety .

	2010		2011		2012		2013		2014		2015		2016		2017		2018		2019		2020	
*Foreign Films BO**	$703.93	47.33%	$993.60	49.17%	$1,413.51	53.42%	$1,423.75	42.70%	$2,103.90	47.42%	$2,384.02	33.93%	$2,636.52	37.92%	$3,408.63	42.36%	$3,549.23	39.98%	$3,359.29	37.61%	$510.00	16.30%

** Includes Box Office for US Majors, US Independents, Other Nationality*

Feature Films Released in China - 2010 - 2020

Film Source	2010		2011		2012		2013		2014		2015		2016		2017		2018		2019		2020	
	# Titles	*%*	*# Titles*	*%*	*# Titles*	*%*	*# Titles*	*%*	*# Titles*	*%*	*# Titles*	*%*	*# Titles*	*%*	*# Titles*	*%*	*# Titles*	*%*	*# Titles*	*%*	*# Titles*	*%*
US Majors	21	15.4%	24	12.9%	27	14.4%	36	22.1%	29	16.0%	32	10.0%	37	9.5%	34	8.6%	47	10.9%	45	9.2%	17	6.0%
US Independent	12	8.8%	15	8.1%	19	10.1%	10	6.1%	14	7.7%	12	3.8%	22	5.6%	18	4.5%	19	4.4%	13	2.6%	10	3.5%
Other Nationality	20	14.7%	25	13.4%	24	12.8%	17	10.4%	18	9.9%	18	5.6%	43	11.0%	41	10.3%	54	12.5%	86	17.5%	33	11.7%
Intl / China Co-Prod	2	1.5%	5	2.7%	7	3.7%	8	4.9%	4	2.2%	13	4.1%	19	4.9%	9	2.3%	12	2.8%	7	1.4%	17	6.0%
China & HK	81	59.6%	117	62.9%	111	59.0%	92	56.4%	116	64.1%	245	76.6%	270	69.1%	295	74.3%	301	69.5%	340	69.2%	205	72.6%
Total	**136**	**100%**	**186**	**100%**	**188**	**100%**	**163**	**100%**	**181**	**100%**	**320**	**100%**	**391**	**100%**	**397**	**100%**	**433**	**100%**	**491**	**100%**	**282**	**100%**

Soure: IFTA analysis of data from Artican Gateway; Baseline Studio Systems, Box Office Mojo; Chinesemov.com, ENT Group Box Office, Film Business Asia; IMDB Pro; Mayam Entertainment; Variety .

China Cinema Screen Growth 2010 - 2020

	2010		2011		2012		2013		2014		2015		2016		2017		2018		2019		2020	
	# Screens	*% Chg*	*# Screens*	*% Chg*	*# Screens*	*% Chg*	*# Screens*	*% Chg*	*# Screens*	*% Chg*	*# Screens*	*% Chg*	*# Screens*	*% Chg*	*# Screens*	*% Chg*	*# Screens*	*% Chg*	*# Screens*	*% Chg*	*# Screens*	*% Chg*
	6,256	32.5%	9,286	48.4%	13,118	41.3%	18,195	38.7%	23,592	29.7%	31,627	34.1%	41,179	30.2%	50,776	23.3%	60,079	18.3%	68,922	14.7%	75,581	9.7%

Nominal Growth for Period: **69,325 screens** ***Percentage Growth for Period:*** **1108.1%**

Average Yearly Growth: **29.2%**

Soure: IFTA analysis of data from Statistica, National Committee of Film Development Fund

as of 1/26/20225:28 PM