

CHINA (PRC)

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2024 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that USTR maintain China on the Priority Watch List in 2024 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 there was some slowing of momentum in 2023, in part due to continued disruptions from the COVID-19 pandemic. Persistent and evolving piracy, worsening market access concerns, some timing and deterrence issues in court cases, 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, as well as 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); and the elevation of certain elements of the three-step test into the law. While these developments are laudable, the implementing measures of this law and prior 2019 Opinions, as well as new draft judicial interpretations must be fully and properly implemented. Unfortunately, the amendments did not include several critical reforms, including extending the term of protection to match the international standard of at least 70 years and the adoption of a more effective online responsibility framework.

The Supreme People’s Court (SPC) has steadily improved 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.

PRIORITY ACTIONS REQUESTED IN 2024

Enforcement

- Fully implement the *2019 Guidelines on Strengthening the Protection of Intellectual Property Rights (Guidelines)*.
- Improve effectiveness of administrative enforcement by addressing repeat infringement and providing timely, consistent, and transparent administrative actions with prompt and efficient transfer of copyright cases from administrative to criminal authorities for investigation and prosecution.

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/2024/01/Appendix-B-2024.pdf>.

- Improve the effectiveness of civil and criminal enforcement, including by issuing deterrent-level civil and criminal penalties against operators of piracy services, with sufficiently high damages to compensate rights holders and deter piracy.

Legal Reforms

- Swiftly and effectively implement amendments to the Copyright Law, including by accelerating the formulation and promulgation of the new Regulations on Implementation of the Copyright Law (expected in late 2024), to ensure effective implementation relating to: protection of TPMs for both access and copying; narrowly interpreted exceptions to prohibition on circumvention; and the new public performance rights in China and the effective exercise and management of these rights in accordance with international best practices.
- Address shortcomings in China's Copyright Law relating to safe harbors from monetary liability for intermediaries and in its Criminal Law to ensure that criminal penalties are available for all online piracy on a "commercial scale."
- Fully implement the intellectual property rights (IPR) enforcement commitments of the U.S.-China Phase One Agreement.
- Fully implement the Judicial Proposals on Enhancing IP Protection and Serving Promotion of High-Quality Development of Film Industry.

Market Access

- Abandon the slew of proposals that discriminate against U.S. producers and distributors of creative content.
- Immediately and fully implement all the terms of the 2012 U.S.-China Film Agreement and fulfill the Phase One services purchasing obligations.
- Reconsider measures prohibiting foreign involvement in online publishing activities, allow distribution of audiovisual content on online video platforms, and increase the number of approvals for foreign video games to match the number of domestic approved video games.
- Refrain from extending China's burdensome content review regime to books intended for other markets and lift content review procedures for imported physical sound recordings.
- Repeal additional impediments to China's market for U.S. audiovisual content, including higher censorship standards, caps on online distribution of foreign films and TV dramas, burdensome documentation requirements, and investment restrictions.
- Adopt a voluntary, age-based classification system to help eliminate disparate treatment of U.S. content and ensure that China's content review process is transparent, predictable, and expeditious.

ENFORCEMENT

- **Fully implement the 2019 Guidelines on Strengthening the Protection of Intellectual Property Rights (Guidelines).**

Late in 2022, the China National Intellectual Property Administration (CNIPA) published a three-year Plan (replacing the prior 2020-2021 plan) implementing the *2019 Guidelines on Strengthening the Protection of Intellectual Property Rights (Guidelines)*, which were jointly released by the Office of the Chinese Communist Party's (CCP) Central Committee and the Office of the State Council in November 2019. CNIPA's plan specifies 114 measures related to intellectual property in six categories (with deadlines). The Plan contains items relevant 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, including lowering criminal thresholds; streamlining evidence processes; establishing a list of repeat infringers; and regulating websites to "remove infringing content, disrupt pirated website links, [and] stop the dissemination of infringing information."

Moreover, China should separately define criminal violations regarding circumvention of TPMs or trafficking in circumvention technologies as noted in the *Guidelines*. As the world’s primary 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.

Additionally, two other measures will help advance the protection and enforcement of copyright, including measure 56, to “[p]ush 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, to “[f]urther 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 that 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 piracy devices (PDs, also known as illicit streaming devices or ISDs) that are ravaging copyright holders’ legal businesses and are mass exported from China. The fact that the entire Asia-Pacific Economic Cooperation (APEC) member community is considering soft-law approaches to this issue, and Singapore and Malaysia have enacted statutes and implemented them to crack down on local sales of the infringing activities of PD/ISD resellers, indicates that the Government of China can do more to tackle this problem; it is hoped the Three in One approach will be effective.

- **Improve effectiveness of administrative enforcement by addressing repeat infringement and providing timely, consistent, and transparent administrative actions with prompt and efficient transfer of copyright cases from administrative to criminal authorities for investigation and prosecution.**

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, the Entertainment Software Association (ESA) reports that in 2023 China ranked 6th 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. According to this same metric, China ranked 4th in the world for unauthorized file-sharing of console-based video games; however, the level of unauthorized file-sharing for mobile game titles decreased dramatically – bringing the country to a rank of 117th in the world in this category. Moreover, the music industry reports that 78% of surveyed users in China admitted to using unlicensed or illegal sources to listen to music.² 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.

In addition to illegal downloading and streaming of copyrighted content, 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 unauthorized services even reach out to the customers of legitimate publishers pretending to represent those rights owners. Administrative enforcement measures are without lasting impact, as administrative authorities are unwilling to act against previously sanctioned entities unless the rights holder files a new complaint for the same infringing conduct. Rights holders must meet lengthy procedures involving repetitious and complicated evidentiary requirements. Pirated

² International Federation of the Phonographic Industry (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.

print publications and compromised log-in credentials continue 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 *Lib-Gen*, repositories of large volumes of pirated content, remain among the top sites 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.

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.

The emergence of these new technologies for enabling mass infringement, especially in the online and mobile environments, requires a vigorous enforcement response. China should provide in its legal system mechanisms that ensure Internet service providers (ISPs) can impose effective relief to remove infringement, including, where applicable, to disrupt or disable access to structurally infringing websites on a no-fault basis, upon rights holders' applications to appropriate authorities.

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 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 Ministry of Industry and Information Technology (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.

The NCAC should establish a mechanism with the MIIT and ISPs to shut down infringing sites operating without a business license, and the government should, consistent with the *Guidelines*,³ 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."

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.

³ See, e.g., IIPA 2020 at 23 for additional information on the *Guidelines*, which were issued jointly by the Communist Party of China's Central Committee (CPCCC) and the State Council.

Additionally, NCAC should provide measures demonstrated effective in preventing or restraining infringement. Further, NCAC should be empowered to prevent platforms from imposing practical barriers to reporting infringements at scale – including burdensome formalities and limitations on the number of infringements that can be reported or processed. Administrative remedies have had limited effect to curb infringement via unlicensed user uploaded content (UUC) platforms. Finally, improvements should be made for the prompt, more efficient, and transparent transfer of administrative complaints to the criminal authorities for investigation and prosecution.

- **Improve the effectiveness of civil and criminal enforcement, including by issuing deterrent-level civil and criminal penalties against operators of piracy services, with sufficiently high damages to compensate rights holders and deter piracy.**

Pirate streaming sites, cyberlockers, IPTV services, and Piracy-as-a-Service (PaaS) providers accessed globally yet operated from within China, continue to be a growing problem. China enforcement agencies have taken limited enforcement actions in recent years. A more comprehensive enforcement strategy coupled with strong deterrent penalties are required to reduce the major piracy services sourced from China.

A small number of criminal enforcement actions, albeit two years ago, 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 (RMB1.5 million, approximately US\$214,286) 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.⁴ More recently, on November 3, 2023, the Supreme People's Court announced “representative” cases involving IP protection of movies, including two criminal cases (the *Yyets* case and one other case referred by MPA and local rights holders) and six other civil IP litigations.⁵

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 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. Several Chinese rights holders have an active litigation strategy against such “mini-VOD” locations. China should also reduce documentation requirements to commence civil action.

⁴ In this case, it was confirmed by the Shanghai No. 3 Intermediate People's Court that since 2018, this pirate service provided unauthorized streaming and downloading of 32,824 movies and TV dramas (most were foreign titles with Chinese subtitles) through the website and apps, accumulating 6.83 million members. The website's illegal business volume reached RMB12 million (~US\$1.7 million). In 2021, the principal of the piracy service was sentenced to imprisonment of three and a half years, as well as fine of RMB1.5 million (~US\$212,000); the illegal gains were confiscated. Fourteen additional defendants were also punished by the lower people's court.

⁵ See The Supreme People's Court Release of Representative Cases Involving Film Intellectual Property Protection, available at https://mp.weixin.qq.com/s/Dn4_zeFw5QsKDmTPD2p6Og, November 3, 2023. The cases were announced by the Court at the 1st IP Protection Forum of the Film Festival of the Golden Rooster Awards and Hundred Flowers Awards and in the media. This represents the first time that the SPC has presented representative cases only focusing on the IP protection of movies. According to the SPC, from 2013 to 2022, the people's courts across the county concluded 11,600 civil litigations in the first instance involving IP protection of movies. The SPC reported that in past five years, movie-related civil lawsuits increased by an average of 7.46% year-on-year, while common civil lawsuits annually increased 2.73% during the same period. Both criminal cases highlighted by the SPC as “representative” were initiated by MPA, along with local industry partners. The first criminal case mentioned was against an illegal camcording syndicate that camcordered over 100 international and local theatrical films and sold the camcordered copies to VOD mini cinemas during the period from June 2016 to February 2019. In 2020, four defendants who played key roles in the piracy syndicate, were sentenced by the Yangzhou Intermediate People's Court to imprisonment of between four and six years and fines ranging from RMB600,000 (~US\$85,000) to RMB5.5 million (US\$777,000); the illegal gains were confiscated. The second criminal case was the case involving the *Yyets.com* (*rrys.tv*, *zimuzu.tv*) piracy services, discussed above.

Recently, the Kunshan Intermediate People's Court found two defendants who illegally sold game plugins for an online game guilty of copyright infringement and sentenced them to four years in prison with fines of RMB 20M (~US\$2.8 million). In May 2023, the Yangzhou City Intermediate People's Court found that the defendants committed the crime of copyright infringement related to a major online game from a U.S. publisher. The Court sentenced them to three years in prison, suspended for three years, with total fines of RMB 700K (~US\$99,000). Earlier in October 2022, the Sucheng Lower People's Court sentenced the principal offender who developed and operated a copycat online game private server to four years and four months in prison with a fine of RMB 6.5M (~US\$900,000) for copyright infringement.

In April 2023, the Public Security Bureau (PSB) in Jiangsu released a model case against illegal sales of cracked device chips (used to crack game consoles, build virtual operating systems, and run pirated console games downloaded from the network) and pirated console games downloading services. The Xuzhou Intermediate People's Court sentenced six defendants to three years in prison for copyright infringement, with probation applicable, and imposed fines ranging from RMB 200K (~US\$28,000) to RMB 6M (~US\$850,000), forfeiting illegal gains of RMB 3.04M (~US\$430,000). In the 2022 Guangzhou Model Cases of Combating Infringement and Piracy (released in May 2023), the Guangzhou PSB cracked a major criminal gang of infringement of game copyrights. Without the copyright holders' consent, the criminal gang copied a variety of software in the main board of the infringing game consoles and established a company to engage in the production, warehousing, and sales of the game consoles, sold throughout the country through e-commerce platforms. The case is still pending.

The Xuzhou police and 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. As a result of these actions, one hacker programmer, two manufacturers, and seven distributors and retailers were raided.

A positive criminal action against digital music piracy involved *Hires.cn*, a UUC platform that offered, in exchange for payment of credits, unlicensed music downloads to users. The infringing downloads were primarily shared by a small group of users controlled by the website operator. The Chongqing PSB seized 25 TB of infringing music content. This included 1,500 verified infringing sound recordings. In April 2023, the defendant was found guilty of copyright infringement and was sentenced to three years' imprisonment, suspended for four years. A fine of RMB550,000 (~US\$78,000) was imposed and the illegal proceeds of over RMB 500K (~US\$70,500) were confiscated in accordance with the law. In the area of physical piracy, in April 2022 the Anhi Chuzhou PSB, in cooperation with Guangzhou PSB, raided five factories that produced 1.2 million infringing vinyl products (as well as other physical formats). Although a positive development, this highlights the scale of China as the source of infringing physical products.

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 and ensure timely enforcement of monetary damages. Also, the same companies that operate services like *RenRen*, against which rights holders have sought relief in China, also 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 PDs, 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 IPTV piracy landscape. (Indeed, enforcement actions taken against distributors in Singapore and Malaysia, after new laws were enacted and went into force in both countries, as well as in Taiwan in Q3 2023, indicate the need for China, as the source of the problem, to take action to fix it.)

Civil and criminal enforcement against copyright infringement involves challenges for IP rights holders, including, among other things, costly and burdensome civil litigation requirements contrasted with low damages

awards. The combined result of such “high costs and low benefits” of bringing civil cases is to force rights holders to rely on administrative and criminal enforcement rather than civil litigation. While the situation might improve with the recent introduction of “Internet Courts” in several cities, for the time being, the effectiveness of copyright enforcement in China remains dependent on the action of the State in taking up rights holders’ administrative and criminal complaints. In some industries, notice-and-takedown procedures on major platforms have proven ineffective at addressing large-scale piracy abuses on their services. Platforms are frequently reluctant to take action against infringing activity occurring on the platform and some have onerous requirements to file takedown notices (including requirements to register IP or entities before being able to file takedown notices); opaque or inconsistent approaches to taking action on takedown notices, and/or extended delays in processing takedown notices. 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.

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.

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 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.

Despite some of the mentioned shortcomings of the civil enforcement system, Chinese courts have also issued judgments with some notable improvements in damages awards and recognition of copyright. 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 that recognized that the map of a multiplayer online battle arena (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. China’s recent accession to the 1961 Hague Convention Abolishing the Requirement of Legalization for Foreign Public Documents, which entered into force on November 7, 2023, may hopefully address one of the largest remaining hurdles.

LEGAL REFORMS

- **Swiftly and effectively implement amendments to the Copyright Law, including by accelerating the formulation and promulgation of the new Regulations on Implementation of the Copyright Law (expected in late 2024), to ensure effective implementation relating to: protection of TPMs; narrowly interpreted exceptions to prohibition on circumvention; and the new public performance rights in China and the effective exercise and management of these rights in accordance with international best practices.**

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.⁶ 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. 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 but have not yet been implemented. IIPA encourages China to expedite the process to revise the Regulations 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 ensure effective implementation and application of these new performance rights, including the protection of foreign sound recordings, ensuring the effective exercise and management of these rights in accordance with international best practices, and providing an adequate framework for tariffs that reflect the economic value of the use of the rights in trade.

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 TRIPS Agreement into the law to appropriately confine exceptions and limitations. China should ensure all exceptions to and limitations on copyright protection in the Copyright Law 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 that 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

⁶ See, -, IIPA 2022.

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, perform 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, rights holders still suffer from a lack of a mechanism that ensures ISPs can impose effective relief to remove infringement, including, where applicable, to disrupt or disable access to structurally infringing websites on a no-fault basis, upon rights holders’ applications to appropriate authorities.

- **Address shortcomings in China’s Copyright Law relating to safe harbors from monetary liability for intermediaries and in its Criminal Law to ensure that criminal penalties are available for all online piracy on a “commercial scale.”**

Despite these improvements, the Copyright Law as amended did not address several deficiencies in China’s legal framework, including matching the international standard of at least 70 years of protection for sound recordings and works, including audiovisual; introducing mechanisms that ensure ISPs can impose effective relief to remove infringement, including, where applicable, to disrupt or disable access to structurally infringing websites on a no-fault basis, upon rights holders’ applications to appropriate authorities; improving available online liability rules and notice and action provisions, and aligning the scope of the making available to the public right with international standards by removing the “server test,” which requires that the act of making available occurs via copies stored in China.

First, 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 piracy services may be held liable for IP infringements carried out by third parties using their services or networks. Furthermore, the “server principle” that has been adopted is causing enforcement problems. While Chinese enforcement authorities (including courts) have taken action against infringing websites that are hosted outside China, they have done so only limited to instances in which the act of making available occurs via copies stored in China, thus limiting rights holders’ abilities to enforce against sites with copies stored outside of China.

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 legal basis for mechanisms that ensure ISPs can impose effective relief to address infringement, including, where applicable, to disrupt or disable access to structurally infringing websites on a no-fault basis, upon rights holders’ applications to appropriate authorities, especially in cases where the sites are operated outside of China or where the identities or locations of the website owners are unknown.

Previously, a provision to provide mechanisms that ensure ISPs can impose effective relief to remove infringement, including, where applicable, to disrupt or disable access to structurally infringing websites on a no-fault basis, upon rights holders’ applications to appropriate authorities, had been removed from an earlier version of the Copyright Law Amendment (in 2012). The recorded music industry continues to lobby the government to provide such mechanisms through separate regulations. In January 2021, the Cyberspace Administration of China (CAC) released the draft Measures on Administration of Internet Information Services (revised draft for public consultation) that appeared to stipulate a similar mechanism, although further clarifications were required to ensure that rights holders could request the relevant governmental agencies to require Internet access providers to prevent access to infringing websites (and other online services). However, there has been no further movement on the draft by the CAC.

The Copyright Law should also 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, which would build upon the Provisions by the Supreme People's Court on Several Issues Concerning the Application of Law in Hearing Civil Dispute Cases Involving Infringement of the Right of Communication through Information Network. Further, it should be clarified that, upon obtaining knowledge of infringement (including through a notice) or otherwise becoming aware of circumstances from which infringement is apparent, intermediaries should 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. Marketplaces should be required and all relevant intermediaries encouraged to institute a "know your business customer" (KYBC) policy to ensure they keep up to date and accurate information about their customers and to allow rights holders to obtain accurate information to protect their rights against direct infringers.

Finally, Chinese law still falls short of international norms and standards regarding the term of protection for sound recordings and other works, including audiovisual. A minimum term of at least 70 years from publication for the protection of sound recordings and works, including audiovisual, has become the international standard, yet China's Copyright Act still provides for only 50 years of protection.

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.⁷ 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 WTO TRIPS Agreement by revising the criminal threshold (which can now more flexibly be met through a combination of numerical and monetary thresholds) 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);⁸ 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 the intellectual property rights (IPR) enforcement commitments in the U.S.-China 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 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,

⁷ 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 ten years imprisonment for the crime of copyright infringement and from three years to five years imprisonment for the crime of selling infringing copies.

⁸ China should clarify that a single episode of a television program counts as one copy toward the threshold.

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 hopefully 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.

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. 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. 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.

- **Fully implement the Judicial Proposals on Enhancing IP Protection and Serving Promotion of High-Quality Development of Film Industry.**

Most recently, in November 2023, the SPC released new Judicial Proposals on Enhancing IP Protection and Serving Promotion of High-Quality Development of Film Industry. The Proposals, supported by multiple associations of the local film industry, call for the enhancement of IP protection for a specific industry (film). They include four key objectives for the film industry: (i) accelerate accomplishment of high-quality development of film industry under the rule of law, and advocate and execute industry practices that encourage innovation and creation; (ii) intensify copyright awareness, strictly implement the Copyright Law, improve protection of film copyright and copyright-related rights, including respecting the rights of screen writers, directors, cinematographers, lyricist, composers, and performers; (iii) utilize technical measures of content protection (for example, block chain and digital water marking) and innovate the license system to reduce infringement from the source; and (iv) actively and widely publicize IP protection during the process of disseminating films, for example, through industry forums and public service advertisements with the theme of anti-piracy and anti-camcording.

MARKET ACCESS

- **Abandon the slew of proposals that discriminate against U.S. producers and distributors of creative content.**

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, and publications.⁹ After the case concluded in 2009, China eased several market access restrictions,¹⁰ but many core

⁹ 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/FE_Search/FE_S_S006.aspx?Query=\(@Symbol=%20wt/ds363/ab/r/*%20not%20rw*\)&Language=ENGLISH&Context=FomerScriptedSearch&languageUIChanged=true#](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Query=(@Symbol=%20wt/ds363/ab/r/*%20not%20rw*)&Language=ENGLISH&Context=FomerScriptedSearch&languageUIChanged=true#).

¹⁰ 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

activities of copyright industries remain restricted or prohibited. For example, 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 17 of the 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.

- **Immediately and fully implement all the terms of the 2012 U.S.-China Film Agreement and fulfill its Phase One services purchasing obligations.**

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 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. IIPA urges China to meet its trade commitments and open its marketplace to U.S. producers instead of continuing down its current protectionist path, which may have resulted in a contracting box office.¹¹ 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.

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.¹² Unfortunately, more than eleven 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 China’s 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 comparable markets and the international norm. 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 a large number of domestic productions (which was 531 in 2022),¹³ as well as around 75,000 theatrical screens in 2021.¹⁴ In the case of “flat fee films,” which are imported by private distributors outside of the box

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.

¹¹ Nancy Tartaglione, China Box Office Drops To \$4.4B In 2022 Amid Covid Swings, Lack Of Product, January 2, 2023, available at <https://deadline.com/2023/01/china-box-office-2022-covid-avatar-hollywood-1235209768/>.

¹² 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>.

¹³ 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/>.

¹⁴ Id.

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 films theatrically released in the country in 2021 bringing in revenue of US\$10.68 million, which is 0.15% of the year's total share of the theatrical box office revenue. Just nine independent theatrical releases in China represents the lowest percentage of slots ever allocated for independent films recorded by the Independent Film and 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 CFA, which replaced State Administration of Press, Publication, Radio, Film and TV (SAPPRFT) in 2018, still permits only one film importer, the China Film Group (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 determines the release dates and length of theatrical runs of foreign films, often restricting the ability of U.S. producers to obtain full commercial value of films.

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 for almost seven 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.

- **Reconsider measures prohibiting foreign involvement in online publishing activities, allow distribution of audiovisual content on online video platforms, and increase the number of approvals for foreign video games to match the number of domestic approved video games.**

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.¹⁵ Furthermore, when China revised the Foreign Investment Catalogue in June 2019, the country lifted certain

¹⁵ 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).

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.

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 the 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 SAPPRFT proposed policies that, if implemented, would provide state-owned media companies with voting control over leading online platforms for films and TV content. 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 approved fewer than ten video games from American publishers since June 2021. China should increase the number of approvals for foreign video games to match the number of domestic approved video games.

- **Refrain from extending China’s burdensome content review regime to books intended for other markets and lift content review procedures for imported physical sound recordings**

China appears to now be applying its content review regime to books intended for other markets. Books merely being printed in China but otherwise intended for distribution in other markets now also appear subject to China’s burdensome content review regime. Books that were previously being printed in and exported from China without issue appear to be subject to the more stringent application of the regime. Extending the reach of its burdensome content review regime to books merely being printed in the country but otherwise intended for distribution in other markets places an arbitrary and unjustified discriminatory burden on foreign publishers, who, for decades, have used printing partners in China, and is arguably a disguised restriction on international trade.

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.

- **Repeal additional impediments to China’s market for U.S. audiovisual content, including higher censorship standards, caps on online distribution of foreign films and TV dramas, burdensome documentation requirements, and investment restrictions.**

China continues to introduce additional impediments to its market for U.S. audiovisual content, limiting the U.S. industry’s ability to compete fairly and inhibiting its potential growth in this massive and fast-growing market. In June 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 formalizes 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. 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.

In July 2023, the revised Anti-Espionage Law, first introduced in November 2014, came into effect. 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 Anti-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.

- **Adopt a voluntary, age-based classification system to help eliminate disparate treatment of U.S. content and ensure that China’s content review process is transparent, predictable, and expeditious.**

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. Such a system will attract investment and boost China’s potential as a regional film and television production hub.

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. 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. Another obstacle for U.S. producers in China is that private Chinese distributors, including VOD platforms, arbitrarily, without clear explanation, request from U.S. producers an excessive and particularly burdensome amount of legalized documentation regarding production and distribution to complete a license agreement or obtain government approvals that permit access to China’s online marketplace. These types of documentation requests (unique to China’s marketplace) cause uncertainty and additional expense that slow or kill negotiations for licensing films to China.

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 General Agreement on Trade in Services (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).¹⁶ 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.

¹⁶ For example, in the 2022 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 55, Report available at <https://ustr.gov/sites/default/files/2023-02/2022%20USTR%20Report%20to%20Congress%20on%20China's%20WTO%20Compliance%20-%20Final.pdf>.