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William Shpiece  
Chair of the Trade Policy Staff Committee  
Office of the United States Trade Representative  
1724 F Street, NW  
Washington, DC 20006

**Re: 2023 China WTO Compliance Report - International Intellectual Property Alliance’s Notice of Intent to Testify and Summary of Testimony and Written Comments in Response to “Request for Written Comments Concerning China’s Compliance with World Trade Organization (WTO) Commitments” (88 FR 56117, August 17, 2023)**

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 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)).<sup>1</sup>

**Notice of Request to Testify**

We hereby notify the TPSC that the following person wishes to testify orally at the above-referenced hearing on behalf of the International Intellectual Property Alliance (IIPA):

Linda Quigley  
Director of Policy and Legal Affairs  
International Intellectual Property Alliance

<sup>1</sup> 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.

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## **Summary of Testimony and IIPA Comments on China's WTO Compliance**

China is a significant market for the creative industries, and China's online marketplace continues to expand. China also leads the world in the number of cinemas, with over 74,225 movie screens as of mid-2023—most of which support 3D, and many of which offer enhanced formats such as IMAX and China Giant Screen. China's total box office revenue was \$4.4 billion (RMB 30 billion) in 2022, down 36.4% from 2021.<sup>2</sup> Further, in 2021, China was the sixth largest music market,<sup>3</sup> the third largest music market in the world for streaming revenue,<sup>4</sup> and the second largest market for video games, with an estimated 699.6 million gamers and revenues estimated to reach \$44 billion in 2022.<sup>5</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.

China's 2021 amendments to its Copyright Law introduced the rights of broadcasting and public performance for producers of sound recordings, which are essential protections for the music industry. 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 for these amendments 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

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<sup>2</sup> Silvia Wong, *Screen Daily*, "China box office fell 36% to \$4.4bn in 2022 amid Covid-related cinema closures," January 9, 2023, available at [https://www.screendaily.com/news/china-box-office-fell-36-to-44bn-in-2022-amid-covid-related-cinema-closures/5177928.article#:~:text=Monthly%20print%20editions-.China%20box%20office%20fell%2036%25%20to%20%244.4bn%20in,amid%20Covid%2Drelated%20cinema%20closures&text=The%20Covid%20pandemic%20has%20continued,bn%20\(RMB30bn\)%20in%202022.](https://www.screendaily.com/news/china-box-office-fell-36-to-44bn-in-2022-amid-covid-related-cinema-closures/5177928.article#:~:text=Monthly%20print%20editions-.China%20box%20office%20fell%2036%25%20to%20%244.4bn%20in,amid%20Covid%2Drelated%20cinema%20closures&text=The%20Covid%20pandemic%20has%20continued,bn%20(RMB30bn)%20in%202022.)

<sup>3</sup> International Federation of the Phonographic Industry (IFPI) Global Music Report 2022, p. 10.

<sup>4</sup> *Id.* at p. 117.

<sup>5</sup> Newzoo, *Top Ten Countries/Markets by Game Revenues*, available at <https://newzoo.com/resources/rankings/top-10-countries-by-game-revenues>.

from fully accessing the Chinese market on a level playing field.

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;
- (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 thoroughly documented the challenges faced

by the motion picture and television, music, publishing, and entertainment software industries, and the 2023 IIPA Special 301 country report on China provides details on these challenges as they stood in January 2023.<sup>6</sup> 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 has yet to comply with the WTO's ruling in the landmark market access case (DS 363) brought by the United States regarding a multitude of market access barriers in music, audiovisual products, and publications.<sup>7</sup> Although China eased several market access restrictions,<sup>8</sup> after the case concluded in 2009, many core activities of copyright industries remain restricted or prohibited. For instance, the Negative Investment List, revised in 2021, 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 15 of the 2021 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 continues to employ a variety of measures that appear intended to further undermine market access for the U.S. creative industries. For example, China appears to apply its content review regime to content intended for other markets. Books merely printed in China but otherwise intended for distribution in other markets are subject to

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<sup>6</sup> See IIPA's 2023 Special 301 submission on China (IIPA 2023), available at <https://www.iipa.org/reports/reports-by-country/page/8>.

<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/cases\\_e/ds363\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds363_e.htm).

<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.

China's burdensome content review regime. This appears to be the case even for books that were being printed in and exported from China previously 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, unjustified, and 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, when China revised its Foreign Investment Catalogue in June 2019, the country lifted certain restrictions, but production and distribution of audio-visual 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, China's game publishing regulator, now called the National Press and Publication Administration (NPPA) 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. China has not approved a video game from an American publisher since June 2021. 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, China's content approval regulations for mobile video games 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. Foreign films and series are subject to increased scrutiny and a lengthier review process than domestically produced content. Censorship rules (released in 2014) requiring submission of full seasons of foreign TV series were implemented in 2015. Regulations severely limit day-and-date releases of Hollywood dramas, leading to a drop in the share of U.S. and western content. In fact, foreign content's share of total content investment has declined from 23% in 2015 to 11% in 2022. The share of western content declined from 12% to

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<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).

8% over the same period.

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. On June 1, 2022, the National Radio and Television Administration (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.

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 because of 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>10</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, in particular for animation, further exacerbates 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 June 2016 Statement and Rules on Importing Television Formats clearly

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<sup>10</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.

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>11</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>12</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 legal 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.

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 December 2021 revision of the Negative Investment List maintained these prohibitions.<sup>13</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.

The Phase One Agreement includes purchasing requirements (Article 6.2) that, among other things, cover IP licensing, and specifically licensing of audiovisual products. If meaningfully

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<sup>11</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>12</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>13</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.

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 should 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 above, 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.

On April 26, 2023, the Standing Committee of the National People's Congress (NPC) passed the revised Anti-Espionage Law, which was first introduced in November 2014. This revised law came into effect on July 1, 2023. The revisions significantly broaden the scope of what constitutes "espionage" and give the relevant authorities new powers to investigate and prosecute suspected espionage activities. Many of these provisions were already present in other existing rules, such as the Anti-Espionage Law's Implementing Rules, released in 2017, which dealt with enforcement procedures, and the Provisions on Anti-Espionage Security Precautions, from 2021, which have now largely been copied in the revised Espionage Law. Still, the consolidation of these amendments into a single, powerful Anti-Espionage Law with broad applicability is significant. The most notable change is the broadened definition of "espionage," which can now involve the collection, storage, or transfer of any information deemed to be relevant to national security interests, including "documents, data materials, or items." The definition was previously more limited to classified information and state secrets. The broadened definition potentially raises uncertainties even under friendly collaborations.

## **II. Legal Reforms**

### **A. Copyright Law**

After years of IIPA and other stakeholders pressing for progress on amendments to the Copyright Law, in November 2020, the 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 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>14</sup>

The 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.<sup>15</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. 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 TPMs that control and manage authorized access to copyright works (“access 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 implementation of the law should include prohibiting 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 protection 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

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<sup>14</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>15</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.

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 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”;<sup>16</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>17</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>18</sup>
- consistent with the requirements of the *Guidelines*, clarify the legal basis for 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>19</sup>
- clarify that only passive and neutral intermediaries that do not contribute to infringing activity 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 the infringement is apparent, intermediaries promptly take steps to limit, stop, and prevent further infringement,

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<sup>16</sup> Certain Chinese 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>17</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>18</sup> China should align its term of protection with the majority of the Organization for Economic Cooperation and Development (OECD) countries and the international trend (to 70 years after the death of the author, or in cases in which term is calculated based on publication, to the U.S. term of 95 years, but in any case, no less than 70 years). 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 countries comprising the membership of the OECD, and nine out of the top ten music markets.

<sup>19</sup> Once the law is enacted, the government should monitor test cases brought to ensure the law operates effectively and fairly for 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.

including expeditious takedown of infringing content and other measures demonstrated effective in preventing or restraining infringement;<sup>20</sup> and

- Require marketplaces to institute a “know your business customer” (KYBC) policy.

## **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 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 intellectual property 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.

IIPA is also encouraged by 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 IIPA hopes will improve the enforcement framework in China.<sup>21</sup> For example, in April 2022, the SPC 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 in 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

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<sup>20</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>21</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 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.

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>22</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>23</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 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.<sup>24</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; 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>25</sup> It is critical that implementation of the e-commerce law is consistent with the

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<sup>22</sup> China should clarify that a single episode of a television program counts as one copy toward the threshold.

<sup>23</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 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.

<sup>24</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>25</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

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>26</sup> To improve enforcement and availability of legitimate products on e-commerce platforms, rights holders seek more effective measures from platforms such as adequate punishment against repeated infringers, improved information regarding infringements, and improved collaboration between e-commerce platforms and rights holders.

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. In 2021, the Government of China 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>27</sup>

### **III. 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 unsettled application of the "server jurisdiction principle," an uncertain interpretation of ISP safe harbor rules, have kept the creative marketplace from reaching its full potential, hampering the development of legitimate services.<sup>28</sup>

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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>26</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 below, Piracy Devices and circumvention devices, both used primarily to access pirated content, remain significant problems in China.

<sup>27</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>28</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.

In 2022, the impact of the COVID-19 pandemic continued to strain China's enforcement resources. 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 18 years. The campaigns have produced some good results, but 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 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 Cultural Law Enforcement Administrations (CLEAs) 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.

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>29</sup> These rogue services effectively cannot be sued or enforced against administratively. 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, while civil suits may be helpful, civil litigation alone cannot address piracy problems because broad injunctive relief is not generally available, where it is, it does not target broadly the source of piracy, and historically, civil damages are relatively low and non-deterrent. While property preservation orders in recent years have been historically high, injunctive relief is generally only title-based, meaning rights holders cannot obtain relief by the Court that will shutter a piracy service or seize the "instrument" of piracy such as the pirate server (e.g., if the server itself is run by or owned by a third party). 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.

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<sup>29</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.

In a positive development, Chinese courts have 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>30</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. This experience matches what other industries, such as the movie industry, are seeing in courts in China in civil cases.

While historically criminal enforcement has been hindered by criminal thresholds that can be too high to reach all “commercial scale” piracy,<sup>31</sup> several recent criminal enforcement actions have been successfully concluded with increasingly deterrent outcomes.<sup>32</sup> Moreover, 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 (RMB1.5 million, approximately USD 214,286) following a guilty plea for copyright infringement offenses, in a case jointly referred by MPA and a local Chinese rights holder.<sup>33</sup> It is

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<sup>30</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>31</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 other quantitative thresholds, including 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>32</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, 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 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.

<sup>33</sup> 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

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. 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 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. As discussed above, a more holistic enforcement response is needed to effectively combat the entire online piracy ecosystem, which poses the greatest threat to the continued growth of legitimate businesses in China.

Rights holders in China face significant problems from piracy apps and devices (including illicit streaming devices (ISDs)) and piracy websites, whether operating from within or outside China. Piracy cloud storage services and social media platforms 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 represents 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 social media platforms and piracy linking sites. The Government of China should 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.

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*) became more prominent in 2022. Due to the suspension of approval for online video games by the

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case resulted in criminal convictions against *Yyets*, which was noted by the SPC as among “2021's Top 10 IP Cases at Chinese Courts” and was further noted as an exemplary case. See also, IIPA 2022 China Special 301 Report at 15.



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 purchases). 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.

Some music streaming services, including *yym3.com*, were hosted in China but now use a U.S.-based reverse proxy service to obscure their location and have stopped responding to 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>34</sup> In addition, many piracy streaming sites that undermine the Chinese music market are hosted outside of China. 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; but more traditional music piracy, including illegal downloads through cyberlockers (such as *Baidu Pan*),<sup>35</sup> domestic and international P2P sites (such as *ThePirateBay*), forums, and streaming sites, remains a problem. As discussed above, the misapplication of safe harbors from monetary liability to UUC sites that are not neutral or passive intermediaries has contributed to the proliferation of unlicensed music content available for streaming on UUC sites. The music industry reports that 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.

Online journal piracy remains a significant and persistent challenge. Given the unfortunate lack of deterrence in the marketplace, online platforms engaged in providing unauthorized copies of journal articles and academic textbooks continue to operate. These platforms host unauthorized PDF copies of academic monographs, edited collections, and textbooks, and 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. In addition, pirated print publications and compromised log-in credentials continue

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<sup>34</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>35</sup> Three cyberlockers continue to provide file sharing in China: *pan.baidu.com*, *ctdisk.com*, and *115.com*.

to be available on e-commerce sites, which also serve as platforms through which producers of pirated and counterfeit textbooks advertise and sell the infringing copies. 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.

*Sci-hub* and *Library Genesis*, repositories of large volumes of pirated content, remain among the top sites 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.

To better combat online journal and book infringement, as discussed above, 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. Peer-to-peer (P2P) file sharing remains popular among Chinese Internet users with one AAP member publisher identifying two million downloads of pirated books since May 2021.

## **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. 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. 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 of international titles has noticeably decreased with only one camcordered copy of a U.S. title being identified since the first quarter of 2022. However, the illicit camcording of Chinese titles has reportedly continued unabated. Such piracy impacts the theatrical and VOD markets and needs to be monitored. Meanwhile, 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 5,000 of these entities own 70,000 screens and are still operating in different cities across China without proper licenses and are routinely screening U.S. content without authorization. In early 2019, China's investigation of four illegal camcording syndicates revealed that most illegal camcorded copies were destined for mini-VOD theaters. In August 2019, the China Film Administration (CFA) clarified that mini-VOD cinemas and chains are “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. A number of Chinese rights holders have an active litigation strategy against such “mini-VOD” locations.

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

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 of concern. 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.

#### **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>36</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’ 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 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 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, a large number of domestic productions (which was 531 in 2022),<sup>37</sup> as well as over 80,000 theatrical screens in 2021.<sup>38</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 nine independent 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. 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.

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<sup>36</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>37</sup> Statista, *Film industry in China - statistics & facts*, August 31, 2023, available at <https://www.statista.com/statistics/260392/number-of-feature-films-produced-in-china/>.

<sup>38</sup> *Id.*

The newly formed CFA, which replaced the State Administration of Press, Publication, Radio, Film and Television, 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 of 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 by 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,

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