

# CHINA (PRC)

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2018 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that USTR maintain China on the Priority Watch List in 2018 and that China be monitored under Section 306 of the Trade Act.<sup>1</sup>

**Executive Summary:** The commercial potential of China's ascendant marketplace for creative works has yet to be fully realized. As part of the largest Internet user base in the world, Chinese consumers have access to a vast array of legitimate music, movies, TV programming, and other works through an increasing number of licensed digital services. In addition, having recently exceeded the United States, China now leads the world with over 50,776 movie screens, many of which offer enhanced formats such as IMAX and 3D. While improved enforcement efforts, particularly against unlicensed music services, have contributed to accelerated gains for certain sectors, copyright piracy remains a critical issue in China, continuing to hamper the market for legitimate content and severely depress licensing revenues. At the same time, China's third comprehensive Copyright Law amendment process has entered a critical stage, and the future development of the creative industries and China's market for creative content hangs in the balance. Moreover, China's policies that deny fair and equitable market access to U.S. content producers and distributors threaten to undermine the hard fought progress that has been achieved.

IIPA is encouraged by certain actions China has taken to combat piracy, particularly the continued crackdown by the National Copyright Administration of China (NCAC) on unlicensed content platforms. In 2018, NCAC should step up efforts to address the piracy "app" ecosystem, which enables both mobile and Illicit Streaming Device (ISD) piracy and has emerged as the most damaging method of accessing pirated audiovisual materials in China. Disrupting the piracy app ecosystem requires a targeted and sustained response. China's ongoing failure to adequately address blatant online piracy of scientific, technical, and medical (STM) journal articles and academic texts has led to more sophisticated copycat services that pollute the scholarly and professional publishing market.

The Copyright Law amendment process is vital because its outcome could lay the foundation for a successful future for the creative industries in China. To achieve that goal, China must not weaken the protections outlined in the most recent public draft, particularly regarding rights for broadcast and public performance. Instead, China should strengthen those protections, including by providing a term of protection in line with international trends; effectively address its evolving piracy challenges, including the problem of apps that facilitate piracy; and bring its standard of protection and enforcement into compliance with international norms and best practices.

China should abandon recent proposals that would erect additional barriers to its online marketplace, and should eliminate current impediments to its market, which exacerbate its piracy problem by impeding access to sought-after U.S. creative content. For example, China should reconsider the revised Online Publishing Rules prohibiting foreign involvement in online publishing activities, and revoke several recent measures that discriminate against foreign film and television content.

IIPA seeks further reforms to improve access for U.S. film producers to China's growing theatrical film market. China must fully implement the 2012 U.S.-China Film Agreement. Incomplete implementation thus far, combined with new barriers to authorized online distribution of imported films and TV programming, create a fertile environment for widespread piracy of films sought by Chinese viewers. In addition to immediate fulfillment of its commitments under the Agreement, improvements to the pact are needed as part of ongoing consultations on the Agreement, commensurate with commitments made by China in bilateral engagements.

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<sup>1</sup>For more details on China's Special 301 and Section 306 monitoring history, see previous years' reports at <https://iipa.org/reports/reports-by-country/>. For the history of China's Special 301 placement, see <https://iipa.org/files/uploads/2018/02/2018SPEC301HISTORICALCHART.pdf>.



## PRIORITY ACTIONS REQUESTED IN 2018

### Enforcement:

- Take further effective action, with increased transparency, against the online piracy ecosystem, including against: piracy websites, such as *zimuzu.tv*, *dytt8.net*, *ttmeiju.com*, *meijutt.com*, *dy2018.com*, *28mtv.com*, *hdmv.cc*, *truemv.com*, *m3bst.com*; plugin player *xigua* and its related piracy ecosystem; and apps such as *KVOD*, *TVFan*, *3DBoBoVR*, *TVPlus*, *TVBrowser*, *KuaiKan*, *mmbox* and *Haiyao Music*.
- Bring more targeted and deterrent actions, with transparency, against ISD piracy (including against dedicated piracy apps), unauthorized camcording, unauthorized broadcasting of movies, unauthorized movie broadcasts in Video on Demand (VOD) mini theaters, and hard goods piracy (including against production and supply of high quality counterfeit optical disks).
- Improve effectiveness of administrative enforcement, including by imposing enhanced penalties against repeat infringers and infringers that make available massive amounts of infringing content; increasing transparency (e.g. notifying rights holders of the results of administrative actions); facilitating more efficient transfer of copyright cases between administrative and criminal authorities, making clear that such transfers are required upon “reasonable suspicion” that the criminal thresholds are met; expanding resources and capability at NCAC, local Copyright Administrations (CAs), and Law and Cultural Enforcement Administrations (LCEAs), commensurate with the scale and complexity of the piracy problem; and improving the performance of local cultural enforcement departments, particularly the Beijing Cultural Enforcement Department, to ensure effective action is taken against infringement reported by rights holders.

### Legislation:

- Enact comprehensive copyright law reform to enhance the development of the creative industries in China, incorporating changes recommended by IIPA and member associations in various past filings including, in particular, ensuring a remedy against apps facilitating infringement; adopting clear rights of public performance and broadcast for sound recordings; clarifying safe harbor requirements; providing a term of protection in line with the international trend; and ensuring that exceptions to and limitations on copyright are adequately defined and appropriately narrow in scope.
- Issue a judicial interpretation or amend the law appropriately to reject the “server principle” in cases involving aggregation apps, which provide unauthorized access to copyrighted contents hosted remotely.

### Market Access:

- Reconsider the Online Publishing Rules prohibiting foreign involvement in online publishing activities and revoke all other measures—including the Notice and Measures on Administration of Online Foreign Films; the Statement and Rules on Importing TV Formats; and content approval regulations for mobile games—that discriminate against foreign content by imposing requirements such as registration, onerous and opaque censorship procedures, restrictions on broadcast and pay TV, and strict quotas on foreign films and television programming.
- Abandon proposals that discriminate against U.S. producers and distributors of creative content, including the March 2016 Ministry of Industry and Information Technology (MIIT) proposal on Internet domain names; the May 2016 State Administration of Press, Publication, Radio, Film and Television (SAPPRFT) proposal directing that state-owned media companies have a stake in online platforms for films and TV content; and the April 2016 proposed administrative measures on e-commerce that discriminate against foreign suppliers.
- Ensure full implementation of all commitments contained in the U.S.-China Film Agreement, including China's commitment in the Agreement and at the June 2015 Strategic and Economic Dialogue (S&ED) to promote licensing of independent (private) national distributors in competition with, and without intervention by, state-owned China Film Group (CFG) and Huaxia. The U.S. Government should engage the Chinese to press for full

compliance and transparent implementation that ensure China fulfills its promise to provide meaningful access for all U.S. film producers to China's growing film market.

## **COPYRIGHT PIRACY UPDATES IN CHINA**

Prior IIPA submissions in the Special 301 docket, as well as IIPA filings in WTO compliance reviews and other fora, have provided detailed accounts of the many piracy and enforcement challenges and issues in China. This year's Special 301 filing serves as a supplement to those, and is not meant as an exhaustive review of all issues.<sup>2</sup>

**Online Piracy Takes a Variety of Forms:** China's online piracy problem persists, and continues to evolve. Piracy websites include illegal download sites, peer-to-peer (P2P) piracy sites, deep linking sites, cyberlockers, BitTorrent indexes or trackers, forums, streaming sites, social media websites, and online marketplace/auction sites selling pirated goods and high quality counterfeits. In addition, large quantities of infringing content are stored in cloud storage services in China, to which links are disseminated through social media platforms. Applications (apps) facilitating piracy are available on a myriad of devices. And ISDs (e.g. media boxes or set-top boxes) allow users to access infringing content, usually through a television.

The piracy app ecosystem, which facilitates piracy on a range of devices (including mobile and handheld devices and televisions) has been expanding at an alarming rate. Apps that aggregate infringing content hosted on remote servers are proliferating. Examples of such apps include *TVPlus*, *TVBrowser*, and *KuaiKan*, listed by the U.S. Trade Representative (USTR) in its 2017 Out-of-Cycle Review (OCR) of Notorious Markets.<sup>3</sup> Other piracy apps include *KVOD* and *TVFan*, which facilitate infringement of audiovisual content, and *mmbox* and *Haiyao Music*, which facilitate infringement of music. App websites provide a portal allowing users to download an app to their device, giving them access to pirated content, including motion pictures and television programming. An example of such a site is *3DBoBoVR*, which was cited by IIPA members in their Notorious Markets OCR filings to USTR in the fall of 2017. In 2017, the music industry reported 243 infringing apps to mobile app marketplaces in China. China must do more to combat the growing threat of the app piracy ecosystem.

Traditional website piracy remains a major issue in China, causing significant damage to rights holders. Notorious piracy sites that disrupt the audiovisual marketplace include *zimuzu.tv*,<sup>4</sup> *dytt8.net*, *ttmeiju.com*, *28mtv.com*, *hdmv.cc*, *truemv.com*, *m3bst.com*, *dy2018.com*, *dYGang.com*, *loldytt.com*, *piaohua.com*, *bttt99.com*, *80s.tw*, *meijutt.com*, *ygdy8.net*, *dysfz.net*, and *lbldy.com*. Streaming sites continue to increase. 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, such as *Kinghou.com*, *cdbau.net*, *88liu.com*, and *mu6.me*, have begun to adopt the same strategy. Infringement of audiovisual materials (i.e., music videos) is also a problem. The music industry reports that based on their monitoring, 77% of the 518,813 infringing links they discovered in 2017 were to infringing audiovisual content. For the music industry, licensed streaming and digital piracy compete side by side, with 9 in 10 Internet users consuming licensed audio streaming and 9 in 10 users engaging in piracy. Music piracy consists mainly of illegal downloads through cyberlockers, international P2P sites, and streaming of pirated content from user-uploaded content (UUC) sites. As discussed below, the misapplication of safe harbors to UUC sites that are not neutral or passive intermediaries has contributed to the proliferation of unlicensed music content available for streaming on these sites.

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<sup>2</sup>See, e.g., IIPA's 2017 Special 301 submission on China ("IIPA 2017"), available at <https://iipa.org/files/uploads/2017/12/2017SPEC301CHINA.pdf>; IIPA, *China's WTO Compliance – Notice of Intent to Testify, Summary of Testimony, and Testimony regarding: "Request for Comments and Notice of Public Hearing concerning China's Compliance with its WTO Commitments (82 Fed. Reg. 36071, August 2, 2017)*, September 20, 2017, available at [https://iipa.org/files/uploads/2018/01/2017\\_Sep20\\_ChinaWTO.pdf](https://iipa.org/files/uploads/2018/01/2017_Sep20_ChinaWTO.pdf).

<sup>3</sup>For the most recent report, see USTR, 2017 Out-of-Cycle Review of Notorious Markets (January 2018), available at <https://ustr.gov/sites/default/files/files/Press/Reports/2017%20Notorious%20Markets%20List%201.11.18.pdf>.

<sup>4</sup>According to Alexa, *zimuzu.tv*, a linking site, is one of the 250 most popular websites in China, and Similarweb recorded 24 million visits to the site in December 2016.

In a more recent and virulent form of piracy, those who visit piracy websites are enticed to create their own derivative sites to generate revenue for themselves and for the mother site. The network of such sites currently numbers in the thousands. The users download a proprietary video player (often malware, which links the user's computer to the website), which provides applications allowing users to access infringing content over a proprietary P2P network or a content delivery network (CDN). An example is the *xigua* plugin player.<sup>5</sup> A Content Management System (CMS) website helps users to easily create their own derivative websites embedded with the proprietary video player, and a Video Collection Resource (VCR) website provides these derivative sites with access to the infringing content. These user-created piracy websites generate traffic (and income) for their owners, and the proprietary video player embedded into these websites links back to the original website, generating traffic (and income) for its owners. Chinese enforcement authorities must investigate and take action against these so-called "clone pyramid" piracy websites, with a particular focus on the producers of the proprietary video players and the CMS and VCR websites that are facilitating the expansion of this network.

**Illicit Streaming Device (ISD) Piracy:** ISDs are media boxes, set-top boxes, or other devices that allow users, through the use of piracy apps (as discussed above), to stream, download, or otherwise access unauthorized content from the Internet. These devices have emerged as a significant means through which pirated motion picture and television content is accessed on televisions in homes in China, as well as elsewhere in Asia and increasingly around the world. China is a hub for the manufacture of these devices. The devices may be promoted and/or advertised to enable infringement of copyright or other illegal activities. These activities include facilitating easy access, through apps, to remote online sources of unauthorized entertainment content including music, music videos, karaoke, motion pictures and television programming (including encrypted content), video games, published materials, and TV content. The devices may be pre-installed with apps that facilitate infringement, either prior to shipment, prior to sale by the vendor, or as an after sale service. Alternatively, users themselves can obtain instructions on where and how to access and install the apps required to access the infringing content.

ISDs are part of a sophisticated and integrated online ecosystem facilitating access to pirated audiovisual materials, and enforcement against them presents complex challenges. If the retailer/distributor takes steps to facilitate infringement, including by pre-loading apps or offering the apps as an after-service, or otherwise breaks the law (e.g., through the circumvention of technological protection measures (TPMs) protecting the content), this may provide a legal basis to hold the retailer/distributor liable. Furthermore, an additional avenue for copyright liability would be against the app developer. As noted above, the apps allow users to connect to a supporting over-the-top (OTT) online infrastructure that provides users with instant access to infringing audiovisual content. However it is done, the Chinese Government must increase enforcement efforts, including cracking down on piracy apps and on device retailers and/or distributors who preload the devices with apps that facilitate infringement. Moreover, because China is the main originating source of this problem spreading around the world, the Chinese Government should take immediate actions against key distribution points for devices whose primary purpose and function is to facilitate copyright piracy.

**Worsening Online Journal Piracy:** The problem of online journal piracy remains a significant challenge. China's failure to take effective action against KJ Med, including the Beijing Municipal Procuratorate's failure to prosecute, underscores the lack of effective criminal remedies against even the most egregious infringers in China.<sup>6</sup> It also highlights both significant limitations in evidence gathering by criminal law enforcement authorities and their unreasonably narrow interpretation and application of the law. The unfortunate lack of deterrence in the marketplace thus continues to encourage copycat services to operate. In July 2015, the publishing industry filed an administrative complaint with NCAC, which was subsequently delegated to the Guangdong Provincial Copyright Bureau, against a

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<sup>5</sup>comScore recorded more than three million page views to *Xigua.com* in December 2016.

<sup>6</sup>The KJ Med entity, which offered scientific, technical and medical (STM) journal articles for purchase and delivery by e-mail without authorization from nor compensation paid to journal publishers, was first brought to the attention of Chinese enforcement authorities in 2006. After the original investigation languished, the current investigation began in 2011, but was not referred to criminal enforcement authorities until 2014. Despite the scope, scale, and clear criminal intention of KJ Med's infringing activities, in December 2015, the Haidan Procuratorate declined to pursue a criminal case against its operators. In December 2016, the Beijing Municipal Procuratorate denied an appeal of the Haidan Procuratorate's decision not to criminally prosecute the KJ Med operators.

new entity, Metstr, which appears to have ties to the operators of the now defunct KJ Med.<sup>7</sup> Although the case remains under investigation by Chinese enforcement authorities, there has been no progress. Operating undeterred, these infringing services generate increasing revenues, and their operators profit from their illegal activity, thus encouraging these entities to provide more sophisticated, user-friendly forms of their services, such as through mobile apps. In addition, a growing number of online platforms have emerged that facilitate access to unauthorized copies of journal articles, including *syyyj.com* and Baidu Paperhelp. These platforms host unauthorized pdf copies of academic monographs, edited collections, and textbooks. For example, Baidu Paperhelp appears to facilitate the exchange of copyright protected academic papers among its users, and awards credits for providing unauthorized copies of the copyrighted works. China must do more to combat this unlawful activity. In a positive development, in June 2017, following a referral by the publishing industry, the Beijing Copyright Enforcement Department took down the UReader platform, finding it was infringing, and imposing a fine of RMB 400,000 (\$58,000).<sup>8</sup> This case is a good example of the importance of enforcement officials engaging with rights holders, and illustrates how such cooperation can lead to success.

Pirated print publications and compromised log-in credentials unfortunately continue to be widely available on e-commerce sites, which also serve as platforms through which producers of pirated and counterfeit textbooks market and sell their illegal products to overseas buyers. Furthermore, in part due to China's inadequate online enforcement framework, sending notifications of infringement remains unduly complicated. E-commerce sites rarely act upon notifications from rights holders, unless they are a "trusted party." Becoming a "trusted party" is extremely burdensome, requiring a rights holder to submit business registration licenses and copyright registration documents.

**Circumvention Devices:** As the world's leading manufacturer, producer, supplier, and exporter of video game circumvention devices, China drives significant amounts of online video game piracy around the world. Game copiers or modification chips are devices commonly used to bypass technological protection measures (TPMs) in a video game console in order to download and play infringing video games on "modded" consoles. These devices allow infringing games distributed over the Internet to be played on handhelds or consoles, and the harm they cause is not limited to console makers because almost all games developed for play on consoles can be illegally downloaded from the Internet. These devices are sold by thousands of vendors in online marketplaces, and constant monitoring and scrutiny is required to achieve a modicum of enforcement. Providing deterrent-level criminal sanctions and penalties for the manufacturers and suppliers of circumvention devices is necessary to have a meaningful impact in stemming the trade in infringing games.

**Unauthorized Camcording Remains a Concern:** Unauthorized camcording of movies in theaters—a key source for online audiovisual infringements—is one of the most damaging problems in China for the film industry, and high quality camcords are increasingly sourced to China.<sup>9</sup> Also fueling the growing camcording problem is the increasing problem of people in Chinese movie theaters using cameras, including those on handheld mobile devices, to live-stream theatrical broadcasts of films online. The motion picture industry has raised the camcording issue with relevant Chinese Government agencies, e.g., SAPPRFT, NCAC, and with the China Film Distribution and Exhibition Association (CFDEA). The criminal convictions for camcord piracy in Hefei in November 2014 and in Hubei in September 2016 are positive signs. Moreover, in 2015, SAPPRFT issued notices that recognized the threat camcording poses to the film industry, calling for Chinese cinema owners to more effectively address camcording incidents, and requiring all film post-production units to enable digital watermarking to aid enforcement efforts. The new Film Industry Promotion Law, which took effect on March 1, 2017, allows cinema personnel to take action against camcording. Unfortunately, the law fails to provide for any sanctions, thus limiting its effectiveness. IIPA is encouraged by these developments, but 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

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<sup>7</sup>The publishing industry recently discovered corporate filings that show a former KJ Med officer listed as a shareholder in Metstr.

<sup>8</sup>In May 2017, following a referral by the Association of American Publishers (AAP), the Beijing Copyright Enforcement Department (CED) raided the offices of UReader, an online platform that was making available for viewing unauthorized copies of ebooks and journal articles. UReader was marketing itself to universities, undermining the legitimate subscription services provided by AAP member publishers. Following the CED's analysis of the entity's servers and their contents, CED determined that UReader was infringing the complaining publishers' copyrights.

<sup>9</sup>In 2017, a total of 36 audio and video camcords were forensically matched to cinemas in China, a significant increase from 2016.

a cinematographic/audiovisual work, from a performance in an exhibition facility. In addition, the Chinese Government, theater owners, and others associated with the chain of theatrical distribution of films must make still stronger efforts to deter unauthorized camcording under current law.

**Pirate/Counterfeit Books and Hard Goods, Including for Export, Remain Problematic:** The copyright industries continue to report piracy of hard goods, which harm both the domestic Chinese market and markets outside of China. Pirate/counterfeit production of textbooks, consumer books, and trade books is a substantial problem. Reports indicate that pirated (largely consumer and religious) books printed in and exported from China are showing up in parts of Africa. China needs to follow through on commitments made in the Joint Commission on Commerce and Trade (JCCT) for transparent, comprehensive, and verifiable progress for strengthening IP protection for published materials and other copyrights in university (including library) settings. Although physical piracy at universities is no longer a significant problem, the use of unauthorized services to access text books and journal articles has unfortunately grown. The Ministry of Education should do more to inform and educate university personnel, librarians and students regarding appropriate use of and legitimate sources of copyrighted content. Similarly, the Ministry of Science & Technology should also become more proactive in addressing pirate document delivery services. Production of pirated and counterfeit copies of academic textbooks has increased in recent years, with these illicit goods marketed and sold through e-commerce sites, and exported to several markets, including the U.S. China remains an export center for pirate DVDs of movies and music CDs as well, feeding the global market with an onslaught of illegal copies of foreign and Chinese movies and music products, including High Quality Counterfeit (HQC) box sets of motion picture and television content and music content, often through e-commerce platforms. China must implement an effective, non-burdensome program to stop and prevent future production and supply of HQC optical disks, sold through popular Chinese and international online marketplaces.<sup>10</sup>

**Unauthorized Movie Broadcasts:** Some Chinese pay-TV operators or licensees of digital content distribute U.S. content to hotels or to increasingly popular VOD mini-cinemas and cinema chains for unauthorized public viewing. In April 2017, the government issued regulations on the business operations, licensing, and management of these mini-cinemas and chains, and released a draft of a second set of such regulations in June 2017. Rather than legitimizing the operations of these businesses that are violating the copyright law, China should severely penalize them or shut them down.

## **ENFORCEMENT UPDATES IN CHINA**

IIPA remains encouraged by China's recent actions to combat piracy and an overall improvement in the climate for enforcement since 2015, which have contributed to commercial gains in some creative sectors; but more must be done. As of June 2017, China had the largest Internet user base in the world, estimated at 751 million users, including 724 million mobile Internet users. This creates the potential for enormous market opportunities for rights holders; but a historic toleration for piracy, and resulting overlapping consumption of legal and illegal content, have kept revenues from creative content far below their commercial potential, and hampered the monetization of legitimate services.<sup>11</sup>

**Notable Progress, But Challenges Remain:** As we have highlighted in recent submissions, since 2015 there have been some notable improvements in enforcement against online piracy in China, particularly regarding efforts to combat unlicensed music. NCAC's 2015 Notice required online storage service providers to take proactive measures to prevent users from uploading copyright infringing content, including works that have been previously

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<sup>10</sup>Shenzhen Optical Media Lab has previously worked with right holders to help identify the source of seized products, but on-going changes in management structure has made communication difficult so it is presently not clear what its operational and enforcement capabilities are.

<sup>11</sup>It is important to understand the broader context in which U.S. creative industries operate in China. In addition to causing exceedingly low licensing revenues, this market failure compounds current enforcement challenges in China because, for example, compensatory damages are calculated at inordinately low levels, and numerical and monetary thresholds triggering criminal liability remain difficult to reach.

removed, works that are the subject of a notice and takedown, and works specifically listed by NCAC.<sup>12</sup> The 2015 version of China's "Sword Net" anti-piracy campaign resulted in the take down of significant amounts of unlicensed work from music platforms and spurred an encouraging wave of licensing activity.<sup>13</sup> In July 2016, the music industry monitored 16 major cyberlockers (i.e., online storage providers) and, of the 16, 9 had been closed and 4 had shut down their file sharing functionality.<sup>14</sup> The three remaining cyberlockers that still provide for file sharing are *pan.baidu.com*, *ctdisk.com*, and *vdisk.weibo.com*. The music industry reports that the takedown rate of infringing links is high; however, infringing content reappears quickly as there is no requirement for ISPs to ensure this content stays down permanently. The video game industry reports that three popular Chinese websites largely ignore takedown requests: *ali213.net*, *yxdown.com*, *gamersky.com*.<sup>15</sup> Also, unfortunately, it is often difficult for rights holders to identify infringers and their locations because ISPs only provide this information in response to government requests. Additional cooperation is needed.

The following are key enforcement actions taken in late 2016 and in 2017 against online piracy services that were causing substantial harm to the audiovisual industry in China:

- In November 2016, pursuant to a case jointly referred by the motion picture industry and Tencent, the Zhenjiang police in Jiangsu province arrested three suspects based across three separate provinces in the cities of Changsha, Xiamen, and Guangzhou, who were responsible for the operation, technical support, and supply of content for four piracy websites.<sup>16</sup> The police seized 18 servers and blocked three bank accounts. NCAC recognized the case as one of its 2016 Top 10 cases, and the Ministry of Public Security is supervising the criminal investigation. In August 2017, local police held a press conference in Zhenjiang City, Jiangsu Province to publicize the successful crackdown. CCTV and other Chinese media reported on this case.
- In August 2017, in decisions stemming from civil actions launched in January 2015 by the motion picture studios against Shenzhen Xunlei Networking Technologies Co. (Xunlei) for infringement of 28 studio titles, the Shenzhen Nanshan District People's Court found Xunlei, a large online content and service provider in China, liable for copyright infringement. The court found Xunlei infringed by providing the studios' titles to the public without authorization on its websites *f.xunlei.com* and *kuai.xunlei.com*; enjoined Xunlei from further infringing activity; and awarded damages totaling RMB1.4 million (US\$209,860) and litigation costs of RMB162,400 (US\$24,340) to the studios. Xunlei has appealed the verdict, which is pending, and the motion picture studios have cross appealed.

Recent innovative industry approaches to the problem have included China's Capital Copyright Industry Alliance (CCIA), which now includes more than 400 organizations and individuals who have joined together to strengthen copyright protection. Under its auspices, the recording and motion picture industry associations began operating the "Qingyuan Action" in 2014, working with Baidu, the number one advertiser in China, to stop advertising support of infringing websites. The local recording industry association also signed a Memorandum of Understanding (MOU) with CCIA for an expedited method ("green channel") to mark websites with infringing music, and for Baidu to halt advertisements on such marked websites. Hundreds of links have been reported since the action began in 2014. According to the music industry, 6636 links have been reported to Baidu from the launch of Qingyuan Action through

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<sup>12</sup>The Notice also requires service providers not to provide any support for users to illegally share copyrighted works, and to require users whose accounts have abnormal activity associated with copyright infringement to provide reasonable explanations. In December 2017, NCAC began requiring service providers to report licensed content on their services and the details and nature of the licenses to improve monitoring.

<sup>13</sup>See IIPA 2017 at 6. Sixteen Chinese online music platforms including Baidu, Alimusic, Kuwo, Kugou, QQ Music, Xiami, TTPod and NetEase released statements claiming that they had taken down all unlicensed material from their sites, while Kugou and QQ Music stated that they had obtained licenses from various record labels for approximately 20 million and 15 million licensed tracks in their music libraries respectively. Tencent has also sublicensed several platforms including NetEase and was reported to be negotiating other sublicensing deals.

<sup>14</sup>In 2016, 59,056 links were sent to Baidu, and all were removed. Sina Disk (a cyberlocker service provided by Sina) has shut down its sharing and uploading functions. In 2016, NCAC also released a list of 284 movies and TV episodes that needed to be specifically monitored.

<sup>15</sup> These sites are all registered business entities in China, and host content and link to other sites with infringing video game content. Over 90% of the traffic to the sites originate in China. In response to takedown notices from the video game industry *ali213.net* takes down only 3% of infringing of content, *yxdown.com* takes down 27% of infringing content, and *gamersky.com* takes down 25% of infringing content.

<sup>16</sup>The motion picture industry has verified 1793 member titles infringed by the four websites. Since January 2014, the three suspects had gained illegal income of RMB8 million (US\$1.26 million) from ad revenue.

December 2017, and Baidu has taken down its advertisements on the reported infringing websites.<sup>17</sup> In addition, pursuant to the 2016 Sword Net campaign, NCAC began monitoring the top three advertising networks in China—Baidu, Alimama (of Alibaba Group), and 360—to help eliminate illegal advertising revenue to rogue sites. In November 2016, these three and a fourth top advertising network, Tencent, jointly called for industry self-enforcement against piracy sites. Among other things, the advertisers committed to terminate advertisements on websites identified by the NCAC and the State Administration for Industry and Commerce (SAIC) on a “blacklist” of piracy sites, or that have been subject to repeated complaints from copyright holders. Baidu has also provided a simplified and expeditious takedown tool for motion picture and television content, and pledged to demote infringing video listings of new release titles on the top ten pages of Baidu search results. The motion picture industry is working with Baidu on reducing infringing content on the cloud storage service Baidu Pan. The takedown rate is satisfactory, and Baidu has indicated it will do more, including full implementation of the 2015 NCAC Notice, to prevent uploading and sharing of infringing content on Baidu Pan.

Notwithstanding these actions, as noted above, dozens of notorious piracy websites remain, disrupting the legitimate market for creative content. Furthermore, while China’s progress in cracking down on unlicensed music services has helped contribute to substantially increased revenues for the music industry, the legitimate music market in China is still nowhere near its potential. Unlicensed music is still available on a large number of sites, services, and mobile apps. Despite boasting the largest number of Internet users in the world, China’s music market is ranked just 12th globally, behind much smaller markets such as South Korea and the Netherlands. Revenues remain a small fraction of what they should be, even when compared to revenues seen in comparably developed markets. Furthermore, online music piracy sites and hard goods shipments from China continue to negatively affect other marketplaces, e.g., in Hong Kong, Taiwan, Japan, Singapore, and Malaysia, among others.

**More Progress Needed, Especially to Disrupt Piracy App Ecosystem:** Since the 2015 Sword Net campaign targeting unlicensed music, subsequent Sword Net actions have been run on a case by case basis, with enforcement considered only for services that rights holders have specifically notified to NCAC. While these actions are often effective, the process lacks transparency. Rights holders submit evidence of infringing websites, but do not receive feedback regarding the progress of the procedures; and more information is needed on the impact of the action to determine whether infringing content has reappeared. In 2017, the music industry filed 264 administrative cases with NCAC which, as of January 2018, have resulted in: closure of 14 infringing websites; punishment against 9 music websites; 17 websites changing to non-music content; and deletion of infringing tracks with warnings issued by local law enforcement for 73 websites.<sup>18</sup>

While the actions of NCAC and other enforcement authorities have made some progress against infringing websites, the Chinese Government needs to increase efforts to combat the growing problem of infringing apps. The Cyberspace Administration of China (CAC) has launched a program to register Internet app marketplaces, and these marketplaces are required to ensure that their apps are legal. In 2016, the CAC took down around 5,500 illegal apps, but there is a lack of transparency regarding these actions and it does not appear that any of these actions were directed towards copyright infringing apps. The motion picture industry notifies app marketplaces of infringing apps, but the marketplaces simply forward takedown notices to the app operators. In 2017, the music industry reported 243 infringing mobile apps to mobile app marketplaces, mostly Android Markets.<sup>19</sup> The operators of app marketplaces need to be more proactive, and implement rules and procedures to ensure piracy apps are not trafficked on their marketplaces. In a positive development, the Shenzhen Nanshan District Court found the operator of the app *MoreTV*, Shanghai Qianshan Network Technology Development Co., Ltd., liable for circumventing TPMs to aggregate unauthorized content, and ordered it to pay RMB100,000 (US\$15,781) to the plaintiff, Tencent Video. Importantly, the court declined to apply the “server principle” in this case, raising hopes that this case will set a

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<sup>17</sup>Unfortunately, infringement on most of these websites still remains.

<sup>18</sup>Difficulties in Internet enforcement in China include evasive techniques of the proprietors of the infringing sites. While all Chinese websites have to register with *miibeian.gov.cn*, and while one can search the proprietors (people or companies) by using their registration number, domain name, IP address, or “Whois” data, many infringers use fake registration information, making it much more difficult to locate the actual person or company.

<sup>19</sup>The music industry reported 45 infringing Apple apps, and 198 infringing Android apps.

precedent for similar actions against operators of infringing apps. Certain Chinese IP judges have embraced the “server principle,” interpreting current law to require that infringement only occurs when the infringing content resides on the server or device of the operator of the app. More needs to be done, including an effective, sustained enforcement campaign against “rogue” app developers found to facilitate copyright infringement. China should also issue a judicial interpretation rejecting the server principle in cases involving aggregation apps, which provide unauthorized access to copyrighted contents hosted remotely.

**Continued Need for Enhanced Chinese Government Resources to Tackle Piracy:** The disproportionately small amount of resources devoted to fighting piracy in China, when compared with those deployed to stop other criminal activities, creates a recipe for failure and fertile ground for piracy. Many of the most serious copyright infringing activities also occur online, and the lack of capability amongst administrative enforcement officers—in their knowledge of both the technical details of the law and the technological complexities of the online environment—further limit the efficacy of the administrative system. In addition, China’s criminal, administrative, and civil enforcement systems do not reliably nor in a timely manner impose deterrent level penalties on infringers. Accordingly, IIPA urges the Chinese Government to undertake the following measures:

- Ensure deterrent-level penalties against operators of piracy websites, especially those that repeatedly infringe or make available a massive amount of infringing content.
- Enhance transparency of administrative enforcement, including by providing rights holders with information regarding the process and the results of administrative actions.
- Provide a full range of injunctive relief for civil enforcement, including injunctions against intermediaries, and ensure courts enforce injunctions in a timely manner, including simple and expeditious orders of contempt for failure to comply.
- Streamline procedures for civil and criminal enforcement, including by reducing documentation requirements to establish copyright ownership and infringement, and ensuring timely enforcement of money damages.
- Enhance expertise among police throughout the country to effectively bring criminal piracy investigations. There is an urgent need in China for police investigators who have the technical understanding and expertise necessary to investigate online piracy cases.

In addition, the music industry reports that certain local cultural enforcement departments, particularly the Beijing Culture Enforcement Department, have not been taking actions against infringement.<sup>20</sup> This raises the prospect that infringing services will make use of these weak links and, for example, move their activities to Beijing to evade enforcement. NCAC should investigate this issue to improve the performance of the local enforcement teams, particularly the team in Beijing.

As noted above regarding the growing problems of ISD piracy and clone pyramid piracy websites, the piracy challenges in China are constantly evolving and increasing in complexity. Chinese enforcement capabilities are lagging behind; authorities must adapt to keep pace with illegal piracy activity. Accordingly, the Chinese Government should be encouraged to expand resources and capability at NCAC, local Copyright Administrations (CAs), and Law and Cultural Enforcement Administrations (LCEAs), commensurate with the scale and complexity of the piracy problem.<sup>21</sup> Given the ongoing prohibition on foreign right holder investigations into piracy, it becomes even more incumbent upon the Chinese Government to enhance its own resources.

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<sup>20</sup>The music industry has filed a total of 135 cases with the Beijing Culture Enforcement Team from 2015 to 2017 regarding infringing activities in or related to Beijing, but the team has taken no action on any of these cases.

<sup>21</sup>IIPA notes that NCAC has organized several training events on copyright enforcement in 2017 in which the creative industries have participated, but more is needed.

## COPYRIGHT AND RELATED LAWS AND REGULATIONS UPDATE

Prior IIPA filings have documented in detail developments in the Chinese legal system for the protection of copyright, including copyright and criminal law reform efforts.<sup>22</sup> These reform processes provide important opportunities to update the legal regime in China for more effective copyright protection and enforcement.

**Copyright Law Amendments Should Be Strengthened, Not Watered Down:** After years of IIPA and other stakeholders pressing for progress on amendments to the copyright law, the process appears to have entered a critical stage. The State Counsel Legislative Affairs Office (SCLAO) is expected to publish a revised draft of the bill, followed by a short public consultation. The bill can then be entered on the legislative agenda for the National People's Congress (NPC). IIPA understands that the NCAC has been instructed to assist the SCLAO with shortening the current draft purportedly "to remove the most controversial elements."

There are a number of significant provisions in the last publicly available draft that we hope will remain in any draft released by the SCLAO. These include provisions that would establish a framework for cooperation to remove online infringements, specifically, by adopting principles of potential joint liability of service providers that knowingly and actively encourage infringement, including the creation of aiding and abetting-type liability for services that abet or instigate infringements (presumably including non-hosted infringements) of third parties. Such provisions would make it possible to efficiently remove infringing materials from the Internet as well as to halt people from engaging in massive infringements, although much would depend on implementation.<sup>23</sup> Many other important topics are taken up in the draft. In particular, the NCAC has proposed introduction of the rights of producers of sound recordings for public performance and broadcasting, a much needed reform 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 critical for the future of the music industry in China, including both foreign and domestic rights holders, that these important provisions remain in the bill.

Furthermore, we hope that any alteration of the draft addresses certain deficiencies. First, it is critical that the legislation clarify China's Copyright Law to ensure adequate and effective enforcement against apps that facilitate unauthorized access to copyrighted works. The Copyright Law amendment should clarify that the right of "communication over information networks" clearly permits action against an app that makes available content to users without authorization, regardless of where the content is stored. Clarifying the law to reject the "server principle" is necessary because these illicit apps typically facilitate unauthorized access to content stored on remote servers. Furthermore, liability should attach when an app circumvents TPMs used by legitimate rights holders to prevent unauthorized access to their content (again, regardless of where that content is stored). Article 48(6) of China's Copyright Law should be clarified to ensure liability for app developers who circumvent TPMs that control access to content (i.e., access controls), without the need to prove a copyright infringement occurred, and to ensure that copyright owners have standing to bring suit in cases in which the TPM was employed by a licensee platform. Apps that allow a user to access unauthorized content undermine business models that are essential to a healthy online ecosystem. We are hopeful that the *MoreTV* decision noted above, in which the court declined to apply the server principle, will set a precedent for similar actions against operators of infringing apps. Therefore, to the extent current law on the right of "communication over information networks" and access controls does not clearly permit

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<sup>22</sup>See, e.g., IIPA 2017 at <https://iipa.org/files/uploads/2017/12/2017SPEC301CHINA.pdf>. Previous developments included the National People's Congress passing legislation to establish IP Courts in Beijing, Shanghai and Guangzhou. The IP court in Beijing opened on November 6, 2014, has four hearing rooms, and as of December 2014 had selected 22 of its 30 judges. These IP courts handle civil and administrative cases related to patents, computer software, technology secrets, trademarks and some copyrights (when cases meet certain thresholds), according to the Supreme People's Court (SPC). The IP courts in Shanghai and Guangdong opened in December 2014. According to the SPC, from their opening day until June 2017, these three IP courts accepted 46,071 cases, of which 33,135 have been closed. A new IP court opened in Shenzhen in December 2017. China launched its first cyber court in Hangzhou in August 2017, which accepts all Internet-related civil and/or administrative cases (including online copyright infringement disputes) within the jurisdiction of Hangzhou City, as well as those assigned to it by higher people's courts.

<sup>23</sup>The draft had deleted the reference to "blocking" which was in previous drafts, but retained the request that Internet Service Providers (ISPs) "delete, disconnect the links, etc." to infringing content. It is believed the concept may still be included, both in the terminology that remains, and the fact that the list of measures is non-exhaustive (with reference to the word "etc.").

action against apps that facilitate unauthorized access to copyrighted works, the amendment should address these deficiencies, and judicial interpretations should be issued to provide clear guidance to the judiciary.

In addition, some of the proposals in the last publicly released draft may require revisions before enactment to avoid conflicts with China's WTO obligations, or inconsistencies with current international or best commercial practices.<sup>24</sup> For example, the ISP liability provisions should be revised to ensure that only neutral intermediaries that do not contribute to infringing activities are eligible for the limitations on damages for infringements (i.e., safe harbor), and that the draft clearly state the safe harbor requirements, including the following: 1) ISPs cannot receive direct financial benefit attributable to the infringement; 2) ISPs must either have no knowledge of the infringement or, upon notice or otherwise obtaining knowledge, promptly take reasonable steps to limit, stop, and prevent the infringement, including expeditious takedown of infringing content and other measures demonstrated effective in preventing or restraining infringement; 3) ISPs cannot modify the content or interfere with the TPMs used by copyright owners to protect their works; and 4) ISPs must have policies to take effective action against repeat infringements. As previously reported, the 2012 Judicial Rules on Several Issues Concerning the Application of Law in Hearing Civil Dispute Cases Involving Infringement of the Right to Network Dissemination of Information (Network Rules) established the current ISP liability framework in China,<sup>25</sup> and IIPA hopes that much of this framework will be reflected in the amended Copyright Law. Unfortunately, UUC sites that are not neutral or passive intermediaries have been able to avail themselves of the Network Rules' safe harbors, which has negatively impacted the music market and contributed to the proliferation of pirated content, such as music videos, available for streaming on these services. The Network Rules should be clarified to ensure that the safe harbors are only available for online services that function as passive intermediaries, and, as noted above, this requirement should similarly be reflected in the Copyright Law amendment.

Other changes that should be made to the draft include updating China's outdated term of copyright protection to bring it in line with evolving global norms.<sup>26</sup> It is also crucial to ensure that proposed exceptions to and limitations on copyright are adequately defined and appropriately narrow in scope, and are otherwise consistent with the WTO TRIPS three-step test. The Copyright Law should also include a legal basis for injunctions against ISPs in copyright cases, including against access providers, requiring them to stop providing access to unlicensed copyrighted content in cases where the content is hosted outside of China or where the identities or locations of the website owners are unknown. Once enacted, the government should monitor test cases brought to ensure the law operates effectively and fairly to all parties.

**Criminal Code Reform:** China's recently adopted Ninth Amendment to its Criminal Law ("Ninth Amendment"), added a potentially helpful secondary liability provision: the offense of "assisting criminal activities over information networks." According to this new law, "knowing others are using information networks to perpetrate crimes, providing technical support such as Internet access, server hosting, web storage, or communication transmission services, or providing assistance in advertising or processing payments, where circumstances are serious," is subject to criminal liability. This is an important development in Chinese criminal jurisprudence. This provision's implementation should be monitored closely to ensure it provides effective secondary liability for criminal copyright infringement. Unfortunately, the intellectual property provisions of the Criminal Law (e.g., Articles 217 and 218 and accompanying Judicial Interpretations) and other related provisions were not included in China's Criminal

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<sup>24</sup>The 2015 IIPA submission identified a more comprehensive list of concerns and suggestions regarding the draft legislation including, notably, regarding the collective management provisions, which includes the fraught concept of "extended collective management" and improper limitations on right holder remuneration and compensation. See IIPA 2015 at 21-22 available at <https://iipa.org/files/uploads/2017/12/2015SPEC301CHINA.pdf>. Also, as noted in the 2015 submission, copyright law revisions provide an opportunity to improve China's civil compensation rules, which are riddled with uncertainties and often result in inadequate compensation to rights holders.

<sup>25</sup>See IIPA 2013 at 42 available at <https://iipa.org/files/uploads/2017/12/2013SPEC301CHINA.pdf>.

<sup>26</sup>China should bring its term of protection in line with the majority of the Organization for Economic Cooperation and Development (OECD) countries and the international trend (to 70 years after the death of the author, or in cases in which term is calculated based on publication, to the U.S. term of 95 years, but in any case, no less than 70 years). Not only would this ensure Chinese creators receive the full global benefits from their creations, it would provide greater incentives for the production and dissemination of creative works, and provide all producers with a stronger incentive to invest in local industry. This in turn would spur economic growth and tax revenues and enable producers to continue offering content to local consumers in the latest formats. More than 80 countries protect some or all creative materials per the terms stated, including 30 out of the 32 member countries of the OECD, and 9 out of the top 10 music markets.

Law reform process. This was a major missed opportunity, and we urge the Chinese Government to adopt further reforms that address shortcomings in China's criminal enforcement framework that IIPA has identified in previous reports.<sup>27</sup>

**Draft E-Commerce Law:** In 2017, the NPC released a second draft E-Commerce law for public comment. The draft law is wide in scope, intending to broadly regulate e-commerce activities, although it does not cover the online dissemination of digital creative content. The draft includes provisions on the protection of intellectual property rights (IPR) that outline procedures permitting right holders to take action against sellers for IPR violations occurring on e-commerce platforms. The draft requires platform operators to take "necessary measures" against infringing goods or services based on preliminary evidence of infringement. Importantly, the draft indicates that the required standard of knowledge for a platform operator to take action is that the platform "knows or should know" that the content is infringing. Because ISDs are sold online, it is critical that rights holders are able to take action to prevent the illegal trafficking on e-commerce platforms of these devices, which are primarily used to access unlawful pirated content. To the extent this draft law does not allow such action, it should be amended. Furthermore, platforms should be obligated to cooperate with rights holders and take reasonable measures to prevent infringement. Finally, the provision that rights holders are liable for losses suffered by platforms as a result of erroneous notices should be amended to ensure that rights holders are only liable for losses caused by notices in which a rights holder knowingly and materially misrepresented that the content is infringing. Some rights holders already experience good cooperation with some e-commerce platforms through voluntary arrangements by which infringing content is expeditiously removed from the platforms. Thus, any implementation of this e-commerce bill should not upset those existing arrangements.

**Property Rights Protection Guidelines:** In November 2016, the Central Committee of the Communist Party of China and the State Council jointly released "opinions" on "improving the property rights protection system and lawfully protecting property rights," which includes a number of guidelines regarding IPR. These include the following: (1) raise penalties for IPR infringement, and explore establishing a system for punitive damages; (2) mark the credit record of entities found to infringe IPR, and improve the transparency of administrative sanctions in IPR infringement cases; (3) combine judicial procedures (civil, criminal and administrative) regarding IPR infringement into one tribunal to improve coordination and cooperation between enforcement authorities, and improve procedures for transferring cases from administrative enforcement agencies to criminal enforcement authorities; and (4) enhance international cooperation in criminal enforcement and intensify criminal investigations of foreign-related IPR infringement. IIPA views these guidelines as an extremely positive step, and we are hopeful that China will implement them swiftly.

**Administrative Criminal Transfer Regulations Need Significant Improvements:** The amended Criminal Transfer Regulations are well intentioned, but do not adequately address existing challenges to the effective transfer of administrative cases to criminal investigation and prosecution. The regulations leave unclear whether transfers are required upon "reasonable suspicion" that the criminal thresholds have been met, and thus, some enforcement authorities believe "reasonable suspicion" is insufficient, requiring proof of illegal proceeds before transferring. However, administrative authorities do not employ investigative powers to ascertain such proof. The amended

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<sup>27</sup>See, e.g., IIPA 2017 at 15. Shortcomings include: (1) Thresholds are too high (in the case of illegal income) or unclear (e.g., in the case of the copy threshold); (2) Some critical commercial scale infringements are without a criminal remedy because of the requirement to show that the infringement is carried out "for the purpose of making profits," an undefined phrase, and, thus, it is often difficult for law enforcement authorities or rights holders to prove that the infringer is operating for the purpose of making profits in cases of Internet piracy; (3) Criminal violations related to the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) are not separately defined, for example, regarding circumvention of TPMs, or trafficking in circumvention technologies, software, devices, components, and services; (4) Presumption of copyright ownership is inadequate and creates unnecessary substantial burdens on rights holders, impeding effective enforcement; (5) Criminal accomplice liability with respect to imports and exports is limited (with lower penalties available); (6) There are uncertainties regarding increased penalties against repeat offenders; and (7) There is a jurisdictional bar limiting foreign rights holders from commencing a private "civil claim" against those being prosecuted for copyright crimes in local district courts.

transfer regulations should expressly include the “reasonable suspicion” rule, and they should ensure this rule is consistently applied by both transferring administrative authorities and receiving criminal authorities.<sup>28</sup>

**Enhanced Administrative Copyright Enforcement:** The amended draft Detailed Measures on Implementation of Administrative Penalties for Copyright Infringement (Detailed Measures) could be a positive step forward for copyright administrative enforcement in China if brought into force. Although it remains to be seen how the Detailed Measures will be interpreted in practice, the amended draft, among other things, provides for punishment of ISPs for acts of infringement they know or should know about, and harmonizes administrative enforcement thresholds for “serious circumstances” with judicial opinions on thresholds for criminal liability to ease the evidentiary burden of proof. IIPA hopes the Detailed Measures are brought into force and implemented.

## **MARKET ACCESS UPDATES AND RELATED ISSUES**

The positive enforcement actions China has recently taken may well be for naught due to the Government of China’s continued pursuit of policies that impede the U.S. creative industries’ access to the Chinese marketplace. This direct relationship between the fight against piracy in China and the need for liberalized market access to supply legitimate product, both foreign and domestic, to Chinese consumers was a motivating factor when several IIPA members, believing that China was not living up to its WTO obligations, urged the United States to bring a case against China regarding many market access barriers in music, audiovisual products, and publications. The United States prevailed in that case, and, after the case concluded in 2009, China eased several market access restrictions.<sup>29</sup> Yet many core activities of copyright industries remain restricted or prohibited.<sup>30</sup> While IIPA has been hopeful China would address longstanding market access barriers, the Government of China has recently been moving in the opposite direction.

**Increasing Online Market Access Barriers:** As we noted last year, SAPPRFT’s Online Publishing Rules, which took effect in March 2016, appear to expand the scope of longstanding restrictions on the involvement of foreign entities from online publishing activities.<sup>31</sup> The full impact of these measures on activities newly covered under the revised regulations are not yet clear; unfortunately, these measures are likely to have a chilling effect on foreign investment in online publishing services where, prior to the rules, some latitude appeared to have been granted.<sup>32</sup> Furthermore, in July 2017, China revised the Foreign Investment Catalogue, lifting certain restrictions, but production of audio-visual products and “network publication services” remained on the “Prohibited” list.

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<sup>28</sup>Presently, even when administrative authorities do seek to transfer a case, the local Public Security Bureau (PSB) does not necessarily accept it. Practices vary among different PSB offices, but too often the PSB adopts strict acceptance criteria, effectively requiring complete or nearly complete evidence that a crime has been committed, rather than using a reasonable suspicion standard.

<sup>29</sup>China eased investment restrictions for some sectors in amendments to the Catalogue of Industries for Guiding Foreign Investment. In late 2013, the Shanghai Free Trade Zone (FTZ) was opened to foreign investment, allowing the introduction of game consoles into China for the first time, and easing restrictions on foreign audio and audiovisual product distribution (although confirmation that distribution of “music videos” is permissible, and that a foreign-invested entity established in the Shanghai FTZ may distribute music throughout China, would be helpful, as it remains unclear whether these activities are permitted). In 2015, China eliminated most restrictions on gaming consoles, paving the way for video game companies to manufacture consoles in all of China, although manufacturers and publishers must still comply with strict regulations including those for pre-sale content review. China also agreed to allow foreign entities to choose their licensees for online music distribution, and to engage in content self-review of music for the first time. New incentives were also introduced for more film co-productions in China.

<sup>30</sup>For example, the Negative Investment List in the Shanghai FTZ expressly prohibits investment in “online audio and video programs,” as well as so-called “Internet cultural business,” while the rules also indicate, “Foreign investors are forbidden to be engaged or involved in operation of online video games directly or indirectly.” Publishing likewise remains a prohibited investment category, with publishers prohibited from undertaking core publishing activities such as editorial and production work, and unable to determine which works, and how many, to bring to market. Other rules of the Ministry of Culture (MOC) also appear to create conflict with respect to foreign-invested entity involvement in Internet distribution of music. For example, where music files are stored on the servers of the Operating Entity for the purpose of being downloaded or streamed by consumers, such services will be considered as “dissemination of audio-video over Internet” services (IP-TV Service) and an IP-TV Permit must be issued by State Administration of Press, Publication, Radio, Film and Television (SAPPRFT). According to Article 7 of the Management Rules for the Dissemination of Audiovisual Programmes through the Internet (2004), an IP-TV Permit is not available to any Operating Entity that is a foreign-invested enterprise. For imported music files, the relevant license holder also needs to obtain an import-related approval from MOC.

<sup>31</sup>The rules appear to expand the definition of “online publishing” to include maps, games and online databases, and a “catch-all” provision to cover new types of digital works to be determined by SAPPRFT.

<sup>32</sup>For example, media reports around the time of the measures entering into force noted that the Online Publishing Rules were used to shut down Apple’s online book and movie services. See, e.g., <https://www.nytimes.com/2016/04/22/technology/apple-no-longer-immune-to-chinas-scrutiny-of-us-tech-firms.html>.

China has also introduced a raft of alarming draft measures that, if implemented, would clearly discriminate against U.S. producers and distributors of creative content. For example, in March 2016, MIIT issued draft regulations that, among other things, would require all Internet domain names available in China to be registered through a licensed, domestic service provider. In May 2016, SAPPFRFT proposed policies that, if implemented, would provide state-owned media companies with voting control over leading online platforms for films and TV content.<sup>33</sup> While this proposal was temporarily suspended due to significant opposition from online platforms, there is concern that it may reemerge. In April 2016, China published a set of administrative measures on e-commerce that discriminate against foreign suppliers; and in June 2016, China published new content approval regulations for mobile games that make it extremely difficult for foreign publishers of mobile games to access the Chinese market.

This flurry of discriminatory measures follows other measures China has introduced in the last couple of years to restrict the online distribution of foreign audiovisual content. The September 2014 SAPPFRFT Notice on Further Implementation of Provisions Concerning the Administration of Online Foreign Films and TV Dramas caps the online distribution of foreign films and TV dramas at 30%, and requires online distributors to register content, obtain permits, and submit content for censorship review. The accompanying regulations allow only one opportunity to submit content for registration and censorship per year, which, because of the nature of television production, does not allow for submission of a full season of a television series. Consequently, the rules significantly delay and curtail the legitimate access of Chinese consumers to U.S. television content. The Notice also has had a damaging effect on Chinese websites and the licensing of audiovisual content, and has made “day-and-date” releases<sup>34</sup> impossible. Chinese distributors are delaying or decreasing licensing activity, pointing to the uncertainty of the Notice, and have cited conflicting reports on the corresponding requirements. There is serious concern that these systemic delays and limitations on Chinese consumers’ ability to access legitimate content will lead to increased piracy.

**Additional Audiovisual Market Access Concerns:** China maintains a number of longstanding discriminatory restrictions on audiovisual content that harm the U.S. industry, limiting its ability to compete fairly and inhibiting its potential growth.<sup>35</sup> Moreover, China continues to introduce additional impediments to its market for U.S. film and television content. In June 2016, SAPPFRFT issued a Statement and Rules on Importing TV Formats that is clearly intended to promote indigenous Chinese radio and television programs at the expense of foreign content. Among other things, the rules establish 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. This distortion of China’s market for television and radio content will negatively impact U.S. producers and appears to contravene China’s WTO obligations.

China needs to change course from its current protectionist path. It is critical to send a strong message that these policies are unacceptable, particularly at a time when China’s creative marketplace holds the potential for explosive growth, and should be reversed. China should instead focus its attention on complete implementation of the 2012 U.S.-China Film Agreement, and other market opening steps for the music, publishing, video game, and motion picture and television industries.

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<sup>33</sup>The proposal was for leading online video platforms to sell up to a 10% “special management stake” and cede at least one board seat to selected state-owned media companies.

<sup>34</sup>“Day and date” release refers to releasing a film in theaters and making it available on a Video on Demand service the same day.

<sup>35</sup>For example, China limits foreign investment in cinemas and in-home video distribution companies to 49% and prohibits all foreign investment in television. Local cable networks cannot carry foreign satellite channels without government approval or landing permits, which are limited to Guangdong and a handful of foreign channels. Foreign satellite channels beaming into China are required to downlink from a government owned encrypted satellite platform, may only be shown in three-star hotels and above and in foreign institutions, and the annual fee for each channel remains excessively high (\$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.

**U.S.-China Film Agreement Implementation:** China still has not implemented certain key provisions of the 2012 US-China Film Agreement that would bring broad reforms and introduce competition, for example, to the distribution marketplace, which would benefit producers of both revenue-sharing films and flat-fee films imported into China. Furthermore, China is obligated to provide further meaningful compensation to U.S. industry. Despite the rapid growth in the number of screens in China and the strengthening of domestic productions, the market is still distorted to limit the access for imported films. In the case of “flat fee films,” which are imported outside of the box office revenue sharing quota system, China has enforced restrictions, including an informal cap on the amount of these films that can be imported, that limit the ability of private Chinese distributors to import and distribute them. China committed in the Agreement (and reconfirmed part of that commitment at the June 2015 S&ED) to promote and license privately-owned Chinese distributors to engage in national theatrical distribution of imported films without the involvement of any State Owned Enterprise, including China Film Group (CFG) and Huaxia. Although CFG’s distribution arm, China Film Company Ltd. (CFC), held an initial public offering in 2016, the majority of shares are still owned by the Chinese Government. Inadequate implementation of this commitment has resulted in many U.S. producers (principally independents) having very limited export opportunities to China, and imported releases have seen a decline in market share.

IIPA recommends that the PRC take action on the following issues: 1) immediately and fully implement all the terms of the 2012 US-China Film Agreement and liberalize the distribution market for private third party Chinese distributors; 2) substantially increase U.S. producers’ share of revenues for the box office revenue share films from the current 25%; 3) further relax the quota for revenue sharing films so filmmakers and audiovisual companies may have substantially better access to the rapidly growing marketplace for films in China; 4) eliminate informal restrictions on the number of imported “flat fee” films so that more independent producers have unimpeded access to the Chinese market; 5) allow U.S. producers more control over release dates to address the problem of the Chinese locking out U.S. films from the prime release dates and to end the practice of “double booking” theatrical releases; and 6) ensure U.S. producers receive timely responses to quota allocations and censorship determination, and effective access to ticketing system information to ensure proper reporting of revenues.

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

As noted above, China is still not in full compliance with the WTO’s ruling in the landmark market access case (DS 363) brought by the U.S. in 2007 and concluded in 2009.<sup>36</sup> In particular, China must do more to open its market to U.S. films, and take further steps to liberalize its online music market. Moreover, the new online publishing rules are also inconsistent with the WTO’s ruling, and raise concerns regarding China’s obligations under the General Agreement on Trade in Services (GATS), particularly Article XVI on market access and Article XVII on national treatment.<sup>37</sup> Similarly, the Statement and Rules on Importing TV Formats, the Notice and Measures on Administration of Online Foreign Films and TV Dramas, and the other longstanding discriminatory restrictions on audiovisual content may also be inconsistent with China’s GATS commitments. The Statement and Rules on Importing TV Formats also raises questions regarding TRIPS Article 3 on national treatment, as it appears to favor Chinese rights holders over foreign rights holders.

Regarding copyright protection and enforcement, the deficiencies outlined above regarding criminal enforcement procedures (e.g. failure to use a “reasonable suspicion” standard for criminal transfers, thresholds that are too high or unclear, inadequate presumption of ownership, limited criminal accomplice liability, uncertainties regarding increased penalties against repeat offenders) are inconsistent with enforcement obligations under TRIPS, including Articles 41, 42, and 61. Furthermore, the jurisdictional bar against foreign rights holders bringing a claim against those prosecuted for copyright crimes implicates TRIPS Article 3 on national treatment. Also, the fact that

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<sup>36</sup>China – Measures Affecting Trading Rights And Distribution Services For Certain Publications And Audiovisual Entertainment Products, WT/DS363/AB/R, December 21, 2009, at <http://www.wto.int>.

<sup>37</sup>In the recently published 2016 Report to Congress on China’s WTO Compliance, USTR acknowledges that the draft *Network Publishing Service Management Regulations*, the predecessor to the new rules, raise concern “relative to China’s GATS commitment.” See p. 157, report available at <https://ustr.gov/sites/default/files/2016-China-Report-to-Congress.pdf>.

commercial scale infringements are without a criminal remedy because of the requirement to show that the infringement is carried out “for the purpose of making profits” is inconsistent with the requirements of both TRIPS Article 41 and Article 61 on criminal procedures. And China’s civil compensation rules, which result in inadequate compensation for rights holders, run afoul of TRIPS Article 45 on civil damages.

Finally, China must follow through on commitments it has made in bilateral engagements, including the Comprehensive Economic Dialogue (CED), JCCT, and S&ED, addressing a number of the issues discussed above, including full implementation of the U.S.-China Film Agreement, enhanced enforcement against ISDs, improved enforcement against online piracy, and enhanced protection of academic journals, including strengthening library copyright protection.