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William Shpiece  
Chair of the Trade Policy Staff Committee  
Office of the United States Trade Representative  
600 17th Street, NW  
Washington, DC 20508

**Re: 2022 China WTO Compliance Report – Comments Regarding China’s WTO Compliance in Response to “Request for Written Comments Concerning China’s Compliance with World Trade Organization (WTO) Commitments” (87 Fed. Reg. 52835, August 29, 2022)**

To the Trade Policy Staff Committee:

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

China is a significant market for the creative industries. China’s online marketplace continues to expand, and China now leads the world in cinemas with over 80,000 movie screens, most of which support 3D and many of which offer enhanced formats such as IMAX and China Giant Screen.<sup>2</sup> China’s box office market increased by \$4.4 billion from 2020 to 2021 and is the top box office outside of the United States and Canada.<sup>3</sup> Further, China is now the seventh largest

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

<sup>2</sup> Xinhua, China Daily, *China’s cinema screen count tops 80,000*, October 13, 2021, available at <http://www.chinadaily.com.cn/a/202110/13/WS6166ac29a310cdd39bc6eb9a.html>.

<sup>3</sup> Motion Picture Association, 2021 Theme Report, available at <https://www.motionpictures.org/wp-content/uploads/2022/03/MPA-2021-THEME-Report-FINAL.pdf>.

music market,<sup>4</sup> the fourth largest music streaming market in the world by revenue,<sup>5</sup> and the largest market for video games with an estimated 742.19 million gamers and revenues estimated to reach \$50.18 billion in 2022.<sup>6</sup> 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.

In a positive development, China's 2021 amendments to its Copyright Law include the introduction of the rights of broadcasting and public performance for producers of sound recordings, which are essential protections for the music industry. Introduction of these rights is a critical development in China's legal regime and is a vital improvement for establishing the foundation for future success in the Chinese music marketplace that will benefit sound recording producers broadly, including those from China, the United States, and beyond.

Additional positive developments include: enforcement reforms, including a ten-fold increase in maximum "punitive" damages and the ability to shift the burden of proof to the accused infringer; protections for technological protection measures (TPMs), which enable digital trade of copyrighted works; and the elevation of certain elements of the three-step test into the law to appropriately confine exceptions and limitations.

While these amendments are laudable, it is critical that the implementing measures, expected later in 2022, meet global best practices and China's international commitments. Additionally, the amendments did not include several reforms that remain necessary to align the standard of copyright protection and enforcement with global norms and best practices to effectively meet the challenges of the digital age. China should fully implement its commitments under the Guidelines on Strengthening the Protection of Intellectual Property Rights (Guidelines), including to regulate websites and digital platforms to remove pirated materials, and under the Economic and Trade Agreement Between the United States and China (Phase One Agreement), including to make a meaningful increase in purchasing audiovisual products for video-on-demand (VOD) services. Following through on these commitments would help China address its substantial and growing piracy problems and remove barriers that prevent U.S. creative industries from fully accessing the Chinese market.

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

- (1) Increased market access barriers to the distribution of creative content, including online, and ongoing production and investment restrictions;

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<sup>4</sup> International Federation of the Phonographic Industry (IFPI) Global Music Report 2021, p. 11.

<sup>5</sup> *Id.* at p. 158.

<sup>6</sup> Newzoo, *Top Ten Countries/Markets by Game Revenues*, available at <https://newzoo.com/insights/rankings/top-10-countries-by-game-revenues>.

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

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

Previous IIPA comments and testimony have well documented the challenges faced by the motion picture and television, music, publishing, and entertainment software industries, and the 2022 IIPA Special 301 country report on China (submitted as an attachment to this submission) provides details on these challenges as they stood in February 2022. The following discussion highlights both potential WTO compliance issues in China and how addressing the five key areas of change noted above can secure positive commercial gains for the creative industries going forward, which remains the ultimate goal of IIPA members' efforts in China.

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

The development of a robust marketplace for copyrighted works in China requires that foreign rights holders have the legal right to enter that market on a non-discriminatory basis. Unfortunately, U.S. and other foreign rights holders have long faced certain restrictions and

prohibitions on core copyright activities in China. For example, China is still not in compliance with the WTO's ruling in the landmark market access case (DS 363) brought by the United States regarding many market access barriers in music, audiovisual products, and publications.<sup>7</sup> After the case concluded in 2009, China eased several market access restrictions,<sup>8</sup> but many core activities of copyright industries remain restricted or prohibited. For instance, the Negative Investment List, revised in 2020, continues to prohibit, among other things, foreign investment in the "publication and editing of books, newspapers, journals, audiovisual products and electronic publications" and foreign investment in audiovisual production studios, movie distribution, and online video services. While the prohibition of foreign investment in audiovisual production studios is also a barrier facing U.S. record labels in China, Item 17 of the 2020 Negative Investment List permits foreign investment in online music services, which is a welcome and positive step. Rather than continue to pursue policies that impede access to its marketplace, China should meet its trade commitments and take steps to open its marketplace for the music, publishing, video game, and motion picture and television industries by eliminating the market access barriers discussed below.

Unfortunately, the Government of China has recently introduced a variety of measures that appear intended to further undermine market access of the U.S. creative industries. For example, China appears to now be applying its content review regime to content intended for other markets. Books merely being printed in China but otherwise intended for distribution in other markets are again subject to China's burdensome content review regime. This appears to be the case even for books that were previously being printed in and exported from China without issue. Extending the reach of its burdensome content review regime to books printed in the country but otherwise intended for distribution in other markets places an arbitrary and unjustified discriminatory burden on foreign publishers, who, for decades, have used printing partners in China, and is arguably a disguised restriction on international trade.

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

As we have previously noted, the 2016 Online Publishing Rules, which appear to expand the scope of longstanding restrictions on the involvement of foreign entities in online publishing activities, are having a chilling effect on foreign investment in online publishing services where, prior to the rules, some latitude appeared to have been granted.<sup>9</sup> Furthermore, in June 2019, China

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<sup>7</sup> China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products, WT/DS363/AB/R, December 21, 2009, available at [https://www.wto.org/english/tratop\\_e/dispu\\_e/363abr\\_e.pdf](https://www.wto.org/english/tratop_e/dispu_e/363abr_e.pdf).

<sup>8</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>9</sup> Among other things, these rules unfortunately restrict the distribution of foreign audiovisual content on online video platforms, even if the distributor has received a home entertainment permit from the former General Administration of Press and Publication (GAPP).

revised its Foreign Investment Catalogue, lifting certain restrictions, but production and distribution of audiovisual products and “network publication services” remained on the “Prohibited” list. The Ministry of Industry and Information Technology’s (MIIT’s) 2017 Regulations on Management of Internet Domain Names, among other things, requires all Internet domain names available in China to be registered through a licensed, domestic service provider. The regulations have unfortunately led to increased use of reverse proxy services by most piracy services targeting China. Since 2019, the National Press and Publication Administration (NPPA, formerly known as SAPP) tightened the approval process for the publication of video games and in August 2021, suspended the approval process altogether. The authority resumed licensing in 2022, but only for domestic titles. NPPA should increase the number of approvals for foreign video games to match the number of approved domestic games. Finally, many of the increasing audiovisual market access barriers discussed below are applicable to online distribution.

In addition to existing online barriers, China has introduced several alarming draft measures that, if implemented, would discriminate against U.S. producers and distributors of creative content. For example, the draft Radio and Television Bill released by National Radio and Television Administration (NRTA) in March 2021 could tighten regulation standards for online audiovisual programs and restrict foreign producers from participating in radio and television activities, including online. 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>10</sup> In June 2016, China published new content approval regulations for mobile video games that would make it extremely difficult for foreign publishers of mobile games to access the Chinese market.

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

China continues to introduce additional impediments to its market for U.S. audiovisual content, limiting the U.S. industry’s ability to compete fairly and inhibiting its potential growth in this massive and fast-growing market. In 2014, the government-imposed rules capping the online distribution of foreign films and TV dramas at 30% and requiring online distributors to register content, obtain permits, and submit content for review, resulting in extended delays and further uncertainty. In May 2022, the NRTA released a Notice on Items Relating to the Administration of Distribution License Services for Domestic Network Dramas, which officially extends China’s onerous content review system to domestic network dramas for online distribution in the administrative licensing system. Furthermore, because there are only two opportunities to submit content for registration and review per year, U.S. producers are unable to submit a full season of a television series when that season is current due to the nature of television production. These rules have substantially reduced the number of U.S. film and television programs licensed in China for online distribution and in practice further reduced the foreign content caps to less than 30%. In September 2018, the NRTA proposed two draft regulations expanding the 30% cap for online distribution of foreign audiovisual content to broadcasting and applying the cap on a genre-basis

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<sup>10</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.

to film, TV, animation, documentaries, and “other” programs.<sup>11</sup> While these regulations have not been officially promulgated, provisions to further tighten the content review process for imported content have been implemented, and IIPA is concerned that industry-wide application of the genre-based restrictions began in early 2020, in particular for animation, further exacerbating the uncertainty and uneven playing field faced by U.S. audiovisual companies.

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

In addition, the 2016 Rules clearly intended to promote domestic Chinese radio and television programs at the expense of foreign content have negatively impacted U.S. producers and appear to contravene China's WTO obligations.<sup>12</sup> A March 2016 Notice allowing refunds from the Film Development Fund to cinemas that report favorable annual box office receipts from the screening of Chinese films incentivizes cinemas to screen more Chinese domestic films, further disadvantaging the competitiveness of foreign films in the Chinese market.<sup>13</sup> Another obstacle for U.S. producers in China is that private Chinese distributors, including VOD platforms, arbitrarily, without clear explanation, request from U.S. producers an excessive and particularly burdensome amount of legalized documentation regarding production and distribution 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.

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<sup>11</sup> The “Administrative Provisions on the Importation and Broadcasting of Overseas Audiovisual Programs” would further tighten regulations on foreign broadcasting, banning foreign films, TV dramas and animation from broadcasting during prime time, putting a 30% maximum cap on foreign audiovisual content in certain circumstances, and restricting content that can be disseminated online. The “Administrative Provisions on Overseas Personnel Participation in the Production of Radio and Television Programs” seeks to regulate the participation of foreigners in the production of radio and TV programs by, for example, banning the employment of foreigners as broadcast TV presenters or newscasters, and banning programs having both a foreign screenwriter and a foreign director.

<sup>12</sup> The June 2016 Statement and Rules on Importing Television Formats, among other things, established a procedure for filing/registration of foreign content by satellite television channels that would apply to jointly developed programs or programs with foreign personnel playing a “major guiding role” in production if the Chinese party does not “fully obtain intellectual property rights” in the program. Only two of these “foreign” programs are permitted to be broadcast in prime time per year; and no more than one new foreign program may be broadcast at any time per year, but it cannot be broadcast in prime time for that first year.

<sup>13</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.

China also maintains numerous longstanding discriminatory restrictions in the audiovisual sector that continue to harm the U.S. industry. For example, China prohibits foreign-owned investment in online video services, which would appear to violate China's General Agreement on Trade in Services (GATS) commitments. China also prohibits foreign investment in audiovisual production studios and distribution. As noted above, the June 2020 revision of the Negative Investment List maintained these prohibitions.<sup>14</sup> U.S. firms are highly competitive globally in these sectors, and these restrictions, including against direct-to-consumer audiovisual online services, undermine the ability of U.S. content creators and distributors to compete in the Chinese marketplace, hurting their growth.

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

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

China needs to meet its trade commitments and open its marketplace to U.S. producers instead of continuing down its current protectionist path. It is critical to send a strong message that these policies are unacceptable—particularly when China is now the largest film market in the

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<sup>14</sup> Other examples include: China limits foreign investment in cinemas and in-home video distribution companies to 49% and prohibits all foreign investment in television; local cable networks cannot carry foreign satellite channels without government approval or landing permits, which are limited to Guangdong and a handful of foreign channels; foreign satellite channels beaming into China are required to downlink from a government-owned encrypted satellite platform and may only be shown in three-star hotels and above and in foreign institutions, and the annual fee for each channel remains excessively high (US\$100,000); foreign television and film programming are limited to no more than 25% of total airtime, and other foreign programming to no more than 15% of total air time; foreign programming is banned during prime time and may not constitute more than 30% of pay television channels; foreign TV series and movies are limited to 50 episodes; foreign animation is restricted to no more than 40% of total airtime, and importers of foreign animation must produce a like amount of domestic animation; under State Council regulations as well as the 2017 Film Promotion Law, public screening of foreign films must not exceed one-third of the total annual screen time; China requires home-video license agreements to be for a duration of at least three years, an unnecessary intrusion into copyright owners' contractual rights; and China continues to require digital film prints to be replicated in local laboratories, impeding rights holders' ability to control the print quality or trace the source of camcording piracy.

world—and should be reversed. As discussed below, China should instead focus its attention on complete implementation of the 2012 U.S.-China Film Agreement and fulfill its Phase One services purchasing obligations, including IP licensing of audiovisual works, as well as other market opening steps for the motion picture and television industries.

## II. Legal Reforms

### A. Copyright Law

In November 2020, the National People's Congress (NPC) passed amendments that entered into force in June 2021. These amendments were long sought by IIPA and various other stakeholders. IIPA encourages China to expedite the revision of the Regulation on the Implementation of the Copyright Law to ensure proper implementation of the amendments, as discussed below.

IIPA welcomes the adoption of the rights of public performance and broadcasting for producers of sound recordings. This critical reform is vital for the future of the music industry in China, including both foreign and domestic rights holders, reflecting that these traditional “secondary uses” have become critical aspects of core revenue for record companies as the industry has transitioned from sale of products to licensing of uses. It is vital that China swiftly and effectively implement these new performance rights, including securing protection for foreign sound recordings, ensuring the effective exercise and management of these rights in accordance with international best practices, and establishing tariffs reflecting the economic value of the use of the rights in trade.<sup>15</sup>

The amendments also include some positive reforms that will improve the enforcement environment in China, including increasing the maximum for “punitive” damages ten-fold and shifting the burden of proof to the accused infringer upon a showing of *prima facie* evidence.<sup>16</sup> In addition, the amendments elevate certain elements of the three-step test (e.g., TRIPS Agreement, Article 13) into the law to appropriately confine exceptions and limitations. In implementing the exceptions to and limitations on copyright protection in the Copyright Law, China should ensure that they are appropriately narrow in scope and otherwise consistent with the three-step test.

IIPA is also encouraged that the amendments include protections against the circumvention of TPMs, including prohibitions against the act of circumvention as well as trafficking in circumvention devices or components. It is critical that China properly implements these amendments to ensure these protections are adequate and effective. For example, protections should apply to TPMs that control and manage authorized access to copyright works (“access

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

<sup>16</sup> Amended Article 54 increased the maximum pre-established damages amount from 500,000 RMB to 5 million RMB. Article 59 shifts the burden of proof to the accused infringer to show the accused infringer has received permission from the rights holder or is able to use the IP without permission under the Copyright Law.

controls”) and prohibitions against trafficking in circumvention devices or components should apply to both access controls and TPMs that protect rights (including against unauthorized copying) in those works (“copy controls”). As China is the world’s leading exporter of video game circumvention devices and software components, the law should prohibit the “export” of circumvention devices or components, which drives significant amounts of online video game piracy around the world. Furthermore, certain exceptions—including for educational or scientific research, encryption research, and reverse engineering—appear overbroad (certainly broader than those found in U.S. law). Implementation of these exceptions should ensure they do not undercut the exclusive rights of copyright owners. China should also ensure that circumvention devices or components are effectively removed from the channels of commerce, and that rights holders have standing to bring suit in cases in which the TPM was employed by a licensee platform. Lastly, China should clarify that criminal liability is available not only for circumvention of TPMs, but also for the manufacture, distribution, and exportation of circumvention devices and software components and the trafficking of circumvention services. If necessary, China should further revise the Copyright Law to address these issues and ensure adequate and effective protections of TPMs.

Other positive aspects of the draft amendments include the destruction or removal of the materials, tools, and equipment used to produce infringing copies from commercial channels without compensation; enabling “competent authorities” to investigate matters relating to the alleged illegal conduct, conduct on-site inspections of the premises where the alleged illegal conduct took place, inspect and copy documents or materials related to suspected illegal acts, and seal or seize premises and articles involving suspected illegal acts; providing new presumptions of ownership; and adding a pre-injunction remedy to prevent further harm to rights holders.

Nonetheless, the amendments failed to address several deficiencies in China’s legal framework. To address these deficiencies, China should further revise its legal framework to:

- ensure adequate and effective enforcement against apps, websites, and other digital platforms that facilitate unauthorized access to copyrighted works stored on remote servers by clarifying the right of “communication over information networks” to reject the “server principle”;<sup>17</sup>
- provide a clear legal basis under which Internet service providers (ISPs) may be held liable for IP infringements carried out by third parties using their services or networks;<sup>18</sup>
- provide protection against unauthorized retransmissions of copyrighted content over the Internet (including live streaming);
- update China’s outdated term of copyright protection to align it with evolving global norms, *e.g.*, 70 years after the death of the author, or in cases in which term is calculated based on publication, to the U.S. term of 95 years, but in any case, no less than 70 years from the date of publication;<sup>19</sup>

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<sup>17</sup> Certain Chinese intellectual property (IP) judges have unfortunately embraced the “server principle,” interpreting current law to require that infringement occurs only when the infringing content resides on the server or device of the operator of the app.

<sup>18</sup> While secondary liability for IP infringement is available under Chinese law, the basis for such liability should be clarified to ensure more predictable liability decisions by Chinese judges.

<sup>19</sup> China should align its term of protection with the majority of the Organization for Economic Cooperation and

- consistent with the requirements of the Guidelines, clarify the legal basis for no-fault injunctions against online intermediaries whose services are used to infringe copyright, including against access providers, requiring them to disrupt or disable access to websites and other online services offering unlicensed copyrighted content, especially in cases where the sites are operated outside of China or where the identities or locations of the website owners are unknown;<sup>20</sup> and
- clarify that only passive and neutral intermediaries are eligible for the safe harbors from monetary liability and that such intermediaries fulfill certain conditions, including adoption of a repeat infringer policy, with encouragement to institute a “know your business customer policy,” and that, upon obtaining knowledge of infringement (including a notice) or otherwise becoming aware of circumstances of which the infringement is apparent, intermediaries promptly take steps to limit, stop, and prevent further infringement, including expeditious takedown of infringing content and other measures demonstrated effective in preventing or restraining infringement.<sup>21</sup>

## **B. Enforcement Reforms**

IIPA welcomed the conclusion of the Phase One Agreement, signed by the United States and China on January 15, 2020. In the Agreement, China made a number of enforceable commitments that address certain concerns identified in these comments, particularly regarding intellectual property rights (IPR) enforcement. While implementation is ongoing, in August 2020, the State Council took an encouraging step by clarifying that, in accordance with Article 1.26 of the Phase One Agreement, transfers of administrative IP cases for criminal enforcement are required upon “reasonable suspicion” that the criminal thresholds have been met. The practice of asking rights holders to show that criminal damage thresholds have been met for a case to be transferred to criminal authorities has been a longstanding enforcement concern for IIPA members,

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

<sup>20</sup> Once the law is enacted, the government should monitor test cases brought to ensure the law operates effectively and fairly to all parties. The Cyberspace Administration of China (CAC) released draft Measures on Administration of Internet Information Services in January 2021, which appears to stipulate a mechanism that would provide for no-fault injunctions similar to procedures in place and successfully enforced in some 35 countries worldwide that provide an essential tool to rights holders by disabling access to piracy websites. Many piracy websites offering pirated music to Chinese Internet users have moved their hosting out of China, underscoring the need for this remedy, as well as improved enforcement cooperation measures in foreign territories.

<sup>21</sup> Safe harbors from monetary liability regarding IP under the current Internet service provider (ISP) liability framework are being misapplied to user-uploaded content (UUC) and other sites and services that are not neutral or passive intermediaries, which has negatively impacted the online market for creative content and contributed to the proliferation of pirated content, such as music videos and other works, available for streaming on these services. Clarification is needed regarding the 2012 Judicial Rules on Several Issues Concerning the Application of Law in Hearing Civil Dispute Cases Involving Infringement of the Right to Network Dissemination of Information (Network Rules), which established the current ISP liability framework in China.

and IIPA is hopeful that this new rule will be effectively applied by both administrative authorities transferring and the criminal authorities receiving the case.

IIPA is also encouraged by recent measures enacted or proposed by the Supreme People's Court (SPC) and the National Copyright Administration of China (NCAC) to implement aspects of the agreement that we hope will improve the enforcement framework in China.<sup>22</sup> For example, in April 2022, the Supreme People's Court released a judicial interpretation, the Provisions on Jurisdiction of IP Civil and Administrative Cases of First Instance and a subsidiary notice, the Criteria for Basic-Level People's Courts' Jurisdiction of IP Civil and Administrative Cases of First Instance. Both legal documents came into force May 1, 2022. According to the judicial interpretation, all copyright-related civil and administrative cases of first instance shall be filed with basic-level courts designated by the SPC, but cases of significance can start at the Intermediate People's Court. The increase of the number of courts now eligible to hear IP cases from four to sixteen should portend well for increasing the speed of cases in the future. IIPA urges China to follow through on its Phase One commitments and encourages the U.S. government to work with China to ensure full implementation.

IIPA is also hopeful that China will follow through on full implementation of the Guidelines introduced in 2019 to improve the legal framework to meet the challenges of copyright enforcement in the digital environment. In particular, China should meet its obligations in the TRIPS Agreement by revising the criminal threshold to ensure that criminal penalties are available for all online piracy on a "commercial scale."<sup>23</sup>

### **C. Other Instruments**

China's "e-commerce" 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.<sup>24</sup> Unfortunately, Article 43 does not explicitly adopt effective practices for handling counter-notices, raising the concern that sellers of infringing products could avoid responsibility by merely

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<sup>22</sup> For example, Official Reply on Issues of Application of Laws for Disputes Related to Internet IP Infringement (Fa Shi [2020] No. 9), enacted by the Supreme People's Court (SPC) on August 24, 2020, entered into force on September 14, 2020; Interpretation on Several Issues of Application of Law in Handling Criminal Cases about IP Infringement (III) (Fa Shi [2020] No.10), enacted by the SPC on August 31, 2020, entered into force on September 14, 2020; Guiding Opinions on Hearing Cases about IP Disputes Involving ECommerce Platforms (Fa Fa [2020] No.32), enacted by the SPC, entered into force on September 10, 2020; Draft Guidelines on Enforcement of IP Judgments was released by the SPC on March 15, 2020, for public comments; Provisions on Evidence in Civil Litigation Related to IP (Fa Shi [2020] No. 12), enacted by the SPC on November 9, 2020, entered into force November 18, 2020; Opinions on Strengthening the Protection of the Copyright and Copyright Related Rights (Fa Fa [2020] No. 42), released by the SPC November 16, 2020; Notice on Evidence Examination and Determination in Copyright Administrative Enforcement (Guoban Fa [2020] No. 2), released by the NCAC on November 15, 2020; and Opinions on Increasing Sanctions against IP Infringements (Fa Fa [2020] No.33), released by SPC, entered into force on September 14, 2020.

<sup>23</sup> China should clarify that a single episode of a television program counts as one copy toward the threshold.

<sup>24</sup> As previously reported, the e-commerce law entered into force in January 2019 and applies only to online transactions of infringing goods, while copyright liability limitations for digital content platforms continue to be decided exclusively in the framework of the existing copyright law and related regulations. The interpretation and implementation of the e-commerce law should be monitored closely, including with respect to its stated scope of coverage as well as any expansion of such explicit coverage.

objecting to rights holders' notices of infringement. As IIPA reported last year, the new Civil Code and SPC's Official Reply on Issues of Application of Laws for Disputes Related to Internet IP Infringement provide for improved takedown procedures that are consistent with Article 1.13 of the Phase One Agreement.<sup>25</sup> In August 2021, the State Administration for Market Regulation (SAMR) proposed amendments to the e-commerce law that included revisions to Article 43 that would improve the takedown procedures in the law, but unfortunately the proposal did not eliminate rights holders' liability for erroneous notices submitted in good faith as required under Article 1.13 of the Phase One Agreement.<sup>26</sup> It is critical that implementation of the e-commerce law is consistent with the Phase One Agreement, supports rights holders' actions to prevent illegal trafficking of infringing goods on e-commerce platforms, and does not upset existing voluntary arrangements between rights holders and some e-commerce platforms where there is already good cooperation.<sup>27</sup>

State Council Decree No. 722, which included Regulations on Optimizing the Business Environment, 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. The Government of China in 2021 took certain positive steps toward establishing a system for punitive damages, but more should be done, including reducing the burdensome and time-consuming procedural requirements for proving ownership and standing in copyright cases.<sup>28</sup>

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<sup>25</sup> See, e.g., 2021 IIPA Special 301 country report at 24-25, <https://www.iipa.org/files/uploads/2021/01/2021SPEC301CHINA.pdf>. In May 2020, China enacted a new Civil Code, which took effect in January 2021, that includes provisions on liability and takedown procedures for platforms that are similar to the e-commerce law. However, the provisions in the Civil Code permit rights holders to take action "within a reasonable period of time" of the filing of a counternotice while the measures to prevent the alleged infringement remain in place, whereas the e-commerce law required such action within 15 days. In August 2020, the SPC enacted the Official Reply on Issues of Application of Laws for Disputes Related to Internet IP Infringement (Fa Shi [2020] No.9) ("Reply"), which entered into force on Sept.14, 2020. The Reply provides for takedown procedures for online IP infringement consistent with Article 1.13 of the Phase One Agreement, including: prescribing that the period for rights holders to take further action in response to a counternotice may not exceed 20 working days; eliminating liability for erroneous takedown notices submitted in good faith; providing for the availability of punitive damages for erroneous counter-notifications submitted in bad faith; and providing for the availability of preliminary injunction orders requiring platforms to take special measures including, but not limited to deleting, blocking and disconnecting links.

<sup>26</sup> Under the proposed provision, the deadline for rights holders to file a complaint following receipt of a counter-notification to a takedown notice would be extended from 15 to 20 working days; an in-platform seller would have to provide double compensation when a false counter-notification it submitted causes expanded loss to a rights holder; in serious cases, the operating licenses of an e-commerce platform operator that fails to take necessary measures according to the law could be revoked; and an in-platform seller may provide guarantees to ensure it can pay compensation for losses caused by IP infringement to enable the e-commerce platform operator to temporarily suspend account deletion and other measures after receipt of a notification from the rights holder.

<sup>27</sup> High-quality Chinese counterfeit goods remain a problem for some creative industry sectors internationally, and effective enforcement action is required to prevent the supply of such goods to online marketplaces. Likewise, as discussed above, Piracy Devices and circumvention devices, both used primarily to access pirated content, remain significant problems in China.

<sup>28</sup> As noted above, the Copyright Law amendments increased "punitive" damages ten-fold. In addition, in March 2021, The Judicial Interpretation of the SPC on Application of Punitive Damages in Civil Litigations of Intellectual Property Rights (IPR) Infringement came into effect, and, among other things, provides for the application of the scope of punitive damages and how to determine "intentional infringement," gravity of circumstances, and calculation base

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

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

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. However, these actions, while helpful, are not enough to deter widespread piracy, particularly when compounded by China's many informal and formal barriers that restrict the distribution of legitimate foreign content in the country. China's growing Internet user base creates opportunities for rights holders, but China's enforcement deficiencies, including application of the "server principle," a broad interpretation of ISP safe harbor rules, a longstanding toleration for some level of piracy, and protracted delays in moving investigations and cases forward, have kept the creative marketplace from reaching its full potential, hampering the development of legitimate services.<sup>29</sup> In 2021 and 2022, the impact of the COVID-19 pandemic strained China's enforcement resources, and lockdowns kept many courts closed or at limited capacity and hindered the progress of investigations in the country. Notwithstanding this, in April 2022, the Supreme People's Court highlighted in its *2021 Report on Chinese Courts' Judicial Protection of IP*, in 2021, all the courts in China had accepted 642,968 IP cases and concluded 601,544 IP cases (both data covering civil, administrative, and criminal IP cases), respectively 22.33% and 14.71% higher than in 2020, and, as noted below, these cases included some important criminal convictions in the copyright area, such as the *yyets* case. IIPA is hopeful that China will fully implement commitments under the Phase One Agreement to improve its enforcement framework, which would make progress in addressing some of the concerns identified below.

China has been operating its annual "Sword Net" anti-piracy campaign for over 17 years. While these administrative enforcement campaigns have been important, notably following NCAC's 2015 Notice requiring online storage service providers to take proactive measures to prevent users from uploading copyright infringing content, the campaigns on their own are not enough to deter widescale piracy.<sup>30</sup> The 2022 campaign is ongoing through November 2022. While China has stated an intention to increase administrative enforcement efforts, penalties remain low and, unless the source of the piracy can be definitively established to be located in China, are unlikely to be imposed. Further, punishment decisions and low fines have not deterred pirate entities from continuing to engage in infringing conduct.

It is often very difficult to identify those responsible for piracy sites because many infringers use obfuscation tactics, such as fake registration information to register their websites.<sup>31</sup>

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and multiples of punitive damages, making the application of punitive damages pragmatic and workable in civil enforcement of IPR.

<sup>29</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 relatively low levels, and numerical and monetary thresholds triggering criminal liability, while increasingly flexible, remain difficult in some cases to reach, and could be questioned as not high enough to encompass all "commercial scale" piracy.

<sup>30</sup> For a summary of recent Sword Net campaigns, see, e.g., 2022 IIPA Special 301 country report at 23.

<sup>31</sup> All websites in China must register with *milbeian.gov.cn*, and the owners of websites can be identified through searches using their registration numbers, domain names, IP addresses, or "Whois" data.

These rogue services effectively cannot be sued. The Government of China should improve the mechanism between NCAC, MIIT, and ISPs to shut down infringing sites operating without a business license and, consistent with the Guidelines, take immediate steps to guide and regulate management of all types of websites to “remove infringing content, disrupt pirated website links, [and] stop the dissemination of infringing information.”

Even when it is possible to identify piracy operations, rights holders attempting to enforce their rights can face some burdensome evidentiary procedures slowing or hindering case development and high risks for foreign rights holders to seek enforcement actions (as discussed above). Moreover, civil suits, while helpful, to date have been ultimately insufficient to address piracy problems because damages are relatively low and non-deterrent, and injunctive relief is only title-based, meaning rights holders cannot obtain relief by the Court that in itself will shutter a piracy service. Improvements in the legal framework have led to rights holders bringing more civil cases, and the backlog in Chinese courts has necessitated a recalibration in the allocation of court resources, as noted above with the April 2022 Judicial Interpretation on jurisdiction of IP civil and administrative cases. In a positive development, Chinese courts have recently taken steps to improve protections for video games. For example, recent court decisions in China have made it clear that video games are copyrightable, and courts also have applied the unfair competition law to protect video games.<sup>32</sup> In addition, in September 2021, a local court in Changsha, Hunan Province, issued the first interim injunction order against video game account rental services.

While historically criminal enforcement has been hindered by criminal thresholds that can be too high to reach all “commercial scale” piracy,<sup>33</sup> several recent criminal enforcement actions have been successfully concluded with increasingly deterrent outcomes.<sup>34</sup> According to the

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<sup>32</sup> In March 2021, the Guangzhou IP Court found that a video-sharing platform streaming game-play videos of Tencent's video game “King of Glory” constituted copyright infringement, holding that game-play graphics and videos, although they remain subject to the player's operation of the game, are still within the scope of copyrightable content of the video game as a whole. In May 2021, the Shenzhen Intermediate People's Court issued a similar judgment, also finding copyright protections applied to “King of Glory.” In cases where the copyright law was not applied, courts have relied on unfair competition law to protect video games, including the anti-confusion/misrepresentation clause, the trade dress clause, and the product name clause.

<sup>33</sup> Historically, in cases of Internet piracy, the criminal threshold of “500 copies” was always interpreted as 500 *titles*, and a single episode was not considered a single “title.” However, authorities have recently become 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 a high number of site visitations or piracy apps that clearly have huge numbers of downloads.

<sup>34</sup> Criminal cases regarding video games mostly involve illegal gambling relating to video card games, with a minority of cases involving unauthorized private servers and plug-ins, but in 2021, the Shanghai No. 3 Intermediate Court held a defendant criminally liable for pirating the game “Legend of Mir” by downloading copyrighted game materials and developing a game engine to run on private servers. The court sentenced the defendant to 3.5 years of imprisonment. As reported last year, a case brought by the Shenzhen Market and Supervision Administration (MSA) and local police against the operators of Daquian Vision, a mobile piracy app for pirating movies, and a case brought by the Tianjin Cultural Task Force and Tianjin Police involving illegal replication of pirate DVDs for distribution within China and export to the U.S., Canada, Europe, and Australia concluded successfully in 2020. See IIPA 2021 at 21. Also reported last year, in July 2020, the police of Shanghai Jing'an District undertook an enforcement action against Shanghai Sigan Network Technology Co., Ltd., the operator of pirate app *Diyidan*, which had disseminated over 20,000 episodes of infringing audiovisual materials from which the operators have collected membership fees of RMB 9.92 million (US\$1.56 million) and advertisement fees of RMB 24.26 million (US\$3.83 million), for total illegal gains of RMB 32.18 million (US\$5 million). In May 2021, the Shanghai Putuo District People's Court imposed a fine of RMB 1.3

announcement by the Supreme People's Procuratorate (SPP) at a press conference on March 1, 2022, in 2021, the procuratorates across the country had an increase of arrests for IP crimes by 9.2% and an increase of cases of 16.8%. Additionally, the year-to-year growth rate for cases brought was 12.3% and against 15.4% more persons. The police accepted 299 cases related to the crime of IP infringement, an annual increase of 65.2%. At the press conference, the SPP also announced four Model IP Cases, including the criminal case against operators of *Daqian Vision* app, which MPA referred to NCAC in 2019, and against whom final judgment was made on March 11, 2021, after the defendants' appeal.

Moreover, the recent imposition of criminal sentences against the operators of the piracy site *yyets* (known as *rrys.tv* and *mys2020.com* in recent years) raises hope that enforcement authorities may be relaxing their unwieldy threshold requirements. In April 2022, the Supreme People's Court cited the *yyets* case as one of the "Top 10 IP Cases" of the year and noted it as one of 50 "typical" IP cases. An additional criminal conviction in May 2021 against the piracy service *diyidan* resulted in 27 defendants facing jail time or fines. Another welcome development is that China has created a dedicated criminal department within the Ministry of Public Security (MPS), the Food and Drug Crime Investigation Department (FDCID), tasked with, among other things, the investigation and prosecution of all IPR cases. It is hoped that this will lead to enhanced administrative and criminal enforcement.

The Chinese government should be encouraged to expand enforcement resources and capability, commensurate with the scale of the evolving online piracy problem. Given the ongoing prohibition on foreign rights holder investigations into piracy, it becomes even more incumbent upon the Chinese government to enhance its own resources.

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

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

Online piracy in China—including illegal streaming and downloading of IIPA members' copyright content through piracy websites, apps, and devices—has evolved extensively in recent years and remains a serious concern. For example, in 2021, China ranked 19th in the world in number of connections by peers participating in the unauthorized file-sharing of select video game titles on public peer-to-peer (P2P) networks, and, according to this same metric, 15th in the world for mobile game titles. Contributing to the problem, many online services financially benefit from overbroad ISP safe harbor rules, allowing such services to avoid seeking licenses to the copyrighted material available on their platforms. As discussed above, a more holistic enforcement

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million (US\$205,000) against the company, sentenced the CEO to three years imprisonment with a four-year probationary term and fined him RMB 240,000 (US\$38,000), and sentenced 26 others to imprisonments ranging from nine months with a one-year probationary term to three years with a three-year probationary term and ordered them to pay fines ranging from RMB 2,000 (US\$315) to RMB 300,000 (US\$47,000). The police in Hubei Province investigated the website *9Izy.cc* (along with *9Izyw.com*, *imeizy.com*, and *ouyadz.com*) and found that it supplies over 100,000 domestic and overseas films and TV dramas, including more than 554 MPA titles to more than 500 rogue sites, which have been shut down. Eighteen criminal suspects located in nine cities/provinces were arrested and illegal gains of RMB 2.5 million (US\$394,000) were confiscated in 2019. In November 2020, the principal defendant was sentenced to four years imprisonment and fined RMB 450,000 (US\$71,000), while 15 other criminals received fixed-term sentences and were ordered to pay a fine.

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, such as *piahua.com*, *vodxc.com*, *panduoduo.com*, *meijutt.tv*, *hao6v.com*, *80s.tw*, *gimyvod.cc*, *100vdo.com*, *olevod.com*, and *fqfilm.com*, whether operating from within or outside China, remain a serious concern. These piracy websites include illegal download sites; P2P piracy sites; deep-linking sites; “hybrid” sites, such as *3dmgame.com*, which offer both hosting and torrenting services; cyberlockers; BitTorrent indexes, trackers, or clients; forums; streaming sites; social media websites; and online marketplace/auction sites selling pirated goods. Piracy Devices, circumvention devices, high-quality counterfeits, USB flash drives containing a high volume of infringing sound recordings, and video game machines containing hundreds or thousands of infringing video games.

Online streaming of pirated content is a growing concern for the music, film and television, and video game industries. Some music streaming services, including *yym3.com*, were hosted in China but now use U.S.-based reverse proxy services to obscure their locations and have stopped responding to takedown request notices. Short video-sharing platforms, such as *XiaoHongshu*, *Douyin*, *Dou Yin's Huo Shan*, and *Kuaishou*, have become increasingly popular distributors of pirated popular movies, television series, video games, and music. Users break up the content into short videos and distribute them on these platforms. In 2021, this form of piracy increased significantly, particularly from Multi-Channel Network (MCN) accounts.<sup>35</sup> In response to this growing problem, domestic rights holders and streaming platforms formed an alliance and launched public campaigns against widespread piracy on MCN accounts. Piracy operators also use short video platforms to attract users to piracy websites and applications. In addition, these platforms have begun providing live-stream functions that enable infringers to provide unauthorized video content in real time.

Piracy over cloud storage services is also causing significant problems in China. Large quantities of infringing content are stored on cloud storage services (or cyberlockers), such as *Baidu Pan*, with links to the content disseminated through popular Chinese social media platforms and piracy linking sites.<sup>36</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>37</sup>

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<sup>35</sup> A Multi-Channel Network (MCN) is an organization that works with social media platforms to attract users by, among other things, providing platforms with influencers and content.

<sup>36</sup> USTR identified *Baidu Pan* in its 2021 Notorious Markets Report. Baidu is the most popular search engine in China, with over 75% of the market, and the second largest search engine in the world by user base.

<sup>37</sup> In 2018, a local stakeholder, Sohu, won a first-instance lawsuit against *Baidu Pan* for indirectly facilitating copyright infringement of third parties, but that decision was overturned on appeal in January 2020. The SPC accepted Sohu's application for retrial but dismissed it after review. Sohu has filed two additional cases against *Baidu* for copyright infringement of additional licensed content. In 2017, Youku sued *Baidu Pan* over the unauthorized availability on the service of a popular local television drama series, prevailing in a first instance case heard by the Beijing Haidian District People's Court. An appeal was heard by the Beijing IP Court, which upheld the decision of the Beijing Haidian District People's Court. The Chinese affiliate of a Hong Kong television station, TVB, filed suit against *Baidu* for copyright infringement, losing a first instance case in the Guangzhou Tianhe District People's Court. The case was appealed at the Guangzhou Intermediate People's Court. Currently, *Baidu* has made an application of retrial at the

Unfortunately, *Baidu's* services continue to be used for piracy, and its notice and takedown system has been ineffective.<sup>38</sup> China's government should encourage Baidu to keep pace with other similarly sized services across the globe that do more to combat piracy, including improving implementation of takedown tools, applying rigorous filtering technology to identify infringing content and taking more effective action to suspend or terminate repeat infringers to ensure infringing content and links are removed expeditiously.

A significant problem for the video game industry is "plagiarism" or "game cloning." This form of infringement, which is rampant in China, refers to the unauthorized copying of important game elements, including underlying gameplay rules, user interfaces, maps, and/or categories of weapons/skills, without copying key character images, soundtracks, and voices. The video game industry is encouraged by recent judicial decisions finding infringement against entities engaged in plagiarism of video games.<sup>39</sup> As discussed above, China needs to enhance its enforcement framework to effectively address this problem, including by adopting streamlined takedown mechanisms on Chinese app platforms.

The piracy app ecosystem, which facilitates piracy on a range of devices (including mobile and handheld devices as well as televisions) remains a serious concern. Apps that aggregate infringing content hosted on remote servers are proliferating, and there remains legal uncertainty regarding the "server principle." China is a leading manufacturer of media hardware and accessories that can be modified to support the installation of third-party, pre-loaded, or post-purchased infringing apps that allow users to access pirated content (i.e., Piracy Devices). The devices often target overseas users and their proprietary apps are not accessible in China, leaving rights holders without a remedy or, at best, with an uncertain remedy. Examples include EVPAD, SVI Cloud, and the "Ubox," which is manufactured and distributed by Unblock Tech (*unblocktech.com*).<sup>40</sup> China must do more to combat the growing threat of the app piracy ecosystem, including apps such as *99kubo*, *Juhe yingshi*, *WanMei*, and *YingShi DaQuan*. Civil cases launched in 2021 by the audiovisual industry against the operators of piracy app *RenRen ShiPin*, which provides access without permission to many popular TV series, is a positive development. There are also Chinese-developed or operated apps that target foreign music markets. China must do more to combat the growing threat of the app piracy ecosystem.

Some music streaming services, including *yymp3.com*, were hosted in China but now use a U.S.-based reverse proxy service to obscure their location and have stopped responding to

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High People's Court of Guangdong Province.

<sup>38</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>39</sup> In *Blizzard & NetEase v. 4399*, the Shanghai Pudong District Court found certain descriptions of character skills or elements are copyrightable. In the *Legend of Mir* case concluded in 2021 by Guangzhou Internet Court (first instance), the court also recognized certain elements of game design are protectible, including the scene, character design (e.g., professions, attributes, and skills), and fighting models.

<sup>40</sup> Ubox runs on Android and incorporates peer-to-peer (P2P) technology as well as branded apps to enable access to pirated video-on-demand (VOD) and live channel content. It appears that Unblock Tech has more than 500 agents and distributors worldwide, and sellers and users of the device can be found across Asia Pacific, Europe, and the U.S. and Canada. Unblock Tech's set top boxes have continued to be among the most popular in the Asia Pacific region, particularly for Chinese speaking users.

takedown request notices. Other sites have begun to adopt the same strategy. Infringement of music videos is also a problem for the music industry.<sup>41</sup> In addition, many piracy streaming sites that undermine the Chinese music market are hosted outside of China.

Online streaming of pirated content is a growing concern for the music, film and television, and video game industries. 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 unlicensed music videos, mostly short videos, from partially licensed or unlicensed user-uploaded content (UUC) platforms (such as *Weibo.com*, *Youku*, and *Miaopai.com*); but more traditional music piracy, including illegal downloads through cyberlockers (such as *Baidu Pan*),<sup>42</sup> domestic and international P2P sites (such as *ThePirateBay*), forums, and streaming sites, remains a problem. As discussed below, the misapplication of safe harbors from monetary liability to UUC sites that are not neutral or passive intermediaries has contributed to the proliferation of unlicensed music content available for streaming on UUC sites. The music industry reports that although the takedown rate of infringing links is high, infringing content reappears quickly as there is no requirement for UUC sites and other hosting providers to ensure this content stays down permanently. There is hope that the pending Information Networks Implementing Regulations and new SPC judicial rules will strengthen the responsibility of ISPs to review and manage UUC and will be helpful in combating online piracy.

The problem of online journal piracy remains a significant challenge. The unfortunate lack of deterrence in the marketplace allows entities engaged in providing unauthorized access to journal articles to continue to operate.<sup>43</sup> Several online platforms that facilitate access to unauthorized copies of journal articles and academic textbooks, including *Keyandi*,<sup>44</sup> *Ureader*, *2447.net*, *80lib.com*, 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 several other ways, including by providing users with search tools, through the use of Internet bots, and by bypassing TPMs to gain unauthorized access to legitimate online services. It remains the case that administrative enforcement measures appear to have no lasting impact, with administrative authorities unwilling to act against previously sanctioned entities absent a new complaint from rights holders.<sup>45</sup>

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<sup>41</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>42</sup> Three cyberlockers continue to provide file sharing in China: *pan.baidu.com*, *ctdisk.com*, and *115.com*.

<sup>43</sup> Although the KJ Med entity has been defunct for some years, several similar entities engaged in providing access to unauthorized copies of journal articles and other reading materials have emerged in China over the last few years. None of these unauthorized services has been effectively shut down, despite referrals to enforcement authorities.

<sup>44</sup> *Keyandi* is an online entity that makes available English e-books for download without publisher authorization, charging a membership subscription fee or a fee for each download by a user. The content on the *Keyandi* site appears to have migrated to a new site, *www.bbs.keyanmi.com*. Despite the Fuzhou Copyright Enforcement Department referring the case to the Public Prosecutor's Office, the referral did not appear to be fully investigated by the Public Prosecutor. As a result, the Procuratorate issued a "relative non-prosecution" decision, which though essentially dismissing the case, found that the defendant operator's conduct — i.e., the distribution of 524 ebooks for profit — constituted criminal copyright infringement. The case was remanded to the CED, which will issue a punishment decision.

<sup>45</sup> For example, in 2017, the Beijing Copyright Enforcement Department issued an administrative penalty against the

In addition, pirated print publications and compromised log-in credentials continue to be widely available on online marketplaces, which also serve as platforms through which producers of pirated and counterfeit textbooks advertise and sell infringing copies of reading materials. In part due to China's inadequate online enforcement framework, sending notifications of infringement to remove these products remains unduly complicated.

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

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

Illicit theatrical camcording in the region remains a significant challenge in China, though in 2021 there was a notable decrease in illicit camcording in the country and globally because of theater closures. In general, the quality of films camcordered in China has improved over the years, threatening the legitimate theatrical and home entertainment markets.<sup>46</sup> Live streaming of theatrical broadcasts of films online is a growing concern. While China has taken some successful enforcement actions in recent years, a more comprehensive solution requires enactment of a specific criminal law against using, or attempting to use, an audiovisual recording device to make or transmit a copy, in whole or in part, of audio and/or video of a cinematographic/audiovisual work, from a performance in an exhibition facility. Further, as discussed below, to address live streaming, the Copyright Law should be revised to prohibit the unauthorized retransmission of content online.

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

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UReader entity, but the platform re-emerged, although it now infringes titles that were not the subject of the prior action. Absent the filing of a new complaint, the enforcement authorities are not inclined to take further action against the platform, which, as a repeat infringer, is acting in direct contravention of the previous finding of illegal conduct.

<sup>46</sup> During 2019, a total of 29 camcords (13 audio and 16 video) were forensically matched to cinemas in China, compared to 24 camcords (11 audio and 13 video) in 2018. The 2020 and 2021 camcord statistics are anomalous due to the widescale closure of theaters due to the COVID-19 pandemic.

licenses and are routinely screening U.S. content without authorization. In early 2019, China's investigation of four illegal camcording syndicates revealed that most illegal camcorded copies were destined for mini-VOD theaters. In August 2019, the China Film Administration (CFA) clarified that mini-VOD cinemas and chains are "entertainment premises" and, therefore, must license rights for theatrical screening, not for online VOD. Instead of legitimizing the operations of these facilities, China should severely penalize or shut down these businesses if they violate the copyright law.

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

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

The copyright industries continue to report piracy of hard goods, which harms both the domestic and foreign markets. Production of pirated and counterfeit textbooks and trade books remains a concern, with unauthorized children's books and academic textbooks marketed and sold through e-commerce sites. China remains an export center for pirated music CDs as well, feeding the global market with an onslaught of illegal copies of foreign and Chinese music products, including High Quality Counterfeit (HQC) box sets of music content, often through popular Chinese and international ecommerce platforms. China must implement an effective, non-burdensome program to stop and prevent future production and supply of HQC optical discs.<sup>47</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>48</sup> Video game machines, originating from China, containing hundreds or thousands of infringing video games have been seized by customs agencies around the world. These machines are found in kiosks and shopping malls in many countries and are sold through several online marketplaces.

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

China still has not implemented certain key provisions of the 2012 U.S.-China Film Agreement signed by then-Vice President Biden and then-Vice President Xi. Hailed as a "breakthrough," the Agreement promised to economically uplift U.S. and Chinese producers and distributors.<sup>49</sup> Unfortunately, more than nine years after its signing, China has failed to meet its

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<sup>47</sup> Shenzhen Optical Media Lab has previously worked with rights holders to help identify the source of seized products, but ongoing changes in management structure have made communication difficult, and as such, its current operational and enforcement capabilities are unclear.

<sup>48</sup> On major online shopping platforms, such as *Taobao.com*, *jd.com*, and *pinduoduo* (a mobile shopping app), more than 2,000 sellers are selling an estimated 500,000 USB flash drives per month containing unlicensed music content, including 500 to 1,000 tracks in a single flash drive.

<sup>49</sup> According to a 2012 White House Press Release:

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

obligations under the Agreement. The result of not implementing key provisions of the Agreement has been a steady further deterioration of U.S. producers' (especially independent producers) ability to access the Chinese theatrical marketplace as well as the broader marketplace for other types of distribution in China, such as via VOD and television.

As part of the Film Agreement, China committed that in 2017 it would make a meaningful increase to compensation for revenue sharing theatrical releases, as the current 25% U.S. share of revenue is far below comparable markets. Furthermore, the official quota on revenue sharing releases of 20-plus-14 (enhanced format) remains. However, review and additional compensation has never occurred, and China must be pressed to comply with its obligations. In addition, China has imposed artificial limits on market access for imported films, despite the huge increases in cinema screens in China since 2012, and the growing number of domestic productions, which were at an all-time high in 2019.<sup>50</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 China's theatrical marketplace, with only 10 independent films theatrically released in the country in 2020, for 0.8% share of the theatrical box office revenue. Just 10 independent theatrical releases in China represents the lowest percentage of slots ever allocated for independent films recorded by IFTA. While 2021 statistics are difficult to compare to prior years due to Covid theater closures, it is clear that U.S. independent producers who rely on private distributors and the payment of minimum guaranteed or flat license fees to raise production financing and secure distribution have seen their licensing revenues plummet and, in many cases, stop altogether.

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

IIPA recommends that China immediately take action on the following issues, which have been long delayed:

1. Immediately and fully implement all the terms of the 2012 U.S.-China Film Agreement,

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

<sup>50</sup> IFTA Research and Analysis, "China Theatrical Market 2010–2019."

- including the requirement to enhance compensation in 2017 (such review has been delayed almost 5 years), liberalize the distribution market for private third-party Chinese distributors, and finalize a new MOU;
2. Substantially increase U.S. producers' share of revenues for the box office revenue share films from the current 25% to a level consistent with international norms;
  3. Allow U.S. producers more control over release dates, address the problem of U.S. films being locked out from the prime release dates, and end the practice of "double booking" international theatrical releases;
  4. Eliminate informal restrictions on the number of imported "flat fee" films so that independent producers have unimpeded access to the Chinese market;
  5. Further relax the quota for revenue-sharing films and VOD products for online video websites so filmmakers and audiovisual companies may have fair and equitable access to the rapidly growing marketplace for films and TV in China;
  6. Ensure U.S. producers receive timely responses to quota allocations and content review determinations, and effective access to ticketing system information to ensure proper reporting of revenues;
  7. Establish defined and prescribed content review time frames for theatrical and online distribution; increase the frequency of content review windows; remove the burden of resubmitting film and television programs that have already been approved; and establish a fast track system for content review under special circumstances; and
  8. Streamline the payment of deposits, guarantees, and royalties by local distributors to U.S. producers, and do not establish any regulation or policy that impedes the collection of license fees by American IP owners.

## **VI. Conclusion**

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

Respectfully submitted,

/Linda Quigley/

Linda Quigley, Director of Policy and Legal Affairs  
International Intellectual Property Alliance  
LQUIGLEY@IIPA.ORG  
TEL: (202) 968-5011

# ATTACHMENT

# CHINA (PRC)

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2022 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that USTR maintain China on the Priority Watch List in 2022 and that China be monitored under Section 306 of the Trade Act.<sup>1</sup>

**Executive Summary:** Supported by the largest Internet user base in the world, China’s online marketplace continues to expand. China also leads the world in the number of cinemas with over 82,200 movie screens—most of which support 3D, and many of which offer enhanced formats such as IMAX and China Giant Screen—and is the largest theatrical market in the world for the second consecutive year, with total box office revenue in 2021 of \$7.3 billion (RMB 47.3 billion), up 131.5% from 2020. Further, China is now the seventh largest music market, the second largest music streaming market in the world by revenue, and the largest market for video games with an estimated 743.5 million gamers and revenues estimated at \$46.4 billion in 2021. Yet legislative shortcomings, persistent and evolving piracy, and growing market access concerns hamper, or block altogether, rights holders’ ability to distribute copyrighted content and prevent rights holders from seeing their investments reach their full potential in China.

Serious challenges in China include piracy applications (apps) and devices, piracy websites, unauthorized camcording, piracy on cloud storage services and social media platforms, unlicensed content available on user-uploaded content (UUC) platforms, including short-video streaming platforms, unauthorized distribution of journal articles, and the proliferation of thousands of “mini video-on-demand (VOD)” facilities that screen unauthorized audiovisual content. Contributing to these problems, many platforms financially benefit from broad Internet service provider (ISP) safe harbor rules, allowing such services to avoid seeking licenses to copyrighted material available on their platforms. While several enforcement actions moved forward in 2021, including the imposition of criminal sentences against the operators of the piracy service *yyets* and a successful criminal case in Shanghai involving piracy of the video game “Legend of Mir,” criminal enforcement efforts generally remain stunted by burdensome evidentiary requirements (particularly application of the “server principle”), and high thresholds that are ill suited to effectively combat piracy in the digital environment. Increased civil actions initiated by rights holders, including a case brought against the operators of piracy app *RenRen ShiPen*, are positive signs, but this increased activity must contend with a backlog in Chinese courts, which may necessitate a recalibration of resources. Moreover, civil litigation is generally time consuming, costly, and can be non-deterrent, underscoring the value of administrative actions undertaken by the government. Helpfully, the National Copyright Administration of China (NCAC), in cooperation with rights holders, continues to pursue administrative actions against certain online services that facilitate piracy. Unfortunately, these actions alone are not sufficient to meaningfully deter widespread online piracy. Greater efforts should be made to improve online enforcement, including building capacity of law enforcement agencies on copyright cases, and additional legal reforms are needed to ensure China’s online marketplace reaches its full potential for rights holders and licensed businesses, in the face of evolving piracy challenges.

In a positive development, China’s Copyright Law Amendment, which came into force on June 1, 2021, added the rights of broadcasting and public performance for producers of sound recordings, which are critical protections for the music industry; enforcement reforms, including a ten-fold increase in maximum “punitive” damages and the ability to shift the burden of proof to the accused infringer; protections for technological protection measures (TPMs), which enable the digital trade of copyrighted works; and certain elements of the three-step test into the law to appropriately confine exceptions and limitations. It is critical that the implementing measures, expected in 2022, meet

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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/2021/01/2021SPEC301HISTORICALCHART.pdf>.



global best practices and China's international commitments. Unfortunately, the amendments did not include several reforms that remain necessary to bring the standard of copyright protection and enforcement in line with global norms and best practices and meet the challenges of the digital age. While China made some notable improvements to its enforcement framework in 2021, China should fully implement its commitments under the *Guidelines on Strengthening the Protection of Intellectual Property Rights (Guidelines)*, including to regulate websites to remove pirated materials, and under the Economic and Trade Agreement Between the United States and China (Phase One agreement), and reform to its intermediary liability framework, all of which would help address many of the concerns raised in this report.

China should eliminate the market access barriers highlighted in this report, including the prohibition against online publishing by foreign entities and foreign investment and ownership restrictions in the cultural and entertainment sectors, which exacerbate the piracy problem by impeding access to sought-after U.S. content. IIPA seeks further reforms and enforcement of China's existing obligations under the 2012 U.S.–China Film Agreement, which mandated review and additional compensation in 2017, and the improvement of access for U.S. film producers to China's well-established theatrical film market, including by increasing theatrical revenue share and allowing private Chinese distributors the ability to distribute films to cinemas without interference from state-owned enterprises, or the imposition of unofficial quotas. Unfortunately, as detailed below, the ability of U.S. producers to compete in the Chinese marketplace for all audiovisual content continued to be severely curtailed during 2021, with licensing opportunities on all distribution platforms significantly hampered by 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. China should fully implement its purchasing commitment under the Phase One agreement for the intellectual property (IP) licensing of audiovisual works. Further, building on the Phase One agreement's principles of reciprocity and national treatment, China should remove restrictions that have hindered market access of U.S. content and not erect further barriers.

## **PRIORITY ACTIONS REQUESTED IN 2022**

### **Enforcement:**

- Improve effectiveness of administrative enforcement, including by:
  - taking measures demonstrated effective in preventing or restraining infringement, including imposing sanctions that deter infringement;
  - imposing enhanced penalties against repeat infringers and infringers that make available massive amounts of infringing content and, where penalties have already been issued against an infringer, issuing penalties for subsequent infringements without requiring rights holders to issue a new complaint;
  - continuing to increase transparency (e.g., notifying rights holders of the results of administrative actions);
  - facilitating more efficient transfer of copyright cases between administrative and criminal authorities, making clear that such transfers are required upon “reasonable suspicion” that criminal thresholds are met;
  - improving and making more effective the mechanism between NCAC, the Ministry of Industry and Information Technology (MIIT), and ISPs for shutting down infringing websites operating without a business license (consistent with the *Guidelines*); and
  - expanding resources and capability at the NCAC, local Copyright Administrations (CAs), and Law and Cultural Enforcement Administrations (LCEAs)
- Take further effective action, with increased transparency, against the online piracy ecosystem, including against:
  - piracy websites, whether operating from within or outside China, such as *2447.net*, *80lib.com*, *wsyyb.com*, *52flac.com*, *dytt8.net*, *dy2018.com*, *dycod.net*, *ygdy8.com*, *gaoqing.la*, *mp4ba.cc*, *btbt20.com*, *pihua.com*, *vodxc.com*, *panduoduo.com*, *meijutt.tv*, *hao6v.com*, *80s.tw*, *gimyvod.cc*, *100vdo.com*, *olevod.com*, *fqfilm.com*, *yyp3.com*, *musicool.cn*, *xh127.com*, *bjhyx.com*, *xxswitch.com*, and *feilongshanzhuang.com*;

- piracy facilitated through cloud-based services that foster piracy, such as *Baidu Pan*, including by encouraging such services keep pace with other similarly sized services across the globe that provide prompt and consistent processing of takedown requests, apply rigorous filtering technology to identify and remove infringing content, and take more effective action to suspend or terminate accounts of repeat infringers;
- unauthorized content available on UUC platforms (e.g. *Youku* and *Miaopai*), including short video-sharing platforms (e.g., *XiaoHongshu*, *Douyin*, *Dou Yin's Huo Shan*, and *Kuaishou*); and
- apps such as *99kubo*, *Juhe yingshi*, *WanMei*, *YingShi DaQuan*, and *Tian Lai K Ge*.
- Bring more targeted and deterrent enforcement actions, including criminal actions, with transparency, against:
  - the manufacture, promotion, distribution, and exportation of Piracy Devices (PDs) (including against dedicated piracy apps);
  - the manufacture, promotion, distribution, and exportation of circumvention devices and software components;
  - unauthorized movie broadcasts in mini VOD facilities;
  - unauthorized theatrical camcording;
  - unauthorized broadcasting of movies and music;
  - services trafficking in, or providing access to, unauthorized copies of journal articles; and
  - hard goods piracy (including against production and supply of high quality counterfeit books and optical discs, USB flash drives containing high volumes of infringing sound recordings, and video game machines containing hundreds or thousands of infringing video games).

#### Legislation:

- Expedite the process to revise the Regulation on the Implementation of the Copyright Law to ensure proper implementation of the copyright amendments in line with international best practices and China's international commitments, including regarding broadcast and public performance rights for sound recordings, imposing "punitive" damages in line with the increased maximums, providing adequate and effective protections for TPMs, shifting the burden of proof to the accused infringer, and ensuring exceptions and limitations to copyright protections comply with the three-step test.
- Enact additional reforms to enhance the development of the creative industries in China, incorporating changes recommended by IIPA and member associations in various past filings including, in particular:
  - ensuring a remedy against websites and apps facilitating infringement (especially where infringing content is hosted remotely), including by rejecting the "server principle";
  - prohibiting unauthorized Internet retransmission of live broadcasts;
  - providing a clear legal basis under which ISPs may be held liable for IP infringements carried out by third parties using their services or networks;
  - clarifying that only passive and neutral intermediaries that do not contribute to infringing activities are eligible for the safe harbors from monetary liability and that such intermediaries fulfill certain conditions, including adoption of a repeat infringer policy, with encouragement to institute a know your business customer policy, and, upon obtaining knowledge of infringement (including a notice) or otherwise becoming aware of circumstances of which the infringement is apparent, intermediaries promptly take steps to limit, stop and prevent further infringement, including expeditious takedown of infringing content and other measures demonstrated effective in preventing or restraining infringement;
  - providing a term of protection in line with international norms, e.g., 70 years after the death of the author, or in cases in which term is calculated based on publication, to the U.S. term of 95 years, but in any case, no less than 70 years;
  - implementing the *Guidelines*, which include important measures to improve copyright protection and enforcement, including lowering criminal thresholds, streamlining evidence processes, establishing a list of repeat infringers, and regulating websites to "remove infringing content, disrupt pirated website links, [and] stop the dissemination of infringing information";

- revising the 2011 Intellectual Property Rights (IPR) Opinions to enable more effective and more frequent criminal investigations and prosecutions;
  - revising the criminal threshold to ensure deterrent-level criminal penalties are available against all instances of commercial scale piracy (consistent with the *Guidelines*); and
  - Consistent with the *Guidelines*, providing a legal basis for no-fault injunctions against ISPs in copyright cases, including against access providers, requiring them to stop providing access to unlicensed copyrighted content in cases where the content is hosted outside of China or where the identities or locations of the website owners are unknown.
- Ensure proper implementation of the e-commerce law, including ensuring that implementation of Article 43 does not result in sellers of infringing products avoiding responsibility by merely objecting to rights holders' notices of infringement and, consistent with the Phase One agreement, eliminating liability for erroneous takedown notices submitted in good faith.

### **Market Access:**

- Take action on the following long-delayed issues to improve the marketplace for U.S. films and TV programs: 1) immediately and fully implement all the terms of the 2012 U.S.–China Film Agreement, including the requirement to enhance compensation in 2017, liberalize the distribution market for private third party Chinese distributors, and finalize a new MOU; 2) substantially increase U.S. producers' share of revenues for the box office revenue share films from the current 25% to a level consistent with international norms; 3) allow U.S. producers more control over release dates, address the problem of U.S. films being locked out from the prime release dates, and end the practice of “double booking” theatrical releases; 4) eliminate informal restrictions on the number of imported “flat fee” films so that independent producers have unimpeded access to the Chinese market; 5) further relax the quota for revenue sharing films and VOD products for online video websites so filmmakers and audiovisual companies may have fair and equitable access to the rapidly growing marketplace for films and TV in China; 6) ensure U.S. producers receive timely responses to quota allocations and content review determinations, and effective access to ticketing system information to ensure proper reporting of revenues; 7) establish defined and prescribed content review time frames for theatrical and online distribution; increase the frequency of content review windows; remove the burden of resubmitting film and television programs that have already been approved; and establish a fast track system for content review under special circumstances; and 8) streamline the payment of deposits, guarantees, and royalties by local distributors to U.S. producers, and do not establish any regulation or policy that impedes the collection of license fees by American IP owners.
- Open key elements of the entertainment and cultural sectors to foreign investment, particularly regarding film and TV production and distribution companies, and online video game services; reconsider the Negative Investment List, Online Publishing Rules as well as other measures prohibiting foreign involvement in online publishing activities, and allow distribution of audiovisual content on online video platforms where the distributor has received a home entertainment permit from the former General Administration of Press and Publication (GAPP); State Administration of Press and Publication (SAPP) should increase the number of approvals for foreign video games to match the number of domestic approved video games; revoke all other measures—including the 2014 Notice on Further Implementation of Provisions Concerning the Administration of Online Foreign Films and TV Dramas, Notice and Measures on Administration of Online Foreign Films, the Statement and Rules on Importing TV Formats, and content approval regulations for mobile video games—that discriminate against foreign content by imposing requirements such as registration, onerous, opaque, and *de facto* discriminatory content review procedures, restrictions on foreign content on broadcast, pay-TV, and online video, and strict quotas on foreign films and television programming, with further limitation by genre-basis; adopt a voluntary, age-based classification system to help eliminate disparate treatment of U.S. content and ensure that China's content review process is transparent, predictable, and expeditious; refrain from extending China's burdensome content review regime to books printed in China but otherwise intended for distribution in other markets; and abandon the slew of proposals that discriminate against U.S. producers and distributors of creative content, including the recent proposals by China's National Radio and Television Administration (NRTA) for further regulating the production and distribution of foreign audiovisual content.

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

China's expanding online marketplace provides consumers with access to a vast array of legitimate music, video games, movies, TV programming, and other works available through an increasing number of licensed digital services. Chinese companies are investing heavily in content and media, with greater numbers of co-productions and financing from China. According to the China Netcasting Services Association, China's online audiovisual users have grown from 461 million in 2015 to 944 million in June 2021. The seventh largest music market in the world, the music industry estimates that in 2021, Chinese consumers spent almost 23 hours listening to music each week (up from almost 18 hours in 2019), with 45% of music listening time spent on short form video apps.<sup>2</sup> In a 2021 report, NCAC announced that China's online copyright market reached 1 trillion RMB (USD\$182 billion) in 2020. Yet serious piracy concerns persist. The COVID-19 pandemic has exacerbated China's online piracy challenges over the past two years, resulting in substantially increased Internet traffic to both legitimate sites and known piracy websites. Prior IIPA submissions in the Special 301 docket, as well as IIPA filings in WTO compliance reviews and other fora, have provided detailed accounts of the many piracy and enforcement challenges and issues in China. This year's Special 301 filing serves as a supplement to those submissions, and does not provide an exhaustive review of all concerns.<sup>3</sup>

**Online Piracy Remains Very Serious:** Online piracy in China—including illegal downloading and streaming of IIPA members' copyright content through piracy websites, apps, and devices—has evolved extensively in recent years, and remains a significant concern. For example, in 2021, China ranked 19<sup>th</sup> in the world in number of connections by peers participating in the unauthorized file-sharing of select video game titles on public peer-to-peer (P2P) networks, and, according to this same metric, 15<sup>th</sup> in the world for mobile game titles. The music industry reports that 69% of Internet users in China admitted to downloading pirated music in the previous month, with stream-ripping from unauthorized content on UUC sites a particular problem. As discussed below, a more holistic enforcement response is needed to effectively combat the entire online piracy ecosystem, which poses the greatest threat to the continued growth of legitimate businesses in China.

Piracy websites remain a major concern, including illegal download sites; P2P piracy sites; deep linking sites; "hybrid" sites, such as *3dmgame.com*, which offer both hosting and torrenting services; cyberlockers; BitTorrent indexes, trackers, or clients; forums; streaming sites; social media websites; and online marketplace/auction sites selling pirated goods, PDs, circumvention devices, high quality counterfeits, USB flash drives containing a high volume of infringing sound recordings, and video game machines containing hundreds or thousands of infringing video games. Notorious piracy sites that disrupt the music and audiovisual marketplaces include *wsyyb.com*, *52flac.com*, *dytt8.net*, *dy2018.com*, *dygod.net*, *ygdy8.com*, *gaoqing.la*, *mp4ba.cc*, *btbt20.com*, *piahua.com*, *vodxc.com*, *panduoduo.com*, *meijutt.tv*, *hao6v.com*, *80s.tw*, *gimyvod.cc*, *100vdo.com*, *olevod.com*, *fqfilm.com*, *yymp3.com*, *musicool.cn*, *xh127.com*, *bjhyx.com*, *xxswitch.com*, and *feilongshanzhuang.com*. An increasing number of pirate sites use CK Player, an online media player that facilitates infringement of audiovisual content, including video games. The video game industry reports that three popular Chinese websites largely ignore takedown requests: *bthaha.bizz*, *ciligou.top*, and *btdoor.cc*. In 2021, the music industry reports an increase in hotlink websites, which are sites that provide users with services to circumvent TPMs.

Online streaming of pirated content is a growing concern for the music, film and television, and video game industries. Some music streaming services, including *yymp3.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. Short video-

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<sup>2</sup>See International Federation the Phonographic Industry (IFPI) Music Listening in 2021, P22, <https://www.ifpi.org/wp-content/uploads/2021/10/IFPI-Engaging-with-Music-report.pdf>.

<sup>3</sup>See, e.g., IIPA's 2021 Special 301 submission on China ("IIPA 2021"), available at <https://www.iipa.org/files/uploads/2021/01/2021SPEC301CHINA.pdf> and IIPA, *China's WTO Compliance – "Request for Comments Concerning China's Compliance With World Trade Organization (WTO) Commitments"* (86 Fed. Reg. 46066, August 17, 2021), September 15, 2021, available at <https://www.iipa.org/files/uploads/2021/09/International-Intellectual-Property-Alliance-Comments-on-Chinas-WTO-Compliance-2021-2.pdf>.

sharing platforms, such as *XiaoHongshu*, *Douyin*, *Dou Yin's Huo Shan*, and *Kuaishou*, have become increasingly popular distributors of pirated popular movies, television series, video games, and music. Users break up the content into short videos and distribute them on these platforms. In 2021 this form of piracy increased significantly, particularly from Multi-Channel Network (MCN) accounts.<sup>4</sup> In response to this growing problem, domestic rights holders and streaming platforms formed an alliance and launched public campaigns against widespread piracy on MCN accounts. Piracy operators also use short video platforms to attract users to piracy websites and applications. In addition, these platforms have begun providing live stream functions that enable infringers to provide unauthorized video content in real time.

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

A significant problem for the video game industry is "plagiarism," or "game cloning." This form of infringement, which is rampant in China, refers to the unauthorized copying of important game elements, including underlying gameplay rules, user interfaces, maps, and/or categories of weapons/skills, without copying key character images soundtracks and voices. The video game industry is encouraged by recent judicial decisions finding infringement against entities engaged in plagiarism of video games.<sup>8</sup> As discussed below, China needs to enhance its enforcement framework to effectively address this problem, including by adopting streamlined takedown mechanisms on Chinese app platforms.

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>9</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 that allow users to access pirated content (i.e., PDs). The devices often target overseas users and their proprietary apps are not accessible in China, leaving rights holders without a remedy or, at best, with

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<sup>4</sup>A Multi-Channel Network (MCN) is an organization that works with social media platforms to attract users by, among other things, providing platforms with influencers and content.

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

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

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

<sup>8</sup>In *Blizzard & NetEase v. 4399*, the Shanghai Pudong District Court found certain descriptions of character skills or elements are copyrightable. In the *Legend of Mir* case concluded in 2021 by Guangzhou Internet Court (first instance), the court also recognized certain elements of game design are protectible, including the scene, character design (e.g., professions, attributes, and skills), and fighting models.

<sup>9</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.

an uncertain remedy.<sup>10</sup> Examples include EVPAD, SVI Cloud, and the “Ubox,” which is manufactured and distributed by Unblock Tech (*unblocktech.com*).<sup>11</sup> Many third-party app stores carry a multitude of piracy apps, which are generally not subject to enforcement action because new ones are constantly emerging, making it very difficult for rights holders to effectively monitor the vast landscape of third party stores.<sup>12</sup> Examples include *99kubo*, *Juhe yingshi*, *WanMei*, and *YingShi DaQuan*, which facilitate infringement of audiovisual content. There are also Chinese-developed or operated apps that target foreign music markets. An infringing Karaoke app that is extremely popular in China and Hong Kong is *Tian LaiK Ge*. China must do more to combat the growing threat of the app piracy ecosystem. Civil cases launched in 2021 by the audiovisual industry against the operators of piracy app *RenRen ShiPin*, which provides access without permission to many popular TV series, is a positive development.

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 unlicensed music videos, mostly short videos, from partially licensed or unlicensed UUC platforms (such as *weibo.com*, *youku*, and *miaopai.com*); but more traditional music piracy, including illegal downloads through cyberlockers (such as *Baidu Pan*),<sup>13</sup> domestic and international P2P sites (such as *ThePirateBay*), forums, and streaming sites, remains a problem. As discussed below, the misapplication of safe harbors from monetary liability to UUC sites that are not neutral or passive intermediaries has contributed to the proliferation of unlicensed music content available for streaming on UUC sites. The music industry reports that although the takedown rate of infringing links is high, infringing content reappears quickly as there is no requirement for UUC sites and other hosting providers to ensure this content stays down permanently. There is hope that the pending Information Networks Implementing Regulations and new Supreme People’s Court (SPC) judicial rules will strengthen the responsibility of ISPs to review and manage UUC will be helpful in combating online piracy.

**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>14</sup> Several online platforms that facilitate access to unauthorized copies of journal articles and academic textbooks, including *Keyandi*,<sup>15</sup> *Ureader*, *2447.net*, *80lib.com*, 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 several other ways, including by providing users with search tools, through the use of Internet bots, and by bypassing TPMs to gain unauthorized access to legitimate online services. It remains the case that administrative enforcement measures appear to have no lasting impact, with administrative authorities unwilling to act against previously sanctioned entities absent a new complaint from rights holders.<sup>16</sup>

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

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<sup>10</sup>IIPA has provided extensive information on Piracy Devices (PDs) in prior reports. See prior IIPA China country reports (e.g., IIPA 2019 at 19).

<sup>11</sup>Ubox runs on Android and incorporates peer-to-peer (P2P) technology as well as branded apps to enable access to pirated video-on-demand (VOD) and live channel content. It appears that Unblock Tech has more than 500 agents and distributors worldwide, and sellers and users of the device can be found across Asia Pacific, Europe, and the U.S. and Canada. Unblock Tech’s set top boxes have continued to be among the most popular in the Asia Pacific region, particularly for Chinese speaking users.

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

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

<sup>14</sup>Although the *KJ Med* entity has been defunct for some years, several similar entities engaged in providing access to unauthorized copies of journal articles and other reading materials have emerged in China over the last few years. None of these unauthorized services has been effectively shut down, despite referrals to enforcement authorities.

<sup>15</sup>*Keyandi* is an online entity that makes available English e-books for download without publisher authorization, charging a membership subscription fee or a fee for each download by a user. The content on the *Keyandi* site appears to have migrated to a new site, *www.bbs.keyanmi.com*, and the relationship between these two entities is unclear.

<sup>16</sup>For example, in 2017, the Beijing Copyright Enforcement Department issued an administrative penalty against the *UReader* entity, but the platform re-emerged, although it now infringes titles that were not the subject of the prior action. Absent the filing of a new complaint, the enforcement authorities are not inclined to take further action against the platform, which, as a repeat infringer, is acting in direct contravention of the previous finding of illegal conduct.

framework, sending notifications of infringement to remove these products remains unduly complicated.<sup>17</sup>

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

**Unauthorized Camcording Remains a Problem:** Illicit theatrical camcording in the region remains a significant challenge in China, though in 2021 there was a notable decrease in illicit camcording in the country and globally because of theater closures. In general, the quality of films camcordered in China has improved over the years, threatening the legitimate theatrical and home entertainment markets.<sup>18</sup> Live-streaming of theatrical broadcasts of films online is a growing concern. While China has taken some successful enforcement actions in recent years, a more comprehensive solution requires enactment of a specific criminal law against using, or attempting to use, an audiovisual recording device to make or transmit a copy, in whole or in part, of audio and/or video of a cinematographic/audiovisual work, from a performance in an exhibition facility.<sup>19</sup> Further, as discussed below, to address live-streaming, the Copyright Law should be revised to prohibit the unauthorized retransmission of content online.

**Pirated/Counterfeit Books and Hard Goods of Certain Copyright Products, Including for Export, Remain a Concern:** Certain copyright industries continue to report piracy of hard goods, which harms both the domestic and foreign markets. Production of pirated/counterfeit textbooks and trade books remains a significant concern, with unauthorized children's books and academic textbooks marketed and sold through e-commerce sites. AAP member publishers report that there have been instances where counterfeit textbooks exported from China have been sold, through online marketplaces, into the U.S. market. China remains an export center for pirated music CDs as well, feeding the global market with an onslaught of illegal copies of foreign and Chinese music products, including High Quality Counterfeit (HQC) box sets of music content, often through popular Chinese and international e-commerce platforms. China must implement an effective, non-burdensome program to stop and prevent future production and supply of HQC optical discs.<sup>20</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>21</sup> Video game machines, originating from China, containing hundreds or thousands of infringing video games have been seized by customs agencies around the world. These machines are found in kiosks and shopping malls in many countries and are sold through several online marketplaces.

**Unauthorized Mini-Video-on-Demand (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

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<sup>17</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>18</sup>During 2019, a total of 29 camcorders (13 audio and 16 video) were forensically matched to cinemas in China, compared to 24 camcorders (11 audio and 13 video) in 2018. The 2020 and 2021 camcord statistics are anomalous due to the widescale closure of theaters due to the COVID-19 pandemic.

<sup>19</sup>For a discussion of recent successful enforcement actions, see IIPA 2021 at 18-19.

<sup>20</sup>Shenzhen Optical Media Lab has previously worked with rights holders to help identify the source of seized products, but ongoing changes in management structure have made communication difficult so it is presently not clear what its operational and enforcement capabilities are.

<sup>21</sup>On major online shopping platforms, such as *Taobao.com*, *jd.com*, and *pinduoduo* (a mobile shopping app), more than 2,000 sellers are selling an estimated 500,000 USB flash drives per month containing unlicensed music content, including 500 to 1,000 tracks in a single flash drive.

investigation of four illegal camcording syndicates revealed that most illegal camcorded copies were destined for mini-VOD theaters. In August 2019, the China Film Administration (CFA) clarified that mini-VOD cinemas and chains are “entertainment premises” and, therefore, must license rights for theatrical screening, not for online VOD. Instead of legitimizing the operations of these facilities, China should severely penalize or shut down these businesses if they violate the copyright law.

## **ENFORCEMENT UPDATES IN CHINA**

As highlighted in past filings, in recent years China has increased its enforcement efforts, contributing to improved protection and development of the legitimate marketplace for some creative sectors; but these actions, while helpful, are not enough to deter widescale piracy, particularly when compounded by China’s many informal and formal barriers that restrict the distribution of legitimate foreign content in China. China’s growing Internet user base creates opportunities for rights holders; but China’s enforcement deficiencies, including application of the “server principle,” a broad interpretation of ISP safe harbor rules, a longstanding toleration for piracy, and protracted delays in moving investigations and administrative cases forward, have kept the creative marketplace from reaching its potential, hampering the development of legitimate services.<sup>22</sup> In 2021, the impact of the COVID-19 pandemic continued to strain China’s enforcement resources and hinder the progress of investigations in the country. IIPA is hopeful that China will fully implement commitments under the Phase One agreement to improve its enforcement framework, which would make progress in addressing some of the concerns identified below.

**Administrative Actions Helpful, But Insufficient:** China has been operating its annual “Sword Net” anti-piracy campaign for over 17 years. While those administrative enforcement campaigns have been important, notably following NCAC’s 2015 Notice requiring online storage service providers to take proactive measures to prevent users from uploading copyright infringing content, the campaigns on their own are not enough to deter widescale piracy.<sup>23</sup> Targets of the 2021 campaign included “short videos” from unauthorized films or TV programs; livestreaming programs disseminating unauthorized films, music, photos, games, and other works; public accounts uploading or disseminating unauthorized programs of major sports events on network platforms; and the unauthorized use of copyrighted content in teaching and educational materials.<sup>24</sup> While China has stated an intention to increase administrative enforcement efforts, penalties remain low and, unless the source of the piracy can be definitively established to be located in China, are unlikely to be imposed.

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

**More Sustained, Holistic Enforcement Approach Needed:** Even when it is possible to identify piracy

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<sup>22</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>23</sup>For a summary of recent Sword Net campaigns, see, e.g., IIPA 2021 at 20 and 2020 at 21.

<sup>24</sup>According to a recent National Copyright Administration of China (NCAC) press release, copyright law enforcement departments at various levels have investigated 445 cases involving online copyright infringement, shut down 245 illegal websites and mobile applications transmitting pirated content, and removed 618,300 infringing links since the 2021 campaign was launched on June 1 by NCAC in collaboration with three other central departments. During the period from June to September 2021, at the request of NCAC, Internet platforms removed more than 8.46 million infringing links, and major short video platforms removed about 80,400 infringing links associated with the Tokyo Olympic Games.

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

operations, rights holders attempting to enforce their rights are stymied by: burdensome evidentiary procedures slowing or hindering case development (including the restrictions on foreign investigations in China); high costs; often high burdens of proof (notwithstanding the recent Copyright Law amendments and ancillary regulations intended to address this problem); and high risks for foreign rights holders to seek enforcement actions in an environment of limited commercial opportunities for foreign rights holders (as discussed above). Moreover, civil suits, while helpful, to date have been ultimately insufficient to address major piracy problems because damages have been awarded on a per-title basis and are relatively low and non-deterrent due also to the general difficulty of obtaining injunctive relief, while civil litigation costs are high for rights holders, especially foreign ones.<sup>26</sup> Improvements in the legal framework (discussed below) have led to rights holders bringing more civil cases, but the backlog in Chinese courts necessitates a recalibration in the allocation of court resources. Law enforcement agencies would also benefit from further training to address the lack of technical expertise and to improve understanding of the copyright framework to better enable such offices to effectively pursue online enforcement cases. In a positive development, Chinese courts have taken some recent steps to improve protections for video games. For example, recent court decisions in China have made it clear that video games are copyrightable, and courts also have applied the unfair competition law to protect video games.<sup>27</sup> In addition, in September 2021, a local court in Changsha, Hunan Province, issued the first interim injunction order against video game account rental services.

Criminal enforcement is inadequate mainly because criminal thresholds are too high.<sup>28</sup> Nevertheless, several criminal enforcement actions were recently successfully concluded.<sup>29</sup> The recent imposition of criminal sentences against the operators of the piracy site *yyets* (known as *rrys.tv* and *mys2020.com* in recent years) raises hope that enforcement authorities may be relaxing their unwieldy threshold requirements. Another welcome development is that China has created a dedicated criminal department within the Ministry of Public Security (MPS), the Food and Drug Crime Investigation Department (FDCID), tasked with, among other things, the investigation and prosecution of all IPR cases. It is hoped that this will lead to enhanced administrative and criminal enforcement.

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

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

<sup>27</sup>In March 2021, the Guangzhou IP Court found that a video-sharing platform streaming game-play videos of Tencent's video game "King of Glory" constituted copyright infringement, holding that game-play graphics and videos, although they remain subject to the player's operation of the game, are still within the scope of copyrightable content of the video game as a whole. In May 2021, the Shenzhen Intermediate People's Court issued a similar judgment, also finding copyright protections applied to "King of Glory." In some cases where the copyright law was not applied, courts have relied on unfair competition law to protect video games, including the anti-confusion/misrepresentation clause, the trade dress clause, and the product name clause.

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

<sup>29</sup>Criminal cases regarding video games mostly involve illegal gambling relating to video card games, with a minority of cases involving unauthorized private servers and plug-ins, but in 2021, the Shanghai No. 3 Intermediate Court held a defendant criminally liable for pirating the game "Legend of Mir" by downloading copyrighted game materials and developing a game engine to run on private servers. The court sentenced the defendant to 3.5 years of imprisonment. As reported last year, a case brought by the Shenzhen Market and Supervision Administration (MSA) and local police against the operators of *Daquan Vision*, a mobile piracy app for pirating movies, and a case brought by the Tianjin Cultural Task Force and Tianjin Police involving illegal replication of pirate DVDs for distribution within China and export to the U.S., Canada, Europe, and Australia concluded successfully in 2020. See IIPA 2021 at 21. Also reported last year, in July 2020, the police of Shanghai Jing'an District undertook an enforcement action against Shanghai Sigan Network Technology Co., Ltd., the operator of pirated app *Diyidan*, which had disseminated over 20,000 episodes of infringing audiovisual materials from which the operators have collected membership fees of RMB 9.92 million (US\$1.56 million) and advertisement fees of RMB 24.26 million (US\$3.83 million), for total illegal gains of RMB 32.18 million (US\$5 million). In May 2021, the Shanghai Putuo District People's Court imposed a fine of RMB 1.3 million (US\$205,000) against the company, sentenced the CEO to three years imprisonment with a four-year probationary term and fined him RMB 240,000 (US\$38,000), and sentenced 26 others to imprisonments ranging from nine months with a one-year probationary term to three years with a three-year probationary term and ordered them to pay fines ranging from RMB 2,000 (US\$315) to RMB 300,000 (US\$47,000). The police in Hubei Province investigated the website *91zy.cc* (along with *91zyw.com*, *imeizy.com*, and *ouyadz.com*) and found that it supplies over 100,000 domestic and overseas films and TV dramas, including more than 554 MPA titles to more than 500 rogue sites, which have been shut down. Eighteen criminal suspects located in nine cities/provinces were arrested and illegal gains of RMB 2.5 million (US\$394,000) were confiscated in 2019. In November 2020, the principal defendant was sentenced to four years imprisonment and fined RMB 450,000 (US\$71,000), while 15 other criminals received fixed-term sentences and were ordered to pay a fine.

- Adopt further reforms to the Copyright Law (as detailed below) and follow through on implementation of the *Guidelines* to improve the legal framework to meet the challenges of copyright enforcement in the digital environment, including to guide and regulate management of all types of websites to “remove infringing content, disrupt pirated website links, [and] stop the dissemination of infringing information.”<sup>30</sup>
- Adopt reforms that address shortcomings in China’s Criminal Law that IIPA has identified in previous reports.<sup>31</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>32</sup> and separately define criminal violations regarding trafficking in devices, technologies, or services to circumvent TPMs used by copyright owners to protect their works in the digital environment.
- Ensure prompt transfer of administrative cases for criminal investigation and prosecution, where appropriate.
- 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 timely and detailed information regarding the process and the results of administrative actions.
- Improve the mechanism between NCAC, MIIT, and ISPs for shutting down infringing websites operating without a business license to make it more effective (consistent with the *Guidelines*).
- Ensure that an effective remedy exists against apps, websites, or services that facilitate copyright infringement, even if the infringing materials are located on remote servers (i.e., reject the “server principle”).
- Provide a full range of injunctive relief for civil enforcement, including injunctions against intermediaries, and ensure courts enforce injunctions in a timely manner, including simple and expeditious orders of contempt for failure to comply. Injunctions should be available against ISPs in copyright cases, including against access providers, requiring them to stop providing access to unlicensed copyrighted content that has been subject to administrative law enforcement action, but remains available.
- Consistent with measures by the SPC implementing the Phase One Agreement, streamline procedures for civil and criminal enforcement, including by reducing documentation requirements to establish copyright ownership and infringement, and ensuring timely enforcement of monetary damages.
- Revise the 2011 IPR Opinions<sup>33</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 facilitate effective criminal piracy investigations. There is an urgent need in China for police investigators who have the technical understanding and expertise necessary to investigate online piracy cases.
- Expand resources and capability at the NCAC, local CAs, and LCEAs.

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

Prior IIPA filings have documented in detail developments in the Chinese legal system for the protection of

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<sup>30</sup>See, e.g., IIPA 2020 at 23 for additional information on the *Guidelines*, which were issued jointly by the Communist Party of China’s Central Committee (CPCCC) and the State Council. The *Guidelines* would, among other things, direct the government to revise the criminal law, including “lowering the threshold for criminal prosecution of IPR offenses” and “enhance punishment[s]” (Clause 2.1); standardize criteria of evidence, lighten rights holders’ burden in giving evidence, establish efficiencies in the notarization process, including bringing down costs, and establish “e-notarization” (Clauses 2.2, 2.4); issue a “judicial interpretation on evidence rules for intellectual property rights (IPR) infringement in the civil justice system” (Clause 2.2); establish a list of repeat infringers (Clause 2.3); and guide and regulate management of all types of websites to “remove infringing content, disrupt pirated website links, [and] stop the dissemination of infringing information” (Clause 4.10).

<sup>31</sup>See, e.g., IIPA 2017 at 15. China’s Ninth Amendment to its Criminal Law (“Ninth Amendment”) in 2015 failed to address the IP provisions, but added a potentially helpful offense of “assisting criminal activities over information networks.” Implementation of this provision should be monitored closely to ensure it provides effective secondary liability for criminal copyright infringement. In late 2019, the SPC and the Supreme People’s Procuratorate issued an Interpretation, which entered into force in November 2019, defining the conditions for “knowing others are using information networks to perpetrate crimes.” It is unclear what practical impact this Interpretation will have.

<sup>32</sup>China should clarify that a single episode of a television program counts as one copy toward the threshold.

<sup>33</sup>Opinions of SPC, Supreme People’s Procuratorate and Ministry of Public Security on Several Issues Concern the Application of Law in Handling Criminal Cases Concerning the Infringement of IPR (2011).

copyright, including copyright and criminal law reform efforts.<sup>34</sup> These reform processes, including the ongoing implementation of the Phase One agreement, provide important opportunities to update the legal regime in China for more effective copyright protection and enforcement.

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

After years of IIPA and other stakeholders pressing for progress on amendments to the Copyright Law, in November 2020, the National People's Congress (NPC) passed amendments that entered into force in June 2021. IIPA encourages China to expedite the process to revise the Regulation on the Implementation of the Copyright Law to ensure proper implementation of the amendments, as discussed below.

IIPA is pleased that the amendments include rights of public performance and broadcasting for producers of sound recordings. This critical reform is vital for the future of the music industry in China, including both foreign and domestic rights holders, reflecting that these traditional “secondary uses” have become critical aspects of core revenue for record companies as the industry has transitioned from sale of products to licensing of uses. It is vital that China swiftly and effectively implement these new performance rights, including securing protection for foreign sound recordings, ensuring the effective exercise and management of these rights in accordance with international best practices, and establishing tariffs reflecting the economic value of the use of the rights in trade.<sup>35</sup> The amendments also include some positive reforms that will improve the enforcement environment in China, including increasing the maximum for “punitive” damages ten-fold and shifting the burden of proof to the accused infringer upon a showing of *prima facie* evidence.<sup>36</sup> In addition, the amendments elevate certain elements of the three-step test (e.g., TRIPS Article 13) into the law to appropriately confine exceptions and limitations. China should implement all exceptions to and limitations on copyright protection in the Copyright Law to ensure they are appropriately narrow in scope and otherwise consistent with the three-step test.

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

There are other positive aspects of the amendments—including destruction or removal of the materials, tools, and equipment used to produce infringing copies from commercial channels without compensation; enabling “competent authorities” to investigate matters relating to the alleged illegal conduct, conduct on-site inspections of the premises where the alleged illegal conduct took place, inspect and copy documents or materials related to

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<sup>34</sup>See, e.g., IIPA 2021.

<sup>35</sup>Unfortunately, China maintains its reservation of Article 15 of World Intellectual Property Organization (WIPO) Performers and Phonograms Treaty (WPPT). This reservation remains an obstacle for the protection of international sound recordings in China. It is urgent that China withdraw this reservation to ensure Article 45 of the new Copyright Law is effectively implemented.

<sup>36</sup>Amended Article 54 increased the maximum pre-established damages amount from 500,000 RMB to 5 million RMB. Article 59 shifts the burden of proof to the accused infringer to show the accused infringer has received permission from the rights holder or is able to use the IP without permission under the Copyright Law.

suspected illegal acts, and seal or seize premises and articles involving suspected illegal acts; providing new presumptions of ownership; and adding a pre-injunction remedy to prevent further harm to rights holders. However, the amendments did not address several deficiencies in China's legal framework. To address these deficiencies, China should further revise its legal framework to:

- ensure adequate and effective enforcement against apps and websites that facilitate unauthorized access to copyrighted works stored on remote servers by clarifying the right of “communication over information networks” to reject the “server principle”;
- provide a clear legal basis under which ISPs may be held liable for IP infringements carried out by third parties using their services or networks;<sup>37</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, e.g., 70 years after the death of the author, or in cases in which term is calculated based on publication, to the U.S. term of 95 years, but in any case, no less than 70 years;<sup>38</sup>
- consistent with the requirements of the *Guidelines* (as noted above), clarify the legal basis for no-fault injunctions against online intermediaries whose services are used to infringe copyright, including against access providers, requiring them to disrupt access to websites and other online services offering unlicensed copyrighted content, especially in cases where the sites are operated outside of China or where the identities or locations of the website owners are unknown;<sup>39</sup> and
- clarify that only passive and neutral intermediaries are eligible for the safe harbors from monetary liability and that such intermediaries fulfill certain conditions, including adoption of a repeat infringer policy, with encouragement to institute a know your business customer policy, and that, upon obtaining knowledge of infringement (including a notice) or otherwise becoming aware of circumstances of which the infringement is apparent, intermediaries promptly take steps to limit, stop, and prevent further infringement, including expeditious takedown of infringing content and other measures demonstrated effective in preventing or restraining infringement<sup>40</sup>

**Criminal Law Reform:** China's 11<sup>th</sup> amendment to its Criminal Law was issued in December 2020 and entered into force in March 2021. Among other things, the reform included some positive changes to the provisions on criminal copyright infringement (Articles 217 and 218 of the Criminal Law), including increased criminal penalties for copyright infringement.<sup>41</sup> In addition, the reforms expanded the scope of criminal liability to include the right of transmission over an information network, performers' rights, and the prohibition on circumvention of TPMs (although there is no express prohibition against trafficking in circumvention devices, technologies, and services). Finally,

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<sup>37</sup>While secondary liability for IP infringement is available under Chinese law, the basis for such liability should be clarified to ensure more predictable liability decisions by Chinese judges.

<sup>38</sup>China should bring its term of protection in line with the majority of the Organization for Economic Cooperation and Development (OECD) countries and the international trend (to 70 years after the death of the author, or in cases in which term is calculated based on publication, to the U.S. term of 95 years, but in any case, no less than 70 years). This would not only ensure Chinese creators receive the full global benefits from their creations, but would provide greater incentives for the production and dissemination of creative works, and provide all producers with a stronger incentive to invest in local industry. This, in turn, would spur economic growth and tax revenues and enable producers to continue offering content to local consumers in the latest formats. More than 80 countries protect some or all creative materials in line with the international trend, including 30 out of the 32 member countries of the OECD, and nine out of the top ten music markets.

<sup>39</sup>Once enacted, the government should monitor test cases brought to ensure the law operates effectively and fairly to all parties. The Cyberspace Administration of China (CAC) released draft Measures on Administration of Internet Information Services in January 2021, which appears to stipulate a mechanism that would provide for no-fault injunctions similar to procedures in place and successfully enforced in some 35 countries worldwide that provide an essential tool to rights holders by disabling access to piracy websites. Many piracy websites offering pirated music to Chinese Internet users have moved their hosting out of China, underscoring the need for this remedy, as well as improved enforcement cooperation measures in foreign territories.

<sup>40</sup>Safe harbors from monetary liability regarding IP under the current Internet service provider (ISP) liability framework are being misapplied to user-uploaded content (UUC) and other sites and services that are not neutral or passive intermediaries, which has negatively impacted the online market for creative content and contributed to the proliferation of pirated content, such as music videos and other works, available for streaming on these services. Clarification is needed regarding the 2012 Judicial Rules on Several Issues Concerning the Application of Law in Hearing Civil Dispute Cases Involving Infringement of the Right to Network Dissemination of Information (Network Rules), which established the current ISP liability framework in China.

<sup>41</sup>Criminal detentions are no longer applied to the crime of copyright infringement (Article 217) and the crime of selling infringing copies (Article 218). The minimum criminal punishments are fixed-term imprisonment, with the maximum sentence raised from seven years to 10 years imprisonment for the crime of copyright infringement and from three years to five years imprisonment for the crime of selling infringing copies.

“disseminating to the public through information network” was explicitly added as a prohibited act of criminal copyright infringement.

**Fully Implement Phase One Agreement:** IIPA welcomed the conclusion of the Phase One agreement, signed by the United States and China on January 15, 2020. In the agreement, China made a number of enforceable commitments that address certain concerns identified in these comments, particularly regarding IPR enforcement. While implementation is ongoing, in August 2020, the State Council took an encouraging step by clarifying that, in accordance with Article 1.26 of the Phase One agreement, transfers of administrative IP cases for criminal enforcement are required upon “reasonable suspicion” that the criminal thresholds have been met. The practice of asking rights holders to show that criminal damage thresholds are likely to have been met in order for a case to be transferred to criminal authorities has been a longstanding enforcement concern for IIPA members, and IIPA is hopeful that this new rule will be effectively applied by both transferring administrative authorities and receiving criminal authorities, although implementation by local law enforcement and public security authorities has so far been uneven. IIPA is also encouraged by recent measures enacted or proposed by the SPC and the NCAC to implement aspects of the agreement that we hope will improve the enforcement framework in China.<sup>42</sup> IIPA urges China to follow through on its Phase One commitments and encourages the U.S. government to work with China to ensure full implementation.

China’s “e-commerce” 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.<sup>43</sup> Unfortunately, Article 43 does not explicitly adopt effective practices for handling counter-notices, raising the concern that sellers of infringing products could avoid responsibility by merely objecting to rights holders’ notices of infringement. As IIPA reported last year, the new Civil Code and SPC’s Official Reply on Issues of Application of Laws for Disputes Related to Internet IP Infringement provide for improved takedown procedures that are consistent with Article 1.13 of the Phase One agreement.<sup>44</sup> In August 2021, the State Administration for Market Regulation (SAMR) proposed amendments to the e-commerce law that included revisions to Article 43 that would improve the takedown procedures in the law, but unfortunately the proposal did not eliminate rights holders’ liability for erroneous notices submitted in good faith as required under Article 1.13 of the Phase One agreement.<sup>45</sup> It is critical that implementation of the e-commerce law is consistent with the Phase One agreement, supports rights holders’ actions to prevent illegal trafficking of infringing goods on e-commerce platforms, and does not upset existing voluntary arrangements between rights holders and some e-commerce platforms where there is

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

<sup>43</sup>As previously reported, the e-commerce law entered into force in January 2019 and applies only to online transactions of infringing goods, while copyright liability limitations for digital content platforms continue to be decided exclusively in the framework of the existing copyright law and related regulations. The interpretation and implementation of the e-commerce law should be monitored closely, including with respect to its stated scope of coverage as well as any expansion of such explicit coverage.

<sup>44</sup>See, e.g., IIPA 2021 at 24-25. In May 2020, China enacted a new Civil Code, which took effect in January 2021, that includes provisions on liability and takedown procedures for platforms that are similar to the e-commerce law. However, the provisions in the Civil Code permit rights holders to take action “within a reasonable period of time” of the filing of a counternotice while the measures to prevent the alleged infringement remain in place, whereas the e-commerce law required such action within 15 days. In August 2020, the SPC enacted the Official Reply on Issues of Application of Laws for Disputes Related to Internet IP Infringement (Fa Shi [2020] No.9) (“Reply”), which entered into force on Sept.14, 2020. The Reply provides for takedown procedures for online IP infringement consistent with Article 1.13 of the Phase One agreement, including: prescribing that the period for rights holders to take further action in response to a counternotice may not exceed 20 working days; eliminating liability for erroneous takedown notices submitted in good faith; providing for the availability of punitive damages for erroneous counter-notifications submitted in bad faith; and providing for the availability of preliminary injunction orders requiring platforms to take special measures including, but not limited to deleting, blocking and disconnecting links.

<sup>45</sup>Under the proposed provision, the deadline for rights holders to file a complaint following receipt of a counter-notification to a takedown notice would be extended from 15 to 20 working days; an in-platform seller would have to provide double compensation when a false counter-notification it submitted causes expanded loss to a rights holder; in serious cases, the operating licenses of an e-commerce platform operator that fails to take necessary measures according to the law could be revoked; and an in-platform seller may provide guarantees to ensure it can pay compensation for losses caused by IP infringement to enable the e-commerce platform operator to temporarily suspend account deletion and other measures after receipt of a notification from the rights holder.

already good cooperation.<sup>46</sup>

**Regulations on Optimizing the Business Environment and Opinions on Strengthening Intellectual Property (IP) Protection:** State Council Decree No. 722, which included Regulations on Optimizing the Business Environment, 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. The Government of China in 2021 took certain positive steps toward establishing a system for punitive damages, but more should be done, including reducing the burdensome and time-consuming procedural requirements for proving ownership and standing in copyright cases.<sup>47</sup>

## **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>48</sup> After the case concluded in 2009, China eased several market access restrictions,<sup>49</sup> but many core activities of copyright industries remain restricted or prohibited. For example, the Negative Investment List, revised in 2020, continues to prohibit, among other things, foreign investment in the "publication and editing of books, newspapers, journals, audiovisual products and electronic publications," and foreign investment in audiovisual production studios, movie distribution, and online video services. While the prohibition of foreign investment in audiovisual production studios is also a barrier facing U.S. record labels in China, Item 17 of the 2020 Negative Investment List permits foreign investment in online music services, which is a welcome and positive step. Rather than continue to pursue policies that impede access to its marketplace, China should meet its trade commitments and take steps to open its marketplace for the music, publishing, video game, and motion picture and television industries by eliminating the market access barriers discussed below.

**Increasing Online Market Access Barriers:** As we have noted in prior reports, the 2016 Online Publishing Rules, which appear to expand the scope of longstanding restrictions on the involvement of foreign entities in online publishing activities, are having a chilling effect on foreign investment in online publishing services where, prior to the rules, some latitude appeared to have been granted.<sup>50</sup> Furthermore, in June 2019, China revised the Foreign Investment Catalogue, lifting certain restrictions, but production and distribution of audio-visual products and "network publication services" remained on the "Prohibited" list. MIIT's 2017 Regulations on Management of Internet Domain Names, among other things, requires all Internet domain names available in China to be registered through a licensed,

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<sup>46</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, PDs and circumvention devices, both used primarily to access pirated content, remain significant problems in China.

<sup>47</sup>As noted above, the Copyright Law amendments increased "punitive" damages ten-fold. In addition, in March 2021, The Judicial Interpretation of the SPC on Application of Punitive Damages in Civil Litigations of IPR Infringement came into effect, and, among other things, provides for the application of the scope of punitive damages and how to determine "intentional infringement," gravity of circumstances, and calculation base and multiples of punitive damages, making the application of punitive damages pragmatic and workable in civil enforcement of IPR.

<sup>48</sup>*China—Measures Affecting Trading Rights And Distribution Services For Certain Publications And Audiovisual Entertainment Products*, WT/DS363/AB/R, December 21, 2009, at <https://www.wto.org/>.

<sup>49</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>50</sup>Among other things, these rules unfortunately restrict the distribution of foreign audiovisual content on online video platforms, even if the distributor has received a home entertainment permit from the former General Administration of Press and Publication (GAPP).

domestic service provider. The regulations have unfortunately led to increased use of reverse proxy services by most piracy services targeting China. Since 2019, SAPP has tightened the approval process for the publication of video games and in August 2021, SAPP suspended the approval process altogether. SAPP should increase the number of approvals for foreign video games to match the number of approved domestic games. Finally, many of the increasing audiovisual market access barriers discussed below are applicable to online distribution.

In addition to existing online barriers, China has introduced several alarming draft measures that, if implemented, would discriminate against U.S. producers and distributors of creative content. For example, the draft Radio and Television Bill released by NRTA in March 2021 could tighten regulation standards for online audiovisual programs and restrict foreign producers from participating in radio and television activities, including online. 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>51</sup> In June 2016, China published new content approval regulations for mobile video games that would make it extremely difficult for foreign publishers of mobile games to access the Chinese market.

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

**Audiovisual Market Access Concerns:** China continues to introduce additional impediments to its market for U.S. audiovisual content, limiting the U.S. industry's ability to compete fairly and inhibiting its potential growth in this massive and fast-growing market. In 2014, the government imposed rules capping the online distribution of foreign films and TV dramas at 30% and requiring online distributors to register content, obtain permits, and submit content for review, resulting in extended delays and further uncertainty. Furthermore, because there are only two opportunities to submit content for registration and review per year, U.S. producers are unable to submit a full season of a television series when that season is current due to the nature of television production. These rules have substantially reduced the number of U.S. film and television programs licensed in China for online distribution and in practice further reduced the foreign content caps to less than 30%. In September 2018, the NRTA proposed two draft regulations expanding the 30% cap for online distribution of foreign audiovisual content to broadcasting and applying the cap on a genre-basis to film, TV, animation, documentaries, and "other" programs.<sup>52</sup> While these regulations have not been officially promulgated, provisions to further tighten the content review process for imported content have been implemented, and IIPA is concerned that industry-wide application of the genre-based restrictions began in early 2020, in particular for animation, further exacerbating the uncertainty and uneven playing field faced by U.S. audiovisual companies.

Chinese distributors have delayed or decreased licensing activity through multiple layers of restrictions under a non-transparent content review system, significantly delaying and limiting Chinese consumers' ability to access the most valuable current U.S. television content within a reasonable period of the U.S. release, which has created fertile ground for increased piracy. To help ensure the content review process is transparent, predictable, expeditious, and does not have a disparate impact on U.S. content, China should adopt a voluntary, age-based classification system. China should also shorten the time for content review to provide certainty of release, increase frequency of content

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<sup>51</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>52</sup>The "Administrative Provisions on the Importation and Broadcasting of Overseas Audiovisual Programs" would further tighten regulations on foreign broadcasting, banning foreign films, TV dramas and animation from broadcasting during prime time, putting a 30% maximum cap on foreign audiovisual content in certain circumstances, and restricting content that can be disseminated online. The "Administrative Provisions on Overseas Personnel Participation in the Production of Radio and Television Programs" seeks to regulate the participation of foreigners in the production of radio and TV programs by, for example, banning the employment of foreigners as broadcast TV presenters or newscasters, and banning programs having both a foreign screenwriter and a foreign director.

review windows, remove the burden of resubmitting film and television programs that have already been approved, and establish a fast-track system for content review under special circumstances. A transparent, predictable, and expeditious content review process will attract investment and boost China's potential as a regional film and television production hub.

In addition, the 2016 Rules clearly intended to promote domestic Chinese radio and television programs at the expense of foreign content have negatively impacted U.S. producers and appear to contravene China's WTO obligations.<sup>53</sup> A March 2016 Notice allowing refunds from the Film Development Fund to cinemas that report favorable annual box office receipts from the screening of Chinese films incentivizes cinemas to screen more Chinese domestic films, further disadvantaging the competitiveness of foreign films in the Chinese market.<sup>54</sup> Another obstacle for U.S. producers in China is that private Chinese distributors, including VOD platforms, arbitrarily, without clear explanation, request from U.S. producers an excessive and particularly burdensome amount of legalized documentation regarding production and distribution in order to complete a license agreement or obtain government approvals that permit access to China's online marketplace. These types of documentation requests (unique to China's marketplace) cause uncertainty and additional expense that slow or kill negotiations for licensing films to China.

China also maintains several longstanding discriminatory restrictions in the audiovisual sector that continue to harm the U.S. industry. For example, China prohibits foreign-owned investment in online video services, which would appear to violate China's General Agreement on Trade in Services (GATS) commitments. China also prohibits foreign investment in audiovisual production studios and distribution. As noted above, the June 2020 revision of the Negative Investment List maintained these prohibitions.<sup>55</sup> U.S. firms are highly competitive globally in these sectors, and these restrictions, including against direct-to-consumer audiovisual online services, undermine the ability of U.S. content creators and distributors to compete in the Chinese marketplace, hurting their growth.

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

China needs to meet its trade commitments and open its marketplace to U.S. producers instead of continuing

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<sup>53</sup>The June 2016 Statement and Rules on Importing Television Formats, among other things, established a procedure for filing/registration of foreign content by satellite television channels that would apply to jointly developed programs or programs with foreign personnel playing a "major guiding role" in production if the Chinese party does not "fully obtain intellectual property rights" in the program. Only two of these "foreign" programs are permitted to be broadcast in prime time per year; and no more than one new foreign program may be broadcast at any time per year, but it cannot be broadcast in prime time for that first year.

<sup>54</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>55</sup>Other examples include: China limits foreign investment in cinemas and in-home video distribution companies to 49% and prohibits all foreign investment in television; local cable networks cannot carry foreign satellite channels without government approval or landing permits, which are limited to Guangdong and a handful of foreign channels; foreign satellite channels beaming into China are required to downlink from a government owned encrypted satellite platform and may only be shown in three-star hotels and above and in foreign institutions, and the annual fee for each channel remains excessively high (US\$100,000); foreign television and film programming are limited to no more than 25% of total airtime, and other foreign programming to no more than 15% of total air time; foreign programming is banned during prime time and may not constitute more than 30% of pay television channels; foreign TV series and movies are limited to 50 episodes; foreign animation is restricted to no more than 40% of total airtime, and importers of foreign animation must produce a like amount of domestic animation; under State Council regulations as well as the 2017 Film Promotion Law, public screening of foreign films must not exceed one-third of the total annual screen time; China requires home-video license agreements to be for a duration of at least three years, an unnecessary intrusion into copyright owners' contractual rights; and China continues to require digital film prints to be replicated in local laboratories, impeding rights holders' ability to control the print quality or trace the source of camcording piracy.

down its current protectionist path. It is critical to send a strong message that these policies are unacceptable—particularly when China is now the largest film market in the world—and should be reversed. As discussed below, China should instead focus its attention on complete implementation of the 2012 U.S.-China Film Agreement and fulfill its Phase One services purchasing obligations, including IP licensing of audiovisual works, as well as other market opening steps for the motion picture and television industries.

**U.S.–China Film Agreement Implementation:** China still has not implemented certain key provisions of the 2012 U.S.-China Film Agreement signed by then-Vice President Xi and then-Vice President Biden. Hailed as a “breakthrough,” the Agreement promised to economically uplift U.S. and Chinese producers and distributors.<sup>56</sup> Unfortunately, more than nine years after its signing, China has failed to meet its obligations under the Agreement. The result of not implementing key provisions of the Agreement has been a steady further deterioration of U.S. producers’ (especially independent producers) ability to access the Chinese theatrical marketplace as well as the broader marketplace for other types of distribution in China, such as via VOD and television.

As part of the Film Agreement, China committed that in 2017 it would make a meaningful increase to compensation for revenue sharing theatrical releases, as the current 25% U.S. share of revenue is far below comparable markets. Furthermore, the official quota on revenue sharing releases of 20-plus-14 (enhanced format) remains. However, review and additional compensation has never occurred, and China must be pressed to comply with its obligations. In addition, China has imposed artificial limits on market access for imported films, despite the huge increases in cinema screens in China since 2012, and the growing number of domestic productions, which were at an all-time high in 2019.<sup>57</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 China’s theatrical marketplace, with only 10 films theatrically released in the country in 2020, for 0.8% share of the theatrical box office revenue. Just 10 independent theatrical releases in China represents the lowest percentage of slots ever allocated for independent films recorded by IFTA. U.S. independent producers who rely on private distributors and the payment of minimum guaranteed or flat license fees to raise production financing and secure distribution have seen their licensing revenues plummet and in many cases stop altogether.

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

IIPA recommends that China immediately take action on the following issues, which have been long delayed: 1) immediately and fully implement all the terms of the 2012 U.S.–China Film Agreement, including the requirement to enhance compensation in 2017 (such review has been delayed almost 5 years), liberalize the distribution market for private third party Chinese distributors, and finalize a new MOU; 2) substantially increase U.S. producers’ share of

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<sup>56</sup>According to a 2012 White House Press Release:

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

“At the same time, Chinese audiences will have access to more of the finest films made anywhere in the world.”

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

<sup>57</sup>IFTA Research and Analysis, “China Theatrical Market 2010–2019”.

revenues for the box office revenue share films from the current 25% to a level consistent with international norms; 3) allow U.S. producers more control over release dates, address the problem of U.S. films being locked out from the prime release dates, and end the practice of “double booking” theatrical releases; 4) eliminate informal restrictions on the number of imported “flat fee” films so that independent producers have unimpeded access to the Chinese market; 5) further relax the quota for revenue sharing films and VOD products for online video websites so filmmakers and audiovisual companies may have fair and equitable access to the rapidly growing marketplace for films and TV in China; 6) ensure U.S. producers receive timely responses to quota allocations and content review determinations, and effective access to ticketing system information to ensure proper reporting of revenues; 7) establish defined and prescribed content review time frames for theatrical and online distribution; increase the frequency of content review windows; remove the burden of resubmitting film and television programs that have already been approved; and establish a fast track system for content review under special circumstances; and 8) streamline the payment of deposits, guarantees, and royalties by local distributors to U.S. producers, and do not establish any regulation or policy that impedes the collection of license fees by American IP owners.

**Full Implementation of the Phase One Agreement:** The Phase One agreement also includes purchasing requirements (Article 6.2) that, among other things, cover IP licensing, and specifically licensing of audiovisual products. If meaningfully implemented, this requirement could improve market access for the film and television industry by increasing the licensing of U.S. audiovisual products for VOD services within China’s 30% quota, as well as increasing revenue share and the number of U.S. films allowed into China.

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

As noted above, China is still not in full compliance with the WTO’s market access case (DS 363) and many of the market access barriers discussed above raise concerns under China’s international obligations, including under the GATS, TRIPS Agreement, and the Phase One agreement (including Article 1.2 to ensure fair and equitable market access to persons that rely upon IP protection).<sup>58</sup>

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

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

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<sup>58</sup>For example, in the *2020 Report to Congress on China’s WTO Compliance*, USTR noted: “NRTA and other Chinese regulatory authorities have also taken actions to prevent the cross-border supply of online video services, which may implicate China’s GATS commitments relating to video distribution.” See page 60, report available at <https://ustr.gov/sites/default/files/files/reports/2020/2020USTRReportCongressChinaWTOCompliance.pdf>.