

CHINA (PRC)

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2023 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that USTR maintain China on the Priority Watch List in 2023 and that China be monitored under Section 306 of the Trade Act.¹

Executive Summary: China remains a critical market for the creative industries. With the largest Internet user base in the world, China's online marketplace continues to expand, although 2022 saw some slowing in momentum, in part due to continued disruptions arising from the COVID-19 pandemic. Persistent and evolving piracy, worsening market access concerns, some procedural hurdles in the courts (in part due to the ongoing COVID-19 situation), and remaining legislative shortcomings hamper rights holders' ability to distribute copyright content, protect their content most effectively, and see the Chinese creative marketplace reach its full potential.

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. Additional positive developments include: enforcement reforms, including a ten-fold increase in maximum statutory 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 of the new law (and implementing measures of prior Opinions issued in 2019) allow rights holders to fully take advantage of the improved (and promised) measures in practice, meet China's international commitments, and reflect global best practices. Unfortunately, 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, including on term of protection and the adoption of a more effective online liability framework.

Moreover, the Supreme People's Court (SPC) improves the position of rights holders generally by clarifying, strengthening, and streamlining the application of copyright laws with respect to civil, criminal, and administrative enforcement actions brought in Chinese courts. The National Copyright Administration of China (NCAC) continues to pursue administrative actions against certain online services that facilitate piracy, but these actions alone are not sufficient to meaningfully deter widespread online piracy. Other serious enforcement challenges in China include unauthorized camcording, unauthorized distribution of journal articles, and the proliferation of thousands of "mini video-on-demand (VOD)" facilities that screen unauthorized audiovisual content, among other things.

China remains one of the most challenging markets in the world for the distribution of copyright content. Extensive market access barriers, both in law and in practice, severely limit foreign participation in the market. Notably some of these barriers are violative of China's multilateral and bilateral obligations to the United States. Rather than continue to pursue policies that impede access to its market, China should meet its trade commitments, eliminate market access barriers, and take other steps to open its marketplace for the U.S. creative industries.

¹ For more details on China's Special 301 and Section 306 monitoring history, see previous years' reports at: <https://www.iipa.org/reports/reports-by-country/>. For the history of China's Special 301 placement, see <https://www.iipa.org/files/uploads/2023/01/2023APPENDIXBSPEC301-1.pdf>.

PRIORITY ACTIONS REQUESTED IN 2023

Enforcement:

- Fully implement the *2019 Guidelines on Strengthening the Protection of Intellectual Property Rights (Guidelines)*, including lowering criminal thresholds; streamlining evidence processes; establishing a list of repeat infringers; regulating websites to “remove infringing content, disrupt pirated website links, [and] stop the dissemination of infringing information”; and separately define criminal violations regarding circumvention of TPMs or trafficking in circumvention technologies.
- Improve effectiveness of administrative enforcement by:
 - Imposing enhanced penalties for repeat infringements and repeat infringers, and where penalties have already been issued against an infringer, issuing penalties for subsequent infringements without the need for rights holders to issue a new complaint;
 - Providing rights holders with timely, transparent, and detailed information regarding the process and the results of administrative actions, as well as ensuring more consistent treatment of cases between provinces; and
 - Facilitating prompt and more efficient transfer of copyright cases from administrative to criminal authorities for investigation and prosecution.
- Improve the effectiveness of civil and criminal enforcement, including by:
 - Providing a full range of injunctive relief for civil enforcement, including injunctions against intermediaries, and ensuring courts enforce injunctions in a timely manner, including simple and expeditious orders of contempt for failure to comply;
 - Streamlining civil and criminal enforcement, including by reducing documentation requirements to commence action, such as documents needed to establish the identity and standing of the plaintiff, copyright ownership, and infringement, as well as ensuring timely enforcement of monetary damages;
 - Issuing deterrent-level civil and criminal penalties against operators of piracy websites that make available a massive amount of infringing content;
 - Ensuring proper implementation of the E-Commerce Law, including that Article 43 implementation does not result in sellers of infringing products avoiding responsibility by merely objecting to rights holders’ notices of infringement and eliminate liability for erroneous takedown notices submitted in good faith; and
 - Encouraging Internet service providers (ISPs) to institute a “know your business customer” (KYBC) policy.

Legislation:

- Ensure that nationwide courts are moving away from the “server principle” and affording rights holders with a remedy against websites and apps facilitating infringement, including where infringing content is hosted remotely.
- Provide a clear legal basis under which ISPs may be held liable for intellectual property (IP) infringements carried out by third parties using their services or networks.
- Clarify that only passive and neutral intermediaries that do not contribute to infringing activities are eligible for safe harbor protection from monetary liability and that such intermediaries fulfill certain conditions, including adoption and implementation of a repeat infringer policy, and, upon obtaining knowledge of infringement (including through notice) or otherwise becoming aware of circumstances from which infringement is apparent, intermediaries promptly take steps to limit, stop, and prevent further infringement, including expeditious takedown of infringing content and other measures demonstrated to be effective in preventing or restraining infringement.
- Provide at least a 70-year term of protection for copyright-eligible works and sound recordings in line with international norms.

Market Access:

- Immediately and fully implement all the terms of the 2012 U.S.-China Film Agreement, such as:
 - Enhance compensation, liberalize the distribution market for private third-party Chinese distributors, and finalize a new MOU;
 - 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;
 - 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;
 - Eliminate informal restrictions on the number of imported “flat fee” films so that independent producers have unimpeded access to the Chinese market;
 - 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;
 - 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;
 - 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
 - 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.
- Reconsider measures prohibiting foreign involvement in online publishing activities and allow distribution of audiovisual content on online video platforms;
- Increase the number of approvals for foreign video games to match the number of domestic approved video games; revoke all other measures 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 censorship process is transparent, predictable, and expeditious;
- Refrain from extending China's burdensome content review regime to books merely 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.

CHINA'S COPYRIGHT MARKETPLACE

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. China also leads the world in the number of cinemas with over 82,200 movie screens as of mid-2022—most of which support 3D, and many of which offer enhanced formats such as IMAX and China Giant Screen. China also remains 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 2020.² Further, China is now the sixth largest music market, the second largest music streaming market in the world by number of subscribers, and China joined the United

² Patrick Brzeski, The Hollywood Reporter, *China Retains Global Box Office Crown With \$7.3B in 2021, Down 26 Percent From 2019*, available at <https://www.hollywoodreporter.com/movies/movie-news/china-tops-global-box-office-2021-1235069251/>.

States, Japan, UK, Germany, and France to become a US\$1 billion plus recorded music market.³ China is also the largest market for video games with an estimated 742.19 million gamers and revenues estimated to reach US\$50.18 billion in 2022.⁴

However, with China's population size of over 1.4 billion in 2021,⁵ the creative industries should be seeing significantly higher revenues from China. For example, while the music market in China has enjoyed double-digit growth over the recent years, it still remains far below the full commercial potential of a country of 1.4 billion people and behind its immediate neighbors in South Korea (51.7 million people)⁶ and Japan (125.7 million people).⁷ Per-capita recorded music industry sales revenues in China are some of the lowest in the world at US\$0.73 per person, compared to US\$15.75 in South Korea, US\$24.78 in Japan, and US\$8.44 in Hong Kong.⁸ Licensed music is widely available in China across a range of different services but too often, listeners still find pirated content easy to locate and use. The COVID-19 pandemic has exacerbated China's online piracy challenges over the past several 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.⁹

Online Piracy Remains Very Serious: Online piracy in China—including illegal downloading and streaming of copyrighted content through piracy websites, apps, and devices—has evolved extensively in recent years and remains a significant concern. For example, in 2022, China ranked 12th in the world in number of connections by peers participating in the unauthorized file-sharing of ESA member video game titles on public peer-to-peer (P2P) networks, and, according to this same metric, 13th in the world for mobile game titles. The music industry reports that 78% of users in China admitted to using unlicensed or illegal sources to listen to music.¹⁰ 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.

Rights holders in China face problems from piracy apps and devices (including illicit streaming devices (ISDs) like *EVPAD*, *SVI Cloud*, *LokLok*, and *UnblockTech*).¹¹ Piracy websites are also a significant challenge, whether operating from within or outside China (like *Dytt8.net*, *Dy2018.com*, *Dygod.net*, *Ygdy8.com*, *gaoqing.la*, *mp4ba.cc*, *btbtt20.com*, *piaohua.com*, *vodxc.com*, *panduoduo.com*, *meijutt.tv*, *hao6v.com*, *80s.tw*, *gimyvod.cc*, *100vdo.com*, *olevod.com*, and *fqfilm.com*). Piracy cloud storage services and social media platforms (e.g., *Baidu Tieba*, *WeChat*, and *Weibo*) are also a concern for rights holders. Apps that aggregate infringing content hosted on remote servers are proliferating, and there remains legal uncertainty regarding the “server principle,” where several court cases in China have held that no liability can be found unless the infringing material resided on the defendant's server. Piracy over cloud storage services (or cyberlockers) in China represent a major area of concern for copyright holders, with large quantities of infringing content being stored on *Baidu Pan* (which is the cloud storage service provided by Baidu, Inc., which also provides more than 80% of China's search engine market) and then disseminated through popular Chinese

³ International Federation of the Phonographic Industry (IFPI), 2022 *Global Music Report*, p. 144.

⁴ Newzoo, *Top Ten Countries/Markets by Game Revenues*, available at <https://newzoo.com/insights/rankings/top-10-countries-by-game-revenues>.

⁵ Macrotrends, *China Population 1950-2022*, available at <https://www.macrotrends.net/countries/CHN/china/population>.

⁶ Data Commons, *Place Explorer: South Korea*, available at https://datacommons.org/place/country/KOR?utm_medium=explore&mprop=count&popt=Person&hl=en.

⁷ Data Commons, *Place Explorer: Japan*, available at https://datacommons.org/place/country/JPN?utm_medium=explore&mprop=count&popt=Person&hl=en.

⁸ IFPI, 2022 *Global Music Report*, p. 144, 154, 161, and 178.

⁹ See, e.g., IIPA's 2022 Special 301 submission on China (IIPA 2022), available at <https://www.iipa.org/files/uploads/2022/01/2022-SPEC301-3.pdf>; IIPA's 2021 Special 301 submission on China (IIPA 2021), available at https://www.iipa.org/files/uploads/2021/01/2021SPEC301REPORT_12854504_1.pdf; and IIPA, *China's WTO Compliance – “Request for Comments Concerning China's Compliance With World Trade Organization (WTO) Commitments”* (87 Fed. Reg. 52835, August 29, 2022), September 28, 2022, available at https://www.iipa.org/files/uploads/2022/09/2022-China-WTO-Compliance-Report_International-Intellectual-Property-Alliance-Comment-1.pdf.

¹⁰ IFPI, *Engaging with Music 2022*, p. 26, available at https://www.ifpi.org/wp-content/uploads/2022/11/Engaging-with-Music-2022_full-report-1.pdf.

¹¹ Another issue is that illicit streaming devices (ISDs) are manufactured in China and can be modified to support the installation of third-party, pre-loaded, or post-purchase infringing applications, allowing consumers access to pirated content. The devices often target overseas customers, and their proprietary applications are not accessible in China, which leave rights holders without a remedy, or at best, with an uncertain remedy.

social media platforms and piracy linking sites. The Government of China needs to do more about piracy hosted through cloud-based services that facilitate piracy, such as *Baidu Pan*, including by encouraging such services to keep pace with other similarly sized services across the globe that provide prompt and consistent processing of takedown requests and take more effective action to suspend or terminate accounts of repeat infringers.

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 the past two years, this form of piracy increased significantly, particularly from Multi-Channel Network (MCN) accounts. 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. Some streamers, in particular via *Douyin*, will play official trailers of video games without authorization to attract traffic for their channels, and further profit directly or indirectly from promoting other videos or mobile games by recommending download links in connection with unauthorized game trailers. In addition, these platforms have begun providing live-stream functions that enable infringers to provide unauthorized video content in real time. Finally, some game operators will place short advertising videos on *Douyin* that use video game images, characters, or music from rights holders' games without authorization. The infringing uses mislead players to believe the linked game content is related to the popular (unauthorized) content. Because these short-video ads are recommended to targeted users by *Douyin*, it is sometimes difficult for rights owners to monitor proactively.

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, or categories of weapons and skills, without copying key character images, soundtracks, and voices. Plagiarism against online video games through *WeChat* and *Douyin* (i.e, the Chinese equivalent of TikTok) is becoming more prominent in 2022. Due to the suspension of approval for online video games by the Chinese State Press and Publication Administration from July 2021 to April 2022, and the continuous strict policy controlling approvals, most foreign online video games cannot be legally published in Mainland China. In the meantime, those developers who were unable to get approved often had to make business decisions to publish the online video games first in an overseas market on platforms like Steam or Google Play. On the other hand, no approval is required if game developers do not receive money directly from game players (in other words, the developers do not require payments or offer in-game purchase). To take advantage of this loophole, copycats quickly plagiarize video games released overseas and launch them on mini-platforms in China at very low cost, then induce game players to watch advertisements when they want to replay or go to the next level. While the infringers do not earn money directly from players, they receive huge profits from advertisers through the display of advertisements.

Book and Journal Piracy: Online journal piracy remains a significant and persistent challenge. The unfortunate lack of deterrence in the marketplace allows entities engaged in providing unauthorized copies of journal articles to continue to operate. Several online platforms that facilitate access to unauthorized copies of journal articles and academic textbooks, including *Ureader*, *2447.net*, *80lib.com*, *Beijing Increscence*, 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. Some of these services even reach out to the customers of legitimate publishers pretending to represent those rights owners. Administrative enforcement measures apparently still have no lasting impact, with administrative authorities unwilling to act against previously sanctioned entities unless the rights holder files a new complaint for the same infringing content. Rights holders need to meet lengthy procedures involving repetitious and complicated evidentiary requirements and must do so repeatedly. 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 framework (often with complex evidentiary requirements), sending notifications of infringement to remove these products remains unduly complicated.

A long-running case against the online site *Keyandi*, which made available infringing copies of more than 1.15 million textbooks and other reading materials, was finally concluded in 2022 with an administrative punishment decision imposing a fine of RMB20,000 (around US\$2,830). The case was initially brought in 2018 by the administrative authorities, who—following their own investigation into and their discovery of the extent of the operator's infringing activity—later referred the matter for criminal prosecution. Unfortunately, the matter sat with the police for 5 months and then the prosecutor's office for over a year. Ultimately a non-prosecution decision was issued. Despite a promising start with the administrative authorities, a review of the prosecutor's files showed that the matter stalled as the police failed to undertake any substantive investigation of the site or its operator, relying instead on the evidence initially collected by the administrative authority, thus failing to provide the prosecutor's office with the evidence necessary to pursue a criminal action. The resources required to push the case forward, the long delays, and the insignificant fines ultimately issued again demonstrate the difficulty with which any deterrence can be achieved in the market.

Sci-hub (*Sci-hub.ru*) and *Library Genesis* (*Libgen.li*), the Russian operated and facilitated platforms and repositories of pirated content are frequented by Chinese Internet users and mimicked by Chinese-language piracy platforms. At least 21 mirror sites are facilitated by Chinese domain registrars. Some Chinese copycat sites have also added payment processing services to their cloned repositories of infringing book and research content, while the copied pirate repositories lack such processes.

Publishers have identified at least 18 Chinese sites and platforms that either host infringing books or link to pirated works, including: *Baidu.com*, *Douban.com*, *Sina.com.cn*, *CSDN.net*, *Docin.com*, *Book118.com*, and *doc88.com*. To better combat infringement on these sites, as discussed below, China should provide rights holders with more effective remedies, including improved administrative processes for notice and takedown as well as other measures demonstrated effective in preventing or restraining infringement. P2P file sharing remains popular among Chinese Internet users with one Association of American Publishers (AAP) member publisher identifying 2 million downloads of pirated books since May 2021.

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 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.

Illicit Theatrical Camcording and Mini-Video-on-Demand (VOD) Locations: 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. The numbers in 2022 were also low, owing to the small number of foreign films that China approved for distribution. In general, the quality of films camcordered in China has improved over the years, threatening the legitimate theatrical and home entertainment markets. 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 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.

Moreover, the proliferation of thousands of mini-VOD locations that show unauthorized audiovisual content is also causing significant problems in China. Regulations on mini-VOD cinemas and chains entered into force in March

2018, but an estimated 14,000 of these entities are still operating in different cities across China without proper licenses and are routinely screening U.S. content without authorization. In early 2019, China's investigation of four illegal camcording syndicates revealed that most illegal camcordered copies were destined for mini-VOD theaters. In August 2019, the China Film Administration (CFA) clarified that mini-VOD cinemas and chains are "entertainment premises" and, therefore, must license rights for theatrical screening, not for online VOD. Instead of legitimizing the operations of these facilities, China should severely penalize or shut down these businesses if they violate the Copyright Law.

Pirated/Counterfeit Books and Hard Goods of Certain Copyright Products: 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. AAP member publishers report that there have been instances where counterfeit textbooks exported from China have been sold, through online marketplaces, into other markets. 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 "deluxe edition" collection sets of music content that have almost identical artwork and packaging to the genuine products and that contain genuine-looking International Federation of the Phonographic Industry (IFPI) source identification (SID) codes. These infringing sets are often sold through popular Chinese and international e-commerce platforms. In recent years, another common form of Chinese physical piracy exports involves the sale of USB flash drives that contain thousands of illegal music files and are exported to other Asian territories (e.g., Taiwan), usually following a sale on e-commerce platforms. In addition, some Chinese software developers have started to sell TPM circumvention software to the United States and the European Union, which enables users to circumvent the TPMs used by legitimate digital music services, such as Spotify, and obtain music content without getting legal access to the services. 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.

At present, domestic e-commerce platforms have onerous formal requirements for complaints from rights holders or agents, and if they accept the complaint, they will delist only the specific infringing items and generally do not take any further action to suspend or close the online shop. Depending on the scale of infringement, local cultural enforcement authorities will pursue a warning and removal of infringing content, administrative penalties, and closure of the online shop, or refer to the public security authorities for criminal investigation.

ENFORCEMENT UPDATES IN CHINA

Enforcement efforts have been largely the same in the last year. As highlighted in past filings, China has increased its enforcement efforts in recent years, contributing to improved protection and development of the legitimate marketplace for some creative sectors. Some enforcement actions, including the ongoing civil cases against the operators of the app *RenRen/DuoDuo ShiPin*, and the *Yyets* and *Diyidan* criminal convictions, give some hope for deterrent action in the Chinese market. While these actions are helpful, they 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. Chinese courts should issue deterrent-level civil and criminal penalties against operators of piracy websites that make available a massive amount of infringing content. Also, the same companies that operate services like *RenRen* in China pivot to run apps like *LokLok*, which massively infringe outside of China but are geo-blocked there, thus evading enforcement. Further, China remains the hub for the manufacture and distribution of piracy devices (PDs, also referred to as ISDs) and its enforcement response is lacking, making it incumbent on the Chinese government to closely examine this issue and crack down on such activities that are fueling much of the world's Internet protocol television (IPTV) piracy landscape. (Indeed, enforcement actions taken in Singapore and Malaysia, after new laws were enacted and went into force in both countries, indicate the need for China, as the source of the problem, to take action to fix it.)

China's large Internet user base creates opportunities for rights holders, but China's enforcement deficiencies have kept the creative marketplace from reaching its potential and hamper the development of legitimate services. In 2022, 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 and criminal enforcement against copyright infringement involves challenges for IP rights holders. Moreover, in some industries, notice-and-takedown procedures on major platforms have proven ineffective at addressing large-scale piracy abuses on their services. Short video-sharing platforms are reluctant to take action to prevent the appearance of infringing content. In the face of the rapid distribution of short videos, the "Notice-Deletion" doctrine runs into significant hurdles. Even if platforms delete the links upon the receipt of notices, in some cases this deletion happens hours or days after the infringing content is posted when the damage has already occurred. Further, the same content continues to reappear and many platforms do not take any measures against users that repeatedly upload infringing content. In addition, most infringing websites and apps use overseas servers and domain registration agencies to hide their identity, making it difficult to find the real operators of infringing websites and apps. These rogue services effectively cannot be sued. The NCAC should establish a mechanism with the Ministry of Industry and Information Technology (MIIT) and ISPs to shut down infringing sites operating without a business license, and the government should, consistent with the *Guidelines*,¹² take immediate steps to guide and regulate management of all types of websites to "remove infringing content, block or disconnect pirated website links, [and] stop the dissemination of infringing information." Chinese courts should streamline procedures for civil and criminal enforcement, including by reducing documentation requirements to establish copyright ownership and infringement and to ensure timely enforcement of monetary damages.

China's Customs Database allows rights holders to record IP and authorized licensees for use in preventing infringing items from being exported from or imported into China. However, the database is in Chinese only and does not support any other languages. It would be helpful for the database to support other languages, at least English, to reflect the international nature of infringement activity across China's borders.

Administrative Actions Helpful but Insufficient: IP enforcement officials conducted the "Sword Network Action," an annual anti-piracy campaign, from September to November of 2022. During this campaign, online platforms deleted nearly 1.2 million infringing links; 1,066 pirated websites and apps were shut down; 1,031 cases related to Internet piracy were handled, among which 135 criminal cases involved a value of RMB711 million (around US\$100 million). While the campaigns have produced some good results, there is a need for greater transparency, including providing rights holders with timely and detailed information regarding the process and the results of administrative action, and more consistent treatment of actioned cases as results have varied among various provinces. It is also hoped that the IP Key Programme will continue its engagement with the Ministry of Public Security so that more copyright infringement cases eventually could be addressed by the criminal authorities. Administrative enforcement should be improved by expanding the resources and capability of the NCAC, local Copyright Administrations (CAs), and Law and Cultural Enforcement Administrations (LCEAs) and improving the mechanism between NCAC, the MIIT, and ISPs for shutting down infringing websites operating without a business license (consistent with the *Guidelines*). Administrative enforcement should also be improved by imposing enhanced penalties for repeat infringers without the need for a new complaint. Finally, improvements should be made for the prompt, more efficient, and transparent transfer of administrative complaints to the criminal authorities for investigation and prosecution.

Civil Enforcement: Because the operation of piracy services is often overseas or multinational, cross-border enforcement cooperation is critical and needs to be improved. Many piracy websites have applied for personal

¹² See, e.g., IIPA 2020 at 23 for additional information on the 2019 *Guidelines on Strengthening the Protection of Intellectual Property Rights (Guidelines)*, which were issued jointly by the Communist Party of China's Central Committee (CPCCC) and the State Council.

information protection with overseas domain registrars, which makes it impossible for copyright holders to collect information and lodge a complaint with related enforcement agencies in China, which require such personal information. Even when rights holders can identify the infringers, China's system creates a barrier to action by requiring extensive documentation even to commence a civil action. There are also often delays by the courts in formally accepting cases. More broadly, China should provide a full range of injunctive relief for civil enforcement, including injunctions against intermediaries, and should ensure that courts enforce injunctions in a timely manner, including simple and expeditious orders of contempt for failure to comply. Injunctions also 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 which remains available. China should also eliminate the "server principle." While courts in Shanghai and Beijing are beginning to shift away from this principle in practice, courts nationwide should follow suit.

Chinese courts have also issued judgments with some notable improvements in damages awards and recognition of copyright in the gaming industry. In November of 2021, Perfect World, a gaming and entertainment company, filed suit against another gaming company for the unauthorized use of character names, biographies, and the relationship between characters in Jin Yong's *Wuxia* novels. The Beijing IP Court upheld the judgment of the first instance and granted damage awards of RMB20 million (US\$2.81 million). In December of 2021, the High People's Court of Guangdong Province affirmed the decision of the Guangzhou IP court, which recognized that the map of a MOBA game operated by Tencent was copyrightable. It should be noted that burdensome procedural requirements for launching civil litigation by foreign plaintiffs can, if not remedied, undermine the effectiveness and availability of enforcement action in China.

Criminal Enforcement: In recent years, several criminal enforcement actions have notably resulted in the imposition of deterrent criminal sentences in a modest sea change in China. In November 2021, the Shanghai Intermediate People's Court sentenced the founder of the China-based multi-million user site *Yyets.com* (also operating as "*Rrys*") to 42 months' imprisonment and a major fine following a guilty plea for copyright infringement offenses, in a case jointly referred by the Motion Picture Association (MPA) and a local Chinese rights holder.¹³ It will hopefully set a positive example leading to greater deterrence. In July 2020, Chinese police executed a raid against the operators of the *Diyidan* app.¹⁴ Then in May 2021, the operator and 27 defendants were convicted of copyright infringement. It is important for Chinese courts to issue deterrent-level civil and criminal penalties against operators of piracy websites that make available a massive amount of infringing content.

In other positive news, the Xuzhou police and public security bureau (PSB) are aggressively chasing a syndicate of TPM circumvention device manufacturers and sellers. Following their notable raid against the *Team Xecuter* syndicate in December 2020, Xuzhou PSB raided another cluster across Shanghai, Guangzhou, Jilin, and Sichuan provinces in May 2022 and continue investigations into similar targets. As a result of these actions, one hacker programmer, two manufacturers, and seven distributors and retailers were raided.

Regional police took positive actions against video game pirates in other locations as well. In February 2022, the Shanghai PSB raided a factory and seized more than 1,400 counterfeit controllers, taking action against seven defendants. In November, the Shanghai court heard the case and reported it to the media. In June 2022, Guangzhou PSB raided seven distributors of infringing game consoles and seized thousands of infringing game consoles from ten locations (factories and warehouses). From the end of August to the beginning of September 2022, Hangzhou PSB raided factories, distributors, and retailers of counterfeit game controllers, and seized more than 3,000 counterfeit controllers and more than 40,000 related items. Following the investigation into an online seller, they found upper

¹³ One case was brought against the operators of the piracy service *Yyets*. *Yyets* had more than 6.8 million registered users and offered nearly 33,000 pirate TV shows and films, earning almost US\$2 million in profits since 2018. The case resulted in criminal convictions against *Yyets*, which was noted by the Supreme People's Court (SPC) as among "2021's Top 10 IP Cases at Chinese Courts" and was further noted as an exemplary case. See also, IIPA 2022 at 15.

¹⁴ At its height, *Diyidan* was disseminating over 20,000 TV series, including series from the U.S., Japan, and Korea. See also, IIPA 2022 at 24.

suppliers and factories, and related distributors and downstream retailers. Finally, in October 2022, a local Cultural Market Comprehensive Law Enforcement Detachment shut down a pirate website following consumer tips.

In a raid action in July 2019, a Shenzhen company was raided for selling infringing game consoles and around 2,000 infringing game consoles were seized. In March 2020, a judgement was issued in which the court reduced punishment on the basis of a false claim of a settlement agreement by the defendant. After resolving the fraudulent evidence, the rights holder requested the original court, Shenzhen Bao'an District People's court, to reopen the case to consider proper punishment against the defendant, only to receive the court's denial in June 2022. The appeal of the case brought no resolution.

Late in 2022, the China National Intellectual Property Administration (CNIPA) published a three-year Plan (replacing the prior 2020-2021 plan) of implementing the *Guidelines* jointly released by the Office of CCP Central Committee and the Office of the State Council in November 2019. CNIPA's plan specifies 114 measures in six categories (with deadlines). The Plan contains relevant items to the copyright industries, and IIPA will be monitoring these developments closely. Industry has identified at least 24 of the 114 measures as having direct relevance to the protection and enforcement of copyright for IIPA members, including measure 56, "Push IP Courts to hear IP criminal cases, continuously push reform of 'Three in One (criminal, civil, and administrative cases in one court)' IP trial mechanism," and measure 51, "Further enhance management of website platforms, push fulfillment of platform accountability, and based on opinions of related departments, dispose suspected IP infringement information/content online, in accordance with laws." The "Three in One" approach is one which IIPA members would like to see fully implemented, particularly against not only the piracy app ecosystem but also against the massive proliferation of the manufacture and distribution of PDs (so-called ISDs) which are ravaging copyright holders' legal businesses, largely outside China. The fact that the entire APEC member community is considering soft-law approaches to this issue, and Singapore and Malaysia have recently enacted statutes and implemented them to crack down on local sales of the infringing activities of resellers, indicates that the government of China can do more to tackle this problem; hopefully the Three in One approach will be effective.

COPYRIGHT AND RELATED LAWS AND REGULATIONS UPDATE

Prior IIPA filings have documented in detail developments in the Chinese legal system for the protection of copyright, including copyright and criminal law reform efforts.¹⁵ 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 to the Copyright Law 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

¹⁵ See, e.g., IIPA 2022.

with international best practices, and establishing tariffs reflecting the economic value of the use of the rights in trade.¹⁶ Despite the closure of this major gap in protection, Chinese law still falls short of international norms and standards regarding the term of protection for sound recordings and other works. A minimum term of 70 years for the protection of sound recordings and works has become the international standard, yet China's Copyright Act still provides for only 50 years of protection.

The Copyright Law amendments also include some positive reforms that will improve the enforcement environment in China, including increasing the maximum for statutory damages ten-fold and, upon *prima facie* evidence, shifting the burden of proof to the accused infringer to show the use was authorized by the rights holder or is otherwise permissible under the Copyright Law. In addition, the amendments elevate certain elements of the three-step test from the Berne Convention and the WTO TRIPS Agreement 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, protection should apply to TPMs that control and manage authorized access to copyright works ("access controls") and prohibition against circumvention 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 amendments include: requiring destruction or removal of the materials, tools, and equipment used to produce infringing copies from commercial channels without compensation; enabling "competent authorities" to investigate matters relating to the alleged illegal conduct, conduct on-site inspections of the premises where the alleged illegal conduct took place, inspect and copy documents or materials related to suspected illegal acts, and seal or seize premises and articles involving suspected illegal acts; providing new presumptions of ownership; and adding a pre-injunction remedy to prevent further harm to rights holders.

However, the Copyright Law as amended did not address several deficiencies in China's legal framework. To address these, 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; and by clarifying the right of "communication over information networks" to reject the "server principle" and 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. The Copyright Law should be further updated to provide protection against unauthorized retransmissions of copyrighted content over the Internet (including live-streaming), and consistent with the requirements of the *Guidelines*, clarify the

¹⁶ 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.

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. Finally, the Copyright Law should be amended to clarify that only passive and neutral intermediaries are eligible for the safe harbors from monetary liability and that such intermediaries must fulfill certain conditions, (including adoption and implementation of a repeat infringer policy) and that, upon obtaining knowledge of infringement (including through a notice) or otherwise becoming aware of circumstances from which infringement is apparent, intermediaries promptly take steps to limit, stop, and prevent further infringement, including expeditious takedown of infringing content and other measures demonstrated to be effective in preventing or restraining infringement. Service providers should be encouraged to institute a know your business customer policy. Chinese Copyright Law should also 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.¹⁷

Criminal Law Reform: China's 11th 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.¹⁸ 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, "disseminating to the public through information network" was explicitly added as a prohibited act of criminal copyright infringement.

The Government of China should also adopt reforms that address shortcomings in China's Criminal Law that IIPA has identified in previous reports. 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" (which is addressed in the *Guidelines* and which will now be further explored through the recently issued Three-Year Plan);¹⁹ 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; and separately criminalize the manufacture and distribution of PDs when it is clear that these devices are exported for the purpose of infringing or facilitating 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 several 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 requirement that rights holders show that criminal thresholds have been met 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. 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.

¹⁷ While secondary liability for intellectual property (IP) infringement is available under Chinese law, the basis for such liability should be clarified to ensure more predictable liability decisions by Chinese judges.

¹⁸ 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.

¹⁹ China should clarify that a single episode of a television program counts as one copy toward the threshold.

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.²⁰ 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 previously, 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.²¹ 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.

Internet Information Services: The *Provisions on the Management of Algorithmic Recommendations in Internet Information Services* (the *Provisions*) was implemented on March 1, 2022. According to the *Provisions*, the algorithmic recommendation refers to "the application of any algorithmic technology, including without limitation, generation and synthesis, individualized push, sorting and selection, searching and filtering, and scheduling and decision-making, to provide information to users." Legal liability associated with the violation of the *Provisions* include the suspension of information updates, the imposition of a fine of RMB10,000 to RMB100,000, administrative penalties, and even criminal liabilities. The *Provisions* could provide rights holders the opportunity to prove that a platform improperly used its algorithm to recommend infringing content to its users and hold the platform responsible for direct infringement.

Judicial Improvements: New legal interpretations and procedural guidelines from the SPC, which will come into force from 2020-2022, improve the position of rights holders generally by clarifying, strengthening, and streamlining the application of copyright and other IP laws regarding civil and criminal enforcement actions brought in Chinese courts. Most recently in April 2022, the SPC released a judicial interpretation and a subsidiary notice that provided that all copyright-related civil and administrative cases of first instances should be filed with basic-level courts designated by the SPC, but that cases of significance can start at the Intermediate People's Court. IIPA is hopeful that this will help to ease the heavy dockets of the IP courts in China.

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 products 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 United States regarding many market access barriers in music, audiovisual products,

²⁰ 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 governed exclusively by 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.

²¹ 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 counter-notice 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.

and publications.²² After the case concluded in 2009, China eased several market access restrictions,²³ 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.

Online Publishing Rules: 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.²⁴ Furthermore, in June 2019, China revised the Foreign Investment Catalogue, lifting certain restrictions, but production and distribution of audio-visual products and “network publication services” remained on the “Prohibited” list. MIIT’s 2017 Regulations on Management of Internet Domain Names, among other things, requires all Internet domain names available in China to be registered through a licensed, domestic service provider. The regulations have unfortunately led to increased use of reverse proxy services by most piracy services targeting China. Since 2019, the State Administration of Press and Publication (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 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.²⁵ 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. China has not approved a video game from an American publisher since June 2021.

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 merely being printed in the country but otherwise intended

²² China—Measures Affecting Trading Rights And Distribution Services For Certain Publications And Audiovisual Entertainment Products, WT/DS363/AB/R, December 21, 2009, at <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:WT/DS/363ABR.pdf&Open=True>.

²³ 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.

²⁴ 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).

²⁵ 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.

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.

Content Censorship of Physical Goods: Sound recordings that are imported into China in a physical format are required to undergo a strict content censorship procedure, comply with a series of formalities, and receive approval before distribution in the market. This requirement should be lifted.

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. On June 1, 2022, the NRTA issued a new system of administrative licensing for domestic online audiovisual works, essentially applying the same censorship rules and standards for offline (theatrical) and online (VOD) content. The practice has been in place since 2019; the issuance of the new administrative licensing requirement will formalize the obligation for online audiovisual works. This reflects a further tightening of government oversight and the push for a higher censorship standard for the online content industry in China.

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.²⁶ 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 or at least provide transparency as to the criteria used by content approval authorities and clear, predictable timelines. 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.²⁷ A March 2016 Notice allowing refunds from the Film Development Fund to cinemas that report favorable

²⁶ 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.

²⁷ 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

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.²⁸ 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.²⁹ 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.

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 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.³⁰ 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' 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 (especially for independent producers).

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

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.

²⁸ 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.

²⁹ Other examples of discriminatory restrictions 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.

³⁰ 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>.

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 2019.³¹ 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 9 films theatrically released in the country in 2021, with a revenue of US\$10.68 million, which is 0.15% of the year’s total share of the theatrical box office revenue. Just 9 independent theatrical releases in China represents the lowest percentage of slots ever allocated for independent films recorded by the Independent Film & Television Alliance (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. This requirement has also not been implemented. The newly formed CFA, which replaced SAPPRT in 2018, still permits only one film importer (CFG) and two distributors of foreign films: CFG and Huaxia Film Distribution Company Ltd. 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 Memorandum of Understanding (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.

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.

³¹ Independent Film & Television Alliance (IFTA) IFTA Research and Analysis, “China Theatrical Market 2010–2019.”

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).³² In terms of copyright protection and enforcement, the deficiencies outlined above regarding criminal enforcement procedures (e.g. thresholds that are too high or unclear, uncertainties regarding increased penalties against repeat offenders) are inconsistent with enforcement obligations under TRIPS, including Articles 41, 42, and 61. Finally, China must follow through on commitments it has made in other bilateral engagements, including the Phase One Agreement and prior commitments, specifically 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.

³² For example, in the 2021 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 61, available at <https://ustr.gov/sites/default/files/enforcement/WTO/2021%20USTR%20Report%20to%20Congress%20on%20China's%20WTO%20Compliance.pdf>.