

# CHINA (PRC)

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2020 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that USTR maintain China on the Priority Watch List in 2020 and that China be monitored under Section 306 of the Trade Act.<sup>1</sup>

**Executive Summary:** China holds enormous potential for the creative industries. China's online marketplace continues to expand, and China now leads the world in cinemas with almost 70,000 movie screens at the end of 2019, 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. 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.

The long delayed Copyright Law amendment process is vital because a positive outcome would lay the foundation for a successful future for the creative industries in China. To achieve that goal, China should ensure the legislation will bring its standard of copyright protection and enforcement into compliance with global norms and best practices in order to meet the challenges of the digital age. China should fully implement the *Guidelines on Strengthening the Protection of Intellectual Property Rights*, the introduction of which has provided hope that enforcement will be enhanced and prioritized, and that the Copyright Law revision process will be accelerated. China also made commitments in the recently-concluded Phase One agreement with the U.S. that raise hopes for improved enforcement and, if implemented in a timely and robust manner, could help address a number of the concerns raised in this report.

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*, *YouKu*), journal piracy, and the proliferation of thousands of "mini Video-On-Demand (VOD)" locations that show unauthorized audiovisual content. Criminal enforcement efforts remain stunted by evidentiary requirements (including thresholds) that are ill-suited to effectively pursuing online piracy cases and do not reflect the nature of "commercial scale" piracy. Civil litigation, even when successfully brought against blatant piracy services, is generally ineffective due to a lack of meaningful injunctive relief, high costs, and low damage awards. The National Copyright Administration of China (NCAC), in cooperation with rights holders, has taken administrative action against certain online services that facilitate audiovisual piracy, but these actions are not sustained or effective 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.

China should abandon recent proposals that would erect additional barriers to its audiovisual marketplace, and should eliminate current impediments, which exacerbate its 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 ensuring private Chinese distributors may distribute films to cinemas without interference from state owned enterprises, or imposition of unofficial quotas. Unfortunately, as detailed below, the ability of U.S. producers to compete in the Chinese marketplace for all audiovisual content was even more drastically curtailed during 2019, with licensing opportunities on

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<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/2020/02/2020SPEC301HISTORICALCHART.pdf>.



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. Finally, the revised “negative list” maintains the foreign investment and ownership restrictions in the cultural and entertainment sectors, and these restrictions need to be eliminated.

## **PRIORITY ACTIONS REQUESTED IN 2020**

### **Enforcement:**

- Improve effectiveness of administrative enforcement, including by:
  - taking measures demonstrated effective in preventing or restraining infringement;
  - imposing enhanced penalties against repeat infringers and infringers that make available massive amounts of infringing content;
  - increasing 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 the criminal thresholds are met;
  - 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;
  - expanding resources and capability at NCAC, local Copyright Administrations (CAs), and Cultural Law Enforcement Agencies (CLEAs), especially after the government restructuring across the country, commensurate with the scale and complexity of the piracy problem; and
  - improving the performance of local cultural enforcement departments to ensure effective action is taken against infringement reported by rights holders.
- Take further effective action, with increased transparency, against the online piracy ecosystem, including against:
  - piracy websites, such as *zimuzu.tv*, *btbtdy.net*, *trix360.com*, *92flac.com*, *sq688.com*, *51ape.com*, *dygod.net*, *ygdy8.com*, *gaoqing.la*, *mp4ba.com*, *btbtt.co*, *piahua.com*, *vodxc.com*, *lbdly.com*, *yym3.com*, *musicool.cn*, *xh127.com*, *b9good.com*, *dygang.com*, *loldytt.com*, *piaohua.com*, *bt99.com*, *80s.tw*, *meijutt.com*, *ygdy8.com*, *dysfz.vip*, and *panduoduo.net*;
  - piracy facilitated through the cloud storage service Baidu Pan and through the Xunlei thunder service;
  - unauthorized content available on UUC platforms (e.g. *Bilibili*, *YouKu*, and *Miaopai*)
  - plugin player xigua and its related piracy ecosystem; and
  - apps such as *Renren Shipin*, *Tian Kian Kan*, *Kuaishou*, and *Tian Lai K Ge*.
- Bring more targeted and deterrent enforcement actions, with transparency, against:
  - 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, and USB flash drives containing high volumes of infringing sound recordings).

### **Legislation:**

- Enact comprehensive copyright law reform 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);

- adopting clear rights of public performance and broadcast for works and sound recordings;
  - prohibiting unauthorized Internet retransmission of live broadcasts;
  - clarifying ISP safe harbor requirements to ensure that safe harbors only apply to passive and neutral intermediaries that do not contribute to infringing activities;
  - providing a term of protection in line with the international trend; and
  - ensuring that exceptions to and limitations on copyright are adequately defined and appropriately narrow in scope.
- Implement the *Guidelines on Strengthening the Protection of Intellectual Property Rights*, which include important measures to improve copyright protection and enforcement, including lowering criminal thresholds, adding punitive damages, streamlining evidence processes, establishing a blacklist of repeat infringers, and regulating websites to ensure infringing content is not made available.
  - Improve enforcement framework by, *inter alia*:
    - 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;
    - separately defining criminal violations regarding circumvention of technological protection measures (TPMs) or trafficking in circumvention products, including devices and software components; and
    - rejecting the “server principle” in cases involving apps and indexing/linking sites that provide unauthorized access to copyrighted contents hosted remotely.
  - 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’ notice of infringement.

#### **Market Access:**

- Take action on the following issues to improve the marketplace for U.S. films and programs: 1) immediately and fully implement all the terms of the 2012 U.S.–China Film Agreement and liberalize the distribution market for private third party Chinese distributors; 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 the Chinese locking out U.S. films 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 more independent producers have unimpeded access to the Chinese market; 5) further relax the quota for revenue sharing films so filmmakers and audiovisual companies may have substantially better access to the rapidly growing marketplace for films 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 8) streamline the payment of deposits, guarantees, and royalties by local distributors to U.S. producers, and ensure that no Chinese regulation or rule impedes the payment of U.S. producers for their intellectual property rights.
- Open key elements of the audiovisual market to foreign investment, particularly regarding film and TV production and distribution companies, and online video services platforms; reconsider the 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); 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 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; 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; 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**

Supported by the largest Internet user base in the world, the potential of China's online marketplace is immense. Chinese companies are investing heavily in content and media, with greater numbers of co-productions and financing from China. This expanding marketplace provides consumers with access to a vast array of legitimate music, movies, TV programming, and other works available through an increasing number of licensed digital services. 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 piracy and market access concerns prevent rights holders from seeing their investments in China reach their full potential. 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 serious concern. Contributing to the problem, many online services benefit from overbroad ISP safe harbor rules to avoid seeking licenses to the copyrighted material available on their platforms. Notwithstanding annual Special Enforcement Campaigns, which have yielded some positive results and helped pave the way for a growing legitimate digital economy in China, the NCAC's generally non-deterrent and piecemeal administrative sanctions have done little to hinder the growth of major piracy websites, apps, and related services.<sup>4</sup> 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 serious concern, including illegal download sites; peer-to-peer (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 (e.g. *Xunlei Thunder*<sup>5</sup>); forums; streaming sites; social media websites; and online marketplace/auction sites selling pirated goods, Piracy Devices, high quality counterfeits, and USB flash drives containing a high volume of infringing sound recordings. Notorious piracy sites that disrupt the music and audiovisual marketplaces include *zimuzu.tv*,<sup>6</sup> *btbtdy.net* *trix360.com*, *92flac.com*, *sq688.com*, *51ape.com* *dygod.net*, *ygdy8.com*, *gaoqing.la*, *mp4ba.com*, *btbtt.co*, *piahua.com*, *vodxc.com*, *lbdly.com*, *yymp3.com*, *musicool.cn*, *xh127.com*, *b9good.com*, *dygang.com*, *loldytt.com*, *piaohua.com*, *bttt99.com*, *80s.tw*, *meijutt.com*, *ygdy8.com*, *dysfz.vip*, and *panduoduo.net*. An increasing number of pirate sites use CK Player, an online media player that facilitates infringement

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<sup>2</sup>See IFPI Music Listening in 2019, P23, available at <https://www.ifpi.org/downloads/Music-Listening-2019.pdf>.

<sup>3</sup>See, e.g., IIPA's 2019 Special 301 submission on China ("IIPA 2019"), available at <https://www.iipa.org/files/uploads/2019/02/2019SPEC301CHINA.pdf>; IIPA, *China's WTO Compliance—Notice of Intent to Testify, Summary of Testimony, and Testimony regarding: "Request for Comments and Notice of Public Hearing Concerning China's Compliance with its WTO Commitments (84 Fed. Reg. 40471, August 14, 2019), September 18, 2019*, available at [https://www.iipa.org/files/uploads/2019/10/2019-09-18\\_IIPA\\_China\\_WTO\\_Compliance\\_Comments.pdf](https://www.iipa.org/files/uploads/2019/10/2019-09-18_IIPA_China_WTO_Compliance_Comments.pdf).

<sup>4</sup>The music industry experience is illustrative. China's crack down on many unlicensed music services has helped contribute to growth of the music industry, but the legitimate music market in China is still nowhere near its potential. Unlicensed music is still available on a large number of sites and services, and through mobile apps. Despite boasting the largest number of Internet users in the world, China's music market ranks just 7th globally, behind much smaller markets such as South Korea and France. Revenues remain a small fraction of what they should be, even when compared to revenues seen in comparably developed markets, and online music piracy sites and hard goods shipments from China continue to negatively affect other marketplaces, e.g., in Hong Kong, Taiwan, Japan, Singapore, and Malaysia, among others.

<sup>5</sup>*Xunlei Thunder* is a BitTorrent service that makes available unauthorized motion picture and television content to users.

<sup>6</sup>According to Alexa, *zimuzu.tv*, a linking site, is currently ranked as the 117<sup>th</sup> most popular website in China, and SimilarWeb recorded 22.1 million visits to the site in December 2018.

of audiovisual content, including video games. The video game industry reports that three popular Chinese websites largely ignore takedown requests: *soft5566.com*, *wuguicili.com*, and *btclillian.net*.<sup>7</sup>

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>8</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>9</sup> Unfortunately, Baidu's services continue to be used for piracy, and their notice and takedown system has been ineffective.<sup>10</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.

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>11</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>12</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>13</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>14</sup> Examples of such apps include *Renren Shipin*, *Daqian Vision*, and *Tian Kian Kan*, which facilitate infringement of audiovisual content; and *Kuaishou*, which facilitates infringement of music. *RenRen ShiPin* is a good example of a piracy app that has been the subject of legal action by legitimate services in China, but continues to blatantly infringe foreign content. The app, which makes available hundreds of unauthorized foreign television episodes, has approximately 35.6 million downloads from major China-specific Android App Stores, and can also be downloaded from a popular website (*rr.tv*).<sup>15</sup> Another app, which is extremely popular in China and Hong Kong, is *Tian Lai K Ge*, an infringing Karaoke app.<sup>16</sup> 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. For the film industry, a significant problem is the proliferation of "clone pyramid" piracy websites, a network of thousands of sites, each embedded with a proprietary video player (e.g., the *xigua* video player), which entice users

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<sup>7</sup>These sites are all registered business entities in China, and host content and link to other sites with infringing video game content. Over 87% of the traffic to *soft5566.com* originates in China. In response to takedown notices from the video game industry, *soft5566.com* and *btclillian.net* take down only 1% of infringing content, and *wuguicili.com* takes down 17% of infringing content.

<sup>8</sup>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>9</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. 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. That case is pending.

<sup>10</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>11</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>12</sup>IIPA has provided extensive information on Piracy Devices in prior reports. See, e.g., IIPA 2019 at 19.

<sup>13</sup>The Google Play Store is not officially available in China.

<sup>14</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>15</sup>*rr.tv* ranks 317 on Alexa and 391 on SimilarWeb in China; more than 85% of its traffic comes from China (with 10% from Japan and 1% from the U.S.). Because *RenRen ShiPin* is also available on both Apple and Android platforms, its use is more prevalent than those traffic numbers would suggest.

<sup>16</sup>In 2019, the operators of *Tian Lai K Ge* were ordered to pay compensation to record labels of 1000RMB per song. The local recording industry in Hong Kong is appealing the low damage award, and the case is still ongoing.

of the sites to create their own derivative piracy websites to generate revenue for themselves and for the mother site.<sup>17</sup> 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*, *cdbao.net*, and *mu6.me*, have begun to adopt the same strategy. Infringement of music videos is also a problem for the music industry.<sup>18</sup>

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>19</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 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>20</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<sup>21</sup> to strengthen the responsibility of ISPs to review and manage UUC will be helpful in combatting online piracy, but it is unclear exactly what the regulations will require. In addition, if fully implemented, the *Guidelines on Strengthening the Protection of Intellectual Property Rights* (discussed below) will also be helpful.

**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>22</sup> Several online platforms that facilitate access to unauthorized copies of journal articles and academic textbooks, including *syyj.com*, *Keyandi*,<sup>23</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. As with other forms of piracy, it is an unfortunate reality that administrative enforcement measures seem 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 has re-emerged and is now infringing publishing titles that were not the subject of the prior action.<sup>24</sup> It appears that China's enforcement authorities will not take action against the platform as a repeat infringer acting in direct contravention of the previous finding of illegal conduct; rights holders must instead refer a new, but essentially identical, infringement case to China's enforcement authorities. This case illustrates the lack of deterrence in the market due to inadequate enforcement.

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

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<sup>17</sup>Previous reports have provided more details on clone pyramid piracy websites. See IIPA 2019 at 19. Chinese enforcement authorities should investigate and take action against the producers of the proprietary video players (e.g., *xigua* plugin player) and the Content Management System (CMS) and Video Collection Resource (VCR) websites that facilitate the expansion of this network.

<sup>18</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>19</sup>Three cyberlockers continue to provide for file sharing in China: *pan.baidu.com*, *ctdisk.com*, and *115.com*.

<sup>20</sup>In 2019, 278 notices with 2944 links were sent to Baidu, and all were removed.

<sup>21</sup>Regulations on the Administration of Online Audio and Video Information Services, which came into effect on January 1, 2020.

<sup>22</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 have been effectively shut down, despite referrals to enforcement authorities.

<sup>23</sup>*Keyandi* 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.

<sup>24</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).

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>25</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, and 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. Deterrent-level criminal sanctions and penalties for the manufacturers and suppliers of circumvention devices and software components are necessary to meaningfully stem the downloading of infringing games.

**Unauthorized Camcording Remains a Problem:** China is a significant source of illicit camcording in the region, and the quality of camcorded films from China has improved, threatening the legitimate theatrical and home entertainment markets.<sup>26</sup> Also fueling the growing camcording problem is the increasing problem of people in Chinese movie theaters using cameras, including those on handheld mobile devices, to live-stream theatrical broadcasts of films online. In April 2019, the Ministry of Public Security (MPS) announced the results of a criminal taskforce investigation into film piracy, including camcording.<sup>27</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 a cinematographic/audiovisual work, from a performance in an exhibition facility. Furthermore, as discussed below, to address livestreaming, 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.

**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 Chinese market and markets outside of China. Pirate/counterfeit production of textbooks, consumer books, and trade books remains a concern. Production of pirated and counterfeit copies of children's books and academic textbooks remains an issue, with these unauthorized physical copies 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>28</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>29</sup>

**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

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<sup>25</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>26</sup>During 2019, a total of 23 audio and three video sources were forensically matched to cinemas in China. In 2018, there were three audio and 13 video matches.

<sup>27</sup>According to the announcement, beginning in February 2019, police investigated 25 film piracy cases, including four camcording syndicates, and made 251 arrests. According to Ministry of Public Security (MPS), the amount of illegal business volume and the value of the main facilities and equipment used for the illegal activities was approximately RMB230 million yuan (US\$34.2 million). Among the cases, Jiangsu police broke up a film piracy syndicate, and seized a cloned server dubbed "phantom number one" (No. A15591), which had been used to pirate 31 films since 2017.

<sup>28</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>29</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.

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 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>30</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. China's growing Internet user base creates potential opportunities for rights holders; but overbroad interpretation of ISP safe harbor rules, especially by law enforcement authorities, as well as a historic toleration for piracy, have kept the creative marketplace from reaching its potential, and hampered the development of legitimate services.<sup>31</sup> 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 14 years. However, during that time, there have been just 600 copyright infringement cases. 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 are not enough.<sup>32</sup> The 2019 Annual “Sword Net” Campaign focused on combatting piracy of films in theatrical release, and combatting unauthorized access to video streaming services.<sup>33</sup> As part of this campaign, China took enforcement actions against the following activities: illegal camcording and the sharing of pirated films through cyberlocker links, social media, and e-commerce platforms; piracy at VOD mini-theaters and chains; pirated movies and TV content hosted outside of China; unauthorized content made available through Internet Protocol Television (IPTV), Over-the-Top (OTT) services, and smart devices and apps (including aggregating apps) for streaming media; and the sale on e-commerce platforms of OTT products that enable access of unauthorized content. In the 2019 campaign, the motion picture industry referred nine piracy websites and seven piracy apps, which were accepted.<sup>34</sup> In December 2019, NCAC announced the results of the 2019 campaign, which included: 450 cases related to online copyright infringement, including 160 cases referred for criminal investigation with a total monetary value of RMB524 (US\$75.5 million); deletion of 1.1 million infringing links; and seizure of 10.75 million pieces of pirated products.<sup>35</sup>

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<sup>30</sup>One example is that some Chinese pay-TV operators or digital licensees distribute U.S. content to hotels for public viewing.

<sup>31</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>32</sup>For a summary of recent Sword Net campaigns, see prior IIPA China country reports (e.g., IIPA 2019 at 22).

<sup>33</sup>The six-month campaign was announced on World IP Day (April 26, 2019) by the NCAC, the Cyberspace Administration of China (CAC), the Ministry of Public Security (MPS), and the Ministry of Industry and Information Technology (MIIT) at the National Conference of Copyright Protection and Development in the Digital Environment.

<sup>34</sup>The piracy apps *Movie Daquan* and *Film and TV Daquan* have been removed from app stores; the *Languang Kampianwang* app has been removed from app stores (and appears to have ceased operating); the *BoboTV* app has issued a written apology, removed infringing content, and paid a fine of RMB 30,000; and investigation of three major piracy websites and one major piracy app are currently under police investigation.

<sup>35</sup>NCAC highlighted ten top cases, five of which were supported by IIPA member evidence collection and title verification. These five cases included: 1) an illegal camcording syndicate (arrests were made and criminal prosecution is underway), 2) a case involving a group of rogue piracy websites' involvement in infringement of hundreds of U.S. motion picture titles, resulting in imprisonment and criminal fines, 3) a case involving a notorious website *cnscg.com* in Shanxi Province involving the infringement of hundreds of U.S. motion picture titles, and resulting in a prison sentence and fine against the principal perpetrator, 4) a case involving a major piracy source website *91zy.cc* in Hubei Province that supplies over 100,000 domestic and overseas films and TV dramas, including 554 U.S. motion pictures, to over 500 piracy websites, which has resulted in arrests and confiscation of illegal criminal gains (prosecution is underway), and 5) a case involving a WeChat public account “movie\_6666” in Jiangxi Province through which more than 2,500 U.S. motion picture titles were infringed, resulting in detention of the main operator and imposition of a fine.



**More Sustained, Holistic Enforcement Approach Needed:** In November 2018, NCAC stated that China would increase focus on combatting online infringement, and local copyright law enforcement agencies have indicated they will strengthen administrative penalties for infringement. But 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 locate those responsible for piracy sites because many infringers use fake registration information to register their websites.<sup>36</sup> These rogue services effectively cannot be sued. The NCAC should establish a mechanism with MIIT and ISPs to shut down these infringing sites operating without a business license. 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); 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 foreign rights holders (discussed below in the Market Access section). Moreover, civil suits, while helpful, are ultimately insufficient to address major piracy problems because damages awards are relatively low and non-deterrent.<sup>37</sup> And criminal enforcement is inadequate mainly because criminal thresholds are too high.<sup>38</sup> One welcome development is that China has created a dedicated criminal department within the 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:

- Follow through on reforms to the copyright law and implementation of the *Guidelines on Strengthening the Protection of Intellectual Property Rights* to improve the legal framework to meet the challenges of copyright enforcement in the digital environment, as detailed below and in the Copyright Law Update section.
- Adopt reforms that address shortcomings in China's Criminal Law that IIPA has identified in previous reports.<sup>39</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>40</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").

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<sup>36</sup>All websites in China must register with *milibeian.gov.cn*, and the owners of websites can be identified through searches using their registration numbers, domain names, IP addresses, or "Whois" data.

<sup>37</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>38</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 huge numbers of downloads.

<sup>39</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. This was a major missed opportunity, although the Amendment did add 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 Procurate 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>40</sup>China should clarify that a single episode of a television program counts as one copy toward the threshold.

- 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.
- 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>41</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 effectively bring 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.

As noted below, some of these measures would be addressed through implementation of the Phase One agreement, which China should fully and swiftly implement.

**Guidelines on Strengthening the Protection of Intellectual Property Rights:** In a hopeful sign, on November 24, the Communist Party of China's Central Committee (CPCCC) and the State Council, jointly issued *Guidelines on Strengthening the Protection of Intellectual Property Rights*, which address many important enforcement priorities identified above. The *Guidelines* outline areas in which the government plans to take steps to strengthen IPR protection (including copyright, patent, and trademark) by 2022, and for China to achieve "social satisfaction" with the improved and strengthened IPR protection system in place by 2025. The *Guidelines* appear to underscore the importance the government is attaching to improving the protection of intellectual property in order to boost Chinese economic competitiveness. Importantly, they would make protection of intellectual property one of the criteria for evaluating local government officials' performance, creating a greater incentive for compliance. The key points in these *Guidelines* direct the government to:

- implement punitive damages for IPR infringements, including copyright, raise the ceiling for civil compensation, and enhance administrative penalties (Clause 2.1);
- 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);
- enhance supervision and inspection for cases handled across departments and regions to avoid local protectionism (Clauses 2.3, 4.9);
- strengthen IPR protection in sports broadcasting (Clause 2.4);
- formulate protection and management standards for e-commerce platforms (Clause 2.4);
- guide and regulate management of all types of websites to "remove infringing content, block or disconnect pirated website links, stop the dissemination of infringing information" (Clause 4.10); and
- improve foreign-related communication mechanisms, build a "level playing field" for IPR protection, organize briefings to inform media and the public about major issues to enhance trust, clarify doubts and actively respond to domestic and foreign rights holders' concerns (Clause 4.13).

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<sup>41</sup>Opinions of Supreme People's Court, Supreme People's Procurate 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).

IIPA urges the Chinese Government to follow through on these important commitments this year.

## **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>42</sup> These reform processes, including the impending 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 Should Be Improved:** After years of IIPA and other stakeholders pressing for progress on amendments to the copyright law, the process appears to be at a critical stage, although there was little information regarding the status of the amendments in 2019. The Ministry of Justice (which has taken over the functions of the now-abolished State Council Legislative Affairs Office) is expected to publish a revised draft of the bill, followed by a public consultation. The bill can then be entered on the legislative agenda for the National People's Congress (NPC). IIPA understands that the bill is being revised.

As previously reported, IIPA hopes that the bill retains certain important provisions already in the last publicly available draft, adds provisions to address deficiencies in China's legal framework, and includes changes to certain provisions that appear to conflict with China's WTO obligations or are inconsistent with current international or best commercial practices.<sup>43</sup> In particular, the bill should retain provisions that:

- provide rights of public performance and broadcasting for producers of sound recordings, which reflect the importance of these uses and are critical for the future of the music industry in China; and
- provide a basis for joint liability of service providers that knowingly and actively encourage infringement, which would significantly enhance online enforcement.

To address deficiencies in China's legal framework, the bill should include provisions that:

- 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" and by ensuring liability attaches when an app or service circumvents TPMs that rights holders use to prevent unauthorized access (i.e., access controls) to copyrighted content (regardless of where that content is stored);<sup>44</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>45</sup>

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<sup>42</sup>See, e.g., IIPA 2019. Previous developments included the National People's Congress passing legislation to establish IP Courts in Beijing, Shanghai and Guangzhou. These IP courts handle civil and administrative cases related to patents, computer software, technology secrets, trademarks, and some copyrights (when cases meet certain thresholds), according to the Supreme People's Court (SPC). The IP court in Beijing opened in November 2014, and the IP courts in Shanghai and Guangdong opened in December 2014. According to the SPC, from their opening day until June 2017, these three IP courts accepted 46,071 cases, of which 33,135 have been closed. A new IP court opened in Shenzhen in December 2017. China launched its first cyber court in Hangzhou in August 2017, and additional cyber courts opened in Beijing and Guangzhou in September 2018. These courts accept all Internet-related civil and/or administrative cases (including online copyright infringement disputes) within their respective jurisdictions, as well as those cases assigned by the higher people's courts. The courts have the potential to increase convenience, efficiency and cost-effectiveness mainly by using the Internet to handle much of the litigation process; however, as we note in this and in prior reports, without adequate legal tools to combat infringement, enforcement will be inadequate.

<sup>43</sup>For a more detailed discussion of the concerns with the draft copyright bill, see IIPA 2019 at 24-25.

<sup>44</sup>Article 48(6) of China's Copyright Law should be clarified to ensure liability for app developers who circumvent TPMs that control access to content (i.e., access controls), without the need to prove a copyright infringement occurred, and to ensure that copyright owners have standing to bring suit in cases in which the TPM was employed by a licensee platform.

<sup>45</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 75 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.

- provide a legal basis for 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;<sup>46</sup> and
- provide for criminal liability for the manufacture, distribution, and exportation of circumvention devices and software components.

Finally, to avoid conflicts with China's WTO obligations, or inconsistencies with current international or best commercial practices, certain provisions in the prior draft should be revised, including:

- the ISP liability provisions to ensure that only passive and neutral intermediaries that do not contribute to infringing activities are eligible for the safe harbors 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; and
- the proposed exceptions to and limitations on copyright to ensure they are adequately defined and appropriately narrow in scope, and otherwise consistent with the WTO TRIPS three-step test.

We understand that a non-public 2018 draft of the legislation did not contain many of the controversial provisions in the prior draft, including resale rights and extended collective management provisions, but unfortunately, it also did not contain many of these recommendations, including an extension of China's outdated copyright term and a clarification of the current ISP liability framework.

**Clarify the Network Rules:** Safe harbors under the current ISP liability framework are being misapplied to 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. The Network Rules<sup>47</sup> should be clarified to ensure that the safe harbors are only available for online services that function as neutral and passive intermediaries (i.e., only activities that are merely technical, automatic or passive) and that, upon notice or otherwise obtaining knowledge of infringement, promptly take reasonable steps to stop and prevent the infringement, including expeditious takedown of infringing content and other measures demonstrated effective in preventing or restraining infringement.<sup>48</sup> As noted above, these requirements should similarly be reflected in the Copyright Law amendment. In addition, as discussed below, proposed amendments to the Civil Code Tort Chapter regarding intermediary liability should ensure coherence with the Network Rules.

**E-Commerce Law:** On January 1, 2019 China's first "e-commerce" law entered into force. The law applies only to online transaction 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. 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 of the new law 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. The Chinese Government should interpret and implement the law to prevent this outcome. Furthermore, it is critical that the e-commerce law support rights holders' actions to prevent illegal trafficking of infringing goods on e-commerce platforms,<sup>49</sup> and where there is already good cooperation between rights holders and some e-

<sup>46</sup>Once enacted, the government should monitor test cases brought to ensure the law operates effectively and fairly to all parties.

<sup>47</sup>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) established the current ISP liability framework in China.

<sup>48</sup>Two recent cases (*iQiyi v. Kuanyu* and *Yang Zhi v. Apple Inc.*) in China found that platforms in China have a duty of care to ensure their services are not used for infringement, a helpful development in clarifying the Network Rules.

<sup>49</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.

commerce platforms through voluntary arrangements, implementation of the e-commerce law should not upset those existing arrangements. 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.

**Tort Law:** China is also presently considering amendments to its Civil Code Tort Chapter (the “Draft Code”) law that include notice and takedown provisions similar to those in the e-commerce law, and the scope of these provisions apparently will extend to digital content. Unfortunately, these provisions include many of the same shortcomings discussed above, including a failure to 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, the Draft Code should be clarified to eliminate uncertainty regarding its interplay with the intermediary liability provisions in the Network Rules and the E-Commerce Law. As noted above, the E-Commerce law does not apply to digital content, while the Network Rules do. Although Article 955 of the Draft Code provides that “if this Law or other laws contain other stipulations on exemption or limitation of liability, such stipulations prevail,” it remains unclear how the Draft Code would interact with the Network Rules and what the requirements or liabilities of Internet intermediaries would be, particularly considering that the Network Rules and the Civil Code Tort Chapter are on different levels of hierarchy. To ensure coherence across the legal framework, a provision should be added to the Draft Code ensuring that network service providers that store and provide public access to infringing contents and whose activities are not merely technical, automatic, and passive may be held liable, and making clear that this provision prevails over other laws or regulations that may state the contrary.

#### **Regulations on Optimizing the Business Environment and Opinions on Strengthening IP Protection:**

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. IIPA encourages China to swiftly implement the Regulations, and to address the many other deficiencies in China’s enforcement framework identified above.

**Administrative Criminal Transfer Regulations Need Significant Improvements:** The amended Criminal Transfer Regulations are well intentioned, but do not adequately address existing challenges to the effective transfer of administrative cases to criminal investigation and prosecution. The regulations leave unclear whether transfers are required upon “reasonable suspicion” that the criminal thresholds have been met, and thus, some enforcement authorities believe “reasonable suspicion” is insufficient, requiring proof of illegal proceeds before transferring. However, administrative authorities do not employ investigative powers to ascertain such proof. The amended transfer regulations should expressly include the “reasonable suspicion” rule, and they should ensure this rule is consistently applied by both transferring administrative authorities and receiving criminal authorities.<sup>50</sup>

**Phase One Agreement:** IIPA welcomes the recent 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 this report, particularly regarding IPR enforcement. These commitments reinforce WTO obligations and recognize Special 301 standards (i.e., ensuring “adequate [and] effective protection and enforcement of intellectual property rights” and “fair and equitable market access to persons . . . that rely upon intellectual property protection” (Article 1.2)), and also expand on these disciplines, calling on China to improve its enforcement framework, particularly against online infringement and trade in pirated goods on e-commerce platforms.<sup>51</sup> IIPA urges China to follow through on these commitments, and encourages the

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<sup>50</sup>Presently, even when administrative authorities do seek to transfer a case, the local Public Security Bureau (PSB) does not necessarily accept it. Practices vary among different PSB offices, but too often the PSB adopts strict acceptance criteria, effectively requiring complete or nearly complete evidence that a crime has been committed, rather than using a reasonable suspicion standard.

<sup>51</sup>China’s commitments include to: “provide enforcement procedures that permit effective and expeditious action by right holders against infringement that occurs in the online environment, including an effective notice and takedown system to address infringement” (Article 1.13); “combat the prevalence of counterfeit or pirated goods on e-commerce platforms by taking effective action with respect to major e-commerce platforms that fail to take necessary measures against the infringement of intellectual property rights,” including providing “that e-commerce platforms may have their operating licenses revoked for repeated failures to curb

U.S. Government to ensure that China fully implements them. IIPA is hopeful that Phase Two of the agreement will address the many other important priorities outlined in this report, including the deficiencies in China's legal framework outlined above and growing market access concerns, as discussed below.

## **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>52</sup> After the case concluded in 2009, China eased several market access restrictions,<sup>53</sup> but many core activities of copyright industries remain restricted or prohibited. For example, the Negative Investment List, revised in 2019, 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 has recently been moving in the opposite direction.

**Increasing Online Market Access Barriers:** As we have noted in prior reports, the Online Publishing Rules, which took effect in March 2016, appear to expand the scope of longstanding restrictions on the involvement of foreign entities in online publishing activities and 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>54</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 GAPP. 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. In 2017, MIIT regulations became effective that, among other things, would require all Internet domain names available in China to be registered through a licensed, domestic service provider.

China has also introduced a raft of alarming draft measures that, if implemented, would clearly discriminate against U.S. producers and distributors of creative content. For example, in September 2018, the new NRTA proposed two draft regulations regulating the production and distribution of foreign audiovisual content.<sup>55</sup> It appears these draft

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the sale of counterfeit or pirated goods" (Article 1.14); provide for forfeiture and destruction of counterfeit and pirated goods, as well as the materials and implements predominantly used in their manufacture (Article 1.20); enhance border enforcement by strengthening cooperation, increasing the number of trained personnel, and increasing border enforcement (Article 1.21); "take sustained and effective action against copyright and trademark infringement at physical markets" (Article 1.22); "require the administrative authorities to transfer a case for criminal enforcement, if, under an objective standard, there is 'reasonable suspicion' based on articulable facts that a criminal violation of an intellectual property right has occurred" (Article 1.26); "provide civil remedies and criminal penalties sufficient to deter future intellectual property theft or infringements," including "by imposing a heavier punishment at or near the statutory maximum permitted under its laws" and by "increasing the range of minimum and maximum preestablished damages, sentences of imprisonment, and monetary fines to deter future intellectual property theft or infringements" (Article 1.27); "ensure expeditious enforcement of any fine, penalty, payment of monetary damages, injunction, or other remedy for a violation of an intellectual property right ordered in a final judgment by its own court" (Article 1.28); provide legal presumptions of copyright ownership, including waiving certain evidentiary requirements to establish ownership, licensing, and infringement in enforcement proceedings (Article 1.29); eliminate or streamline requirements for foreign litigants to authenticate evidence for use in China's courts (Article 1.30); and provide in civil proceedings "a reasonable opportunity to present witnesses or experts in its case and cross-examine any witness testifying in the proceeding" (Article 1.31). Full implementation of these commitments would help to address certain concerns identified in this report.

<sup>52</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>53</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>54</sup>For example, media reports around the time of the measures entering into force noted that the Online Publishing Rules were used to shut down Apple's online book and movie services. See, e.g., <https://www.nytimes.com/2016/04/22/technology/apple-no-longer-immune-to-chinas-scrutiny-of-us-tech-firms.html>.

<sup>55</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

regulations were never published but provisions to further tighten the content review process for imported content were implemented. 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>56</sup> In April 2016, China published a set of administrative measures on e-commerce that would discriminate against foreign suppliers; and in June 2016, China published new content approval regulations for mobile 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. 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, 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. The September 2018 draft rules on foreign audiovisual content, discussed above, contained expansions of the 30% cap on foreign content to cartoons, documentaries, and other programs. 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>57</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, and expeditious, and does not have a disparate impact on U.S. content, China should adopt a voluntary, age-based classification system.

**Additional Audiovisual Market Access Concerns:** China maintains a number of longstanding discriminatory restrictions in the audiovisual sector that harm the U.S. industry, limiting its ability to compete fairly and inhibiting its potential growth in this massive and fast-growing market.<sup>58</sup> To highlight just one, China prohibits foreign-owned investment in online video services, and audiovisual production studios and distribution (and, as noted above, the June 2019 revision of the Negative Investment List maintained these prohibitions). U.S. firms are highly competitive globally in these sectors, and these restrictions undermine the ability of U.S. content creators and distributors to compete in the Chinese marketplace, hurting their growth. Moreover, China continues to introduce additional impediments to its market for U.S. audiovisual content. The June 2016 Statement and Rules on Importing TV Formats, which was clearly intended to promote indigenous Chinese radio and television programs at the expense of foreign content, has negatively impacted U.S. producers and appears to contravene China’s WTO obligations.<sup>59</sup> A March 2016

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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>56</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>57</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>58</sup>For example, 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, 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. In addition, under State Council regulations, public screening of foreign films must not exceed one-third of the total annual screen time. The same screen quota was maintained in the Film Promotion Law, which took effect in 2017. China requires home-video license agreements to be for a duration of at least three years, an unnecessary intrusion into copyright owners’ contractual rights. 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.

<sup>59</sup>Among other things, the rules 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.

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>60</sup> Another market impediment 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, and have become yet another obstacle for U.S. producers to access the Chinese marketplace.

In addition to all of these longstanding and more recent barriers (and the theatrical market access barriers discussed below), beginning mid-2019, without any official announcement, the Chinese government agencies and distribution platforms have significantly slowed the processing and licensing of new U.S. content intended for Chinese online streaming platforms, in what is being called a "soft ban." It continues today, and is dramatically decreasing 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. U.S. producers—shut out of the second largest market in the world—are also increasingly inhibited from making significant investments in U.S.-origin content.

China needs to change course from its current protectionist path. 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 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 that would greatly improve the distribution marketplace and would remove other market distortions that suppress prices and reduce access for both revenue-sharing films and flat fee films imported into China.

First and foremost, China committed in 2017 to make a meaningful increase to compensation, as the current 25% U.S. share of revenue is far below comparable markets. Furthermore, the official quota 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, 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.

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<sup>60</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>61</sup>IFTA Research and Analysis, "China Theatrical Market 2010–2019".

<sup>62</sup>*Id.*



China further committed in the Agreement (and reconfirmed part of that commitment 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 fully implemented. The newly-formed CFA, which replaced SAPPRFT in 2018, still permits only one film importer 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 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, and liberalize the distribution market for private third party Chinese distributors; 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 the Chinese locking out U.S. films 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 more independent producers have unimpeded access to the Chinese market; 5) further relax the quota for revenue sharing films and online video websites so filmmakers and audiovisual companies may have substantially better access to the rapidly growing marketplace for films 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 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 to 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). In particular, China must do more to open its market to U.S. films, and take further steps to implement the WTO ruling regarding all the sectors of its online marketplace. Moreover, the new online publishing rules are also inconsistent with the WTO's ruling, and raise concerns regarding China's obligations under the General Agreement on Trade in Services (GATS), particularly Article XVI on market access and Article XVII on national treatment.<sup>63</sup> Similarly, the many discriminatory restrictions on audiovisual content may also be inconsistent with China's GATS commitments. The Statement and Rules on Importing TV Formats also raises questions regarding TRIPS Article 3 on national treatment, as it appears to favor Chinese rights holders over foreign rights holders. These provisions also appear inconsistent with China's commitment in Article 1.2 of the Phase One agreement to ensure fair and equitable market access to persons that rely upon intellectual property protection.

Regarding copyright protection and enforcement, the deficiencies outlined above regarding criminal enforcement procedures (e.g. failure to use a “reasonable suspicion” standard for criminal transfers, thresholds that are too high or unclear, inadequate presumption of ownership, 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. Also, the fact that commercial scale infringements are without a criminal remedy because of thresholds that are too high and the requirement to show that the infringement is carried out “for the purpose of making profits” is inconsistent with the

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<sup>63</sup>In the *2018 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 p. 157, report available at <https://ustr.gov/sites/default/files/2018-USTR-Report-to-Congress-on-China%27s-WTO-Compliance.pdf>.

requirements of both TRIPS Article 41 and Article 61 on criminal procedures. And 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.