

# CHINA (PRC)

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2019 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that USTR maintain China on the Priority Watch List in 2019 and that China be monitored under Section 306 of the Trade Act.<sup>1</sup>

**Executive Summary:** China's ascendant marketplace for creative works has yet to reach its commercial potential. Supported by the largest Internet user base in the world, China's online marketplace continues to expand, providing consumers with access to a vast array of legitimate music, movies, TV programming, and other works available through an increasing number of licensed digital services. In addition, China now leads the world with over 60,079 movie screens, most of which support 3D, and many of which offer enhanced formats such as IMAX and China Giant Screen. While past improved enforcement efforts, particularly against unlicensed music services, have contributed to accelerated gains for certain sectors, China's market for legitimate content continues to be hampered by a combination of rampant piracy, discriminatory market access policies, and long-standing unfulfilled international obligations.

Problems abound, including piracy apps and devices, illegal camcording, dissemination of pirated content through cloud storage services (such as Baidu Pan) and social media platforms (such as baidu tieba, wechat and weibo). New emerging problems include the growing number of online platforms that facilitate piracy of scientific, technical, and medical (STM) journal articles and academic texts, and the proliferation of thousands of "mini Video On Demand (VOD)" locations that show unauthorized audiovisual content. Criminal enforcement efforts remain stunted by thresholds that are too high and do not cover all "commercial scale" piracy as required by the WTO TRIPS Agreement, and civil litigation, even when successfully brought against blatant piracy services such as Xunlei, is generally ineffective due to a lack of meaningful injunctive relief and low damage awards. The National Copyright Administration of China (NCAC), in cooperation with rights holders, has taken action against significant online services that facilitate audiovisual piracy, but has reduced enforcement in other sectors, including against pirated music. In 2019, NCAC should enhance its enforcement efforts regarding all copyright sectors. Overall, much more is needed to tackle China's growing piracy problems identified above and described in this report.

The Copyright Law amendment process, which is at a critical stage, is vital because a positive outcome would 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 for sound recordings. 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 by ensuring that services that facilitate piracy are held liable (regardless of whether the content is stored on their servers) and prohibiting unauthorized Internet retransmission of live broadcasts; 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 2016 Online Publishing Rules prohibiting foreign involvement in online publishing activities, and revoke recent measures that discriminate against the production, distribution, and broadcast of foreign film and television content.

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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/2019/02/2019SPEC301HISTORICALCHART.pdf>.



IIPA seeks further reforms and enforcement of China's existing obligations to improve access for U.S. film producers to China's well-established theatrical film market, which leads the world in the number of screens and will soon surpass the U.S. in total box office. Pursuant to the nearly decade old WTO settlement, China must fully implement the 2012 U.S.-China Film Agreement, including, among other key issues, permitting private Chinese distribution companies to engage in theatrical releases of imported films without the interference of State-Owned Enterprises (SOEs), increasing the revenue share for producers of imported theatrical films, eliminating written and unwritten quotas on imported films, and ensuring the timeliness and transparency of the censorship process. In addition to committing to provide additional meaningful compensation in 2017, China also committed in the Agreement to consult on other key issues. China has not met these requirements, nor fully implemented its other obligations under the Agreement. Instead, China has created new barriers to authorized online distribution of imported films and TV programming, and imposed significant restrictions on foreign investment in online platforms, production and distribution companies. Lack of access to the Chinese market by U.S. producers has created a fertile environment for widespread piracy of films sought by Chinese viewers. It is urgent that China immediately fulfill its commitments under the Agreement (including, e.g., cracking down on the under-reporting of box office revenues), and participate in ongoing consultations on the Agreement in order to meet international standards for a market of its size and sophistication.

## **PRIORITY ACTIONS REQUESTED IN 2019**

### **Enforcement:**

- Take further effective action, with increased transparency, against the online piracy ecosystem, including against: piracy websites, such as *zimuzu.tv*, *dytt8.net*, *666c.com*, *sacdr.net*, *yyp3.com*, *musicool.cn*, *dy2018.com*, *xh127.com*, *b9good.com*, *dygang.com*, *loldytt.com*, *piaohua.com*, *bttt99.com*, *80s.tw*, *meijutt.com*, *ygdy8.com*, *dysfz.vip*, *panduoduo.net*, *bttdy.net*, and *lbldy.com*; piracy facilitated through the cloud storage service Baidu Pan, through the Xunlei thunder service, and on *miaopai*, and other similar user-uploaded content (UUC) video services; plugin player *xigua* and its related piracy ecosystem; and apps such as *Renren Shipin*, *KuaiKan*, *Today Vido*, *XF Play*, *Haiyao Music*, and *Tian Lai K Ge*.
- Bring more targeted and deterrent enforcement actions, with transparency, against Piracy Devices (including against dedicated piracy apps), unauthorized movie broadcasts in mini VOD locations, unauthorized camcording, unauthorized broadcasting of movies and music, and hard goods piracy (including against production and supply of high quality counterfeit optical discs and USB flash drives containing high volume of infringing sound recordings).
- 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 Cultural Law Enforcement Agencies (CLEAs), especially after the government restructuring across the country, commensurate with the scale and complexity of the piracy problem; and improving the performance of local cultural enforcement departments 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 (especially where infringing content is hosted remotely); adopting clear rights of public performance and broadcast for works and sound recordings; prohibiting unauthorized Internet retransmission of live broadcasts; clarifying ISP safe harbor requirements to ensure that safe harbors only apply to passive and neutral intermediaries that do not contribute to infringing activities;

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.

- Improve enforcement framework by, *inter alia*, revising the criminal threshold to ensure criminal penalties are available against all instances of commercial scale piracy, separately defining criminal violations regarding circumvention of technological protection measures (TPMs) or trafficking in circumvention technologies, and rejecting the “server principle” in cases involving apps and indexing/linking sites that provide unauthorized access to copyrighted contents hosted remotely.
- Ensure proper implementation of the e-commerce law, including ensuring that implementation of Article 43 does not result in sellers of infringing products avoiding responsibility by merely objecting to rights holders’ notice of infringement.

#### Market Access:

- Open key elements of the audiovisual market to foreign investment, particularly in online video services, audiovisual production, and movie distribution; 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, opaque, and *de facto* discriminatory censorship procedures, restrictions on foreign content on broadcast, pay TV, and online video, and strict quotas on foreign films and television programming.
- Abandon the slew of proposals that discriminate against U.S. producers and distributors of creative content, including the recent proposals by China’s National Radio and Television Administration (NRTA) for regulating the production and distribution of foreign audiovisual content.
- The U.S. Government should press China for immediate, full, and transparent implementation of all the terms of the 2012 U.S.-China Film Agreement, including the obligation to provide further meaningful compensation on revenue share and other issues in 2017, by: 1) liberalizing the distribution market for private third party Chinese distributors to engage in theatrical distribution without the interference of SOEs, in accordance with China’s commitment in the Agreement and at the June 2015 Strategic and Economic Dialogue (S&ED); 2) substantially increasing 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) fulfilling its commitment for Box Office audits under the Agreement by adopting internationally recognized methodologies; 4) allowing U.S. producers more control over release dates, addressing the problem of the Chinese locking out U.S. films from the prime release dates, and ending the practice of “double booking” theatrical releases; 5) eliminating informal restrictions on the number of imported “flat fee” films so that more independent producers have unimpeded access to the Chinese market; 6) further relaxing 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; 7) ensuring 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; 8) providing a timely and transparent censorship process for imported content; and 9) refraining from imposing any other barriers or discriminatory restrictions that hinder the ability of U.S. producers to engage in or conduct business with Chinese distributors or the Chinese Government.

## 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 to provide an exhaustive review of all issues.<sup>2</sup>

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<sup>2</sup>See, e.g., IIPA’s 2018 Special 301 submission on China (“IIPA 2018”), available at <https://iipa.org/files/uploads/2018/02/2018SPEC301CHINA.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*

**Online Piracy Remains a Problem:** China's online piracy problem persists, and takes a variety of forms. Piracy websites include illegal download sites; peer-to-peer (P2P) piracy sites; deep linking sites; "hybrid" sites, such as *3dmgame.com*, which offer both hosting and torrenting services; cyberlockers; BitTorrent indexes or trackers; forums; streaming sites; social media websites; and online marketplace/auction sites selling pirated goods, Piracy Devices, high quality counterfeits, and USB flash drives containing high volume of infringing sound recordings. For example, Xunlei Thunder is a BitTorrent service that makes available unauthorized motion picture and television content to users. In addition, large quantities of infringing content are stored in cloud storage services in China, such as Baidu Pan, to which links are disseminated through social media platforms (e.g., baidu tieba, wechat and weibo) and piracy linking sites. Applications (apps) facilitating piracy are available on a myriad of devices. And China is the hub of technologies proliferating around the Asia-Pacific region and worldwide by which Piracy Devices (e.g., media boxes, set-top boxes, or mobile devices) allow users to access infringing content using apps or add-ons, through a smart television or directly through the mobile device screen itself.

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 *KuaiKan* (listed by U.S. Trade Representative (USTR) in its 2017 Out-of-Cycle Review (OCR) of Notorious Markets)<sup>3</sup> *Renren Shipin*, *Today Vido*, and *XF Play*, which facilitate infringement of audiovisual content; and *Haiyao Music*, which facilitates infringement of music. Sometimes, apps are advertised and distributed through traditional websites that provide a portal allowing users to download the app to their devices. App operators may also advertise and distribute their apps through bulletin boards, social media, or other chat functions through apps. However they are distributed, these apps provide access to a variety of pirated content, including motion pictures and television programming. In 2017, the music industry reported 243 infringing apps to mobile app marketplaces in China. One app in particular that is extremely popular in China as well as Hong Kong is *Tian Lai K Ge*, a set of infringing Karaoke apps; unfortunately, while the app has been taken down from the app store at least eight times, each time it has been taken down it has quickly reappeared with the same content but under the names of different developers. Chinese enforcement authorities have been reluctant to take appropriate action.<sup>4</sup> In 2018, rights holders sent complaints to NCAC and the Ministry of Culture and Tourism (MOCT), but did not receive any response; and a civil case was filed in early 2018, but it has not yet been heard or adjudicated. 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 music and audiovisual marketplaces include *zimuze.tv*,<sup>5</sup> *dytt8.net*, *666c.com*, *sacdr.net*, *yymp3.com*, *musicool.cn*, *dy2018.com*, *xh127.com*, *b9good.com*, *dygang.com*, *loldytt.com*, *piaohua.com*, *bt99.com*, *80s.tw*, *meijutt.com*, *ygy8.com*, *dysfz.vip*, *panduoduo.net*, *btbtdy.net*, and *lbldy.com*. An increasing number of pirate sites use CK Player, an online media player that facilitates infringement of audiovisual content, including video games. The video game industry reports that three popular Chinese websites largely ignore takedown requests: *soft5566.com*, *wuguicili.com*, and *btclillian.net*.<sup>6</sup> The number of streaming sites continue to increase. Some music streaming services, including *yymp3.com*, were hosted in China but now use a U.S.-based reverse proxy service to obscure their location and have stopped responding to takedown request notices. Other sites, such as *666c.com*, *cdbao.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, 64% of the

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Concerning China's Compliance with its WTO Commitments (83 Fed. Reg. 42968, August 24, 2018), September 18, 2018, available at [https://iipa.org/files/uploads/2019/01/2018\\_Sep18\\_IIPA\\_Comments\\_on-China\\_WTO\\_Compliance.pdf](https://iipa.org/files/uploads/2019/01/2018_Sep18_IIPA_Comments_on-China_WTO_Compliance.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>The Beijing Culture Enforcement Team has not taken any action to investigate this repeated infringement. 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. National Copyright Administration of China (NCAC) should investigate this issue to improve the performance of the local enforcement teams, particularly the team in Beijing.

<sup>5</sup>According to Alexa, *zimuze.tv*, a linking site, is currently ranked as the 117<sup>th</sup> most popular website in China, and SimilarWeb recorded 22.1 million visits to the site in December 2018.

<sup>6</sup>These sites are all registered business entities in China, and host content and link to other sites with infringing video game content. Over 87% of the traffic to *soft5566.com* originates in China. In response to takedown notices from the video game industry, *soft5566.com* and *btclillian.net* take down only 1% of infringing content, and *wuguicili.com* takes down 17% of infringing content.

406,089 infringing links they discovered in 2018 were to infringing audiovisual content. For the music industry, licensed streaming and digital piracy compete side by side, with nine in ten Internet users consuming licensed audio streaming and nine in ten users engaging in piracy. Music piracy consists mainly of illegal downloads through cyberlockers (such as Baidu Pan)<sup>7</sup>, international P2P sites (such as PirateBay and Nyaa), and streaming of pirated content, including short videos, from user-uploaded content (UUC) sites (such as *weibo.com*, *miaopai.com*, and *bilibili.com*). 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. 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.<sup>8</sup>

Chinese enforcement authorities should investigate and take action against “clone pyramid” piracy websites, a network of thousands of sites created by users of piracy websites who are enticed to create their own derivative sites to generate revenue for themselves and for the mother site. 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. A Content Management System (CMS) website helps users to easily create their own derivative websites embedded with the 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 video player embedded into these websites links back to the original website, generating traffic (and income) for its owners. Chinese enforcement authorities should focus on the producers of the proprietary video players and the CMS and VCR websites that facilitate the expansion of this network.

**Piracy Devices:** Piracy Devices 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 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 are loaded with apps that facilitate infringement. These apps may be pre-installed, 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.

Piracy Devices 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 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 should 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. The appropriate administrative authority in China should set copyright protection rules for app stores, including a takedown mechanism for removal of apps that have the primary function of facilitating access to unauthorized content. Moreover, because China is the main originating source of this problem spreading around the world and is a key middleware provider for Piracy Devices operating throughout Asia, the Chinese Government should take immediate actions against key distribution points, including for export, for devices whose primary purpose and function is to facilitate copyright piracy.

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<sup>7</sup>As previously reported, three cyberlockers continue to provide for file sharing in China: *pan.baidu.com*, *ctdisk.com*, and *vdisk.weibo.com*.

<sup>8</sup>In 2018, 1655 notices with 35,687 links were sent to Baidu, and all were removed.

**Worsening Online Journal Piracy:** The problem of online journal piracy remains a significant challenge. The unfortunate lack of deterrence in the marketplace continues to encourage journal piracy services to operate.<sup>9</sup> 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 and academic textbooks, including *syyyj.com*, Keyandi, and Baidu Paperhelp. These platforms host unauthorized pdf copies of academic monographs, edited collections, and textbooks. They also facilitate access to infringing content online in a number of 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. 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 case underscoring the importance of enforcement officials engaging with rights holders, 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). Unfortunately, this type of meaningful engagement with industry has been more the exception than the rule.

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.<sup>10</sup>

**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 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. Deterrent-level criminal sanctions and penalties for the manufacturers and suppliers of circumvention devices are necessary to meaningfully stem the trade in infringing games.

**Unauthorized Camcording Remains a Concern:** Unauthorized camcording of movies in theaters—a key source for online audiovisual infringements—remains a significant problem in China for the film industry.<sup>11</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., China Film Administration (CFA) (formerly State Administration of Press, Publication, Radio, Film and Television (SAPPRFT)), NCAC, and the China Film Distribution and Exhibition Association (CFDEA). Criminal convictions for camcord piracy in Hefei in November 2014 and in Hubei in September 2016 were positive signs. Moreover, in 2015, SAPPRFT issued notices that recognized the threat camcording poses to the film industry, calling for Chinese cinema owners to

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<sup>9</sup>In July 2015, the publishing industry filed an administrative complaint with NCAC, which was subsequently delegated to the Guangdong Provincial Copyright Bureau, against an entity, Metstr, which appears to have ties to the operators of the now defunct KJ Med. While the KJ Med site was taken down, the failure to prosecute the site's operator(s) has contributed to the continuing emergence of copycat services that provide unauthorized access to copyright protected journal articles. Although the Metstr case remains under investigation by Chinese enforcement authorities, there has been no progress.

<sup>10</sup>On a positive note, an e-commerce site that proved the exception was *DHgate.com*. Following its inclusion in USTR's 2017 Out-of-Cycle Review (OCR) of Notorious Markets, the site proactively contacted and worked with publishers to address the sale of counterfeit and infringing copies of textbooks on the site. *DHgate.com* continues to address infringement that re-occurs on the site.

<sup>11</sup>In 2017, a total of 36 audio and video camcords were forensically matched to cinemas in China, a significant increase from 2016. In 2018 China produced 16 video camcords, although 13 of those were of relatively poor quality.

more effectively address camcording incidents, and requiring all film post-production units to enable digital watermarking to aid enforcement efforts. The Film Industry Promotion Law, which took effect in 2017, allows cinema personnel to take action to stop camcording. Unfortunately, the law fails to expressly provide any authority to undertake enforcement actions and impose 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 a cinematographic/audiovisual work, from a performance in an exhibition facility. Furthermore, as discussed below, to address livestreaming the Copyright Law should be revised to prohibit the unauthorized retransmission of content online. 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 harms 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 unfortunately continues to grow. 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 be 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 music CDs as well, feeding the global market with an onslaught of illegal copies of foreign and Chinese music products, including High Quality Counterfeit (HQC) box sets of music content, often through e-commerce platforms. China must implement an effective, non-burdensome program to stop and prevent future production and supply of HQC optical discs, sold through popular Chinese and international online marketplaces.<sup>12</sup> Online sales of USB flash drives containing high volume of infringing sound recordings have become a new problem in China. On major online shopping platforms, such as *Taobao.com*, *jd.com*, and *pinduoduo* (a mobile shopping app), more than 2000 sellers are selling an estimated 500,000 USB flash drives per month containing unlicensed music content, including 500 to 1000 tracks in a single flash drive. These flash drives are also exported from China to other Asian markets, including Taiwan and Hong Kong.

**Unauthorized Mini VOD Locations:** On March 6, 2018, SAPPRFT (now abolished and renamed the CFA) issued the “Regulations on the Management of Mini VOD Theaters and Chains” to regulate an estimated 10,000 mini VOD locations spreading across China. The new regulations went into effect on March 30, 2018, but due to government restructuring (which began in March 2018 and is still ongoing), the regulations have not yet been implemented. Prior to implementation of the regulations, the Chinese Government should crack down on these mini-VOD locations that are showing unauthorized content in violation of the copyright law.<sup>13</sup>

## **ENFORCEMENT UPDATES IN CHINA**

IIPA remains encouraged by China’s past actions to combat piracy and an overall improvement in the climate for enforcement, which have contributed to improved protection and development of the legitimate marketplace for some creative sectors; but much more should be done. China’s growing Internet user base creates potential opportunities for rights holders; but a historic toleration for piracy, and resulting overlapping consumption of

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<sup>12</sup>Shenzhen Optical Media Lab has previously worked with rights holders to help identify the source of seized products, but on-going changes in management structure have made communication difficult so it is presently not clear what its operational and enforcement capabilities are.

<sup>13</sup>MPAA members have not licensed any content to these entities.

legal and illegal content, have kept the creative marketplace from reaching its potential, and hampered the development of legitimate services.<sup>14</sup>

**Some Progress, But Still Many Challenges:** As we have highlighted in recent submissions, there were some notable recent improvements in enforcement against online piracy in China, particularly regarding efforts to combat unlicensed music. For example, NCAC's 2015 Notice required online storage service providers to take proactive measures to prevent users from uploading copyright infringing content, and Operation "Sword Net," an annual anti-piracy campaign, has resulted in enforcement against piracy services, apps, and the take down of significant amounts of unlicensed work from music platforms.<sup>15</sup> In the 2017 Sword Net Campaign, Chinese enforcement authorities inspected 63,000 websites, shutting down 2,554 of them, deleting 710,000 infringing links, and confiscating 2.76 million items used to facilitate piracy. Chinese enforcement authorities also investigated 543 cases related to online infringement; 57 of these cases involved business volume of RMB100 million and were referred for criminal investigation. In 2018, MOCT increased its administrative enforcement actions against music piracy; on the other hand, NCAC significantly reduced enforcement actions against infringing music content. Regarding piracy of film and television content, pursuant to the 2018 Sword Net Campaign, which is still ongoing, NCAC summoned representatives from online video platforms such as Douyin, Kuaishou, Pear Video, and Bilibili to demand that they improve their copyright protection efforts. As a result, 15 platforms collectively took down 570,000 infringing videos within a one month period, but significant issues still remain with many of the major platforms.

As previously reported, innovative industry approaches to the problem included China's Capital Copyright Industry Alliance (CCIA), which included more than 400 organizations and individuals. But, despite some good results, Baidu decided to end the "Qingyuan Action" in December 2018. In addition, the advertising alliance program previously pushed for by NCAC involving major advertisers, including Baidu, Alimama (of Alibaba Group), 360, Tencent, Sugou, and Netease, to help eliminate illegal advertising revenue to rogue sites, is presently stalled due to government restructuring. These programs should be resumed and strengthened as soon as possible to reduce the flow of advertising money to pirate services in China. Meanwhile, direct enforcement actions by the Chinese Government should be improved to a level commensurate with the scale of copyright infringement online.

As noted above, dozens of notorious piracy websites and infringing services remain, disrupting the legitimate market for creative content. For example, Baidu, the most popular search engine in China, also provides a popular cloud storage service, and has long prospered while facilitating infringement of copyrighted materials. Baidu is a powerful intermediary and platform that should cooperate better with rights holders to set the right example for other Internet businesses in China. Although Baidu has in recent years provided a tool for taking down motion picture and television content, and demoted infringing video listings of new release titles on Baidu search results, takedown rates and timeframes for removal of infringing links vary. Baidu should be encouraged to do more, including improving implementation of its takedown tool to ensure all rights holders are treated equally and infringing content and links are removed expeditiously. A growing concern is the popular cloud storage service known as Baidu Pan. A local rights holder group recently won a lawsuit against Baidu Pan for copyright infringement, and a local stakeholder, Sohu, is currently suing it for copyright infringement of its licensed materials.<sup>16</sup> Problems clearly remain with the Baidu Pan service, and Baidu should do more to ensure infringing materials are not made available to users.

While China's progress in cracking down on unlicensed music services has helped contribute to growth of 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 10th globally, behind much smaller markets such as South Korea and Australia. Revenues remain a small fraction of what they should be, even when compared to revenues

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<sup>14</sup>It is important to understand the broader context in which U.S. creative industries operate in China. In addition to causing exceedingly low licensing revenues, this market failure compounds current enforcement challenges in China because, for example, compensatory damages are calculated at inordinately low levels, and numerical and monetary thresholds triggering criminal liability remain difficult to reach and are not high enough to encompass all "commercial scale" piracy.

<sup>15</sup>For additional details, see IIPA 2018 at 17-18.

<sup>16</sup>In 2017, Sohu successfully sued Baidu Pan for indirectly facilitating copyright infringement of third parties.

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 Sustained, Holistic Enforcement Approach Needed:** While the Operation Sword Net actions are often effective to address infringing sites, apps, or services notified to the Chinese Government, more must be done beyond the campaigns. Simply put, a more holistic approach is needed—including enhanced administrative enforcement by the NCAC and improvements to the legal framework, including the Copyright Law and Criminal Law (as detailed below)—to better allow the government and rights holders to work together to defeat the piracy menace and open the market to legitimate services. One persistent problem is that China’s enforcement authorities do not do enough to identify those responsible for Internet piracy. Many infringers use fake registration information to register their websites, making it very difficult to locate those responsible for piracy sites.<sup>17</sup> Rights holders can do only so much under the law to identify the operators of these piracy sites. ISPs only provide this identification information in response to government requests. Once alerted to the problem, government enforcement authorities, including the People’s Procuratorates, should take action to bring about meaningful results. While rights holders bring infringement actions in civil courts against piracy services, civil suits are insufficient to address major piracy problems, and damages awards are too low.<sup>18</sup> And with criminal enforcement inadequate mainly because criminal thresholds are too high,<sup>19</sup> it is clear that China’s enforcement framework is simply not up to the challenge of its enormous piracy problems, notwithstanding its administrative enforcement efforts.

In 2018, the music industry filed 117 administrative cases with MOCT and the National Administration of Press and Publication (NAPP) which, thus far, have yielded the following results: closure of eight infringing services (including websites, mobile apps, and online physical sellers); punishment against two of these services (i.e., fines imposed or servers confiscated); eight services changed to non-music content; deletion of infringing tracks with warnings issued by local law enforcement in 44 cases; and 98 cases remain under investigation. In 2018, the music industry reported 248 infringing mobile apps to mobile app marketplaces, mostly Android Markets.<sup>20</sup> The motion picture industry similarly has reported key piracy services to NCAC, and NCAC has investigated and fined pirate operators and, in some cases, demanded that they cease infringing activities. These actions are helpful, but enforcement authorities should do more, and the Chinese Government should ensure its enforcement authorities are, as necessary, provided with greater resources to take additional proactive actions.

IIPA urges the Chinese Government to undertake the following measures:

- Ensure deterrent-level penalties against operators of piracy websites that make available a massive amount of infringing content.
- Enhance transparency of administrative enforcement, including by providing rights holders with information regarding the process and the results of administrative actions
- Ensure that an effective remedy exists against apps, websites, or services that facilitate copyright infringement, even if the infringing materials are located on remote servers.<sup>21</sup>

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<sup>17</sup>All websites in China must register with *milbeian.gov.cn*, and the owners of websites can be identified through searches using their registration numbers, domain names, IP addresses, or “Whois” data.

<sup>18</sup>As reported last year, 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 Internet 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* (the “Fangzhou” service) and *kuai.xunlei.com* (the “kuaichuan” service); enjoined Xunlei from further infringing activity; and awarded damages totaling RMB1.4 million (US\$210,000) and litigation costs of RMB162,400 (US\$24,350) to the studios. Both services are now defunct, but, as indicated above, Xunlei continues to run a service called Thunder, through which unauthorized motion picture and television content remains available in and outside China. Xunlei has been sued multiple times for copyright infringement by various stakeholders, but low damage awards and lack of meaningful injunctive relief hinder the effectiveness of civil enforcement against Xunlei and other platforms that facilitate piracy.

<sup>19</sup>Currently, in cases of Internet piracy, the criminal threshold of “500 copies” is interpreted as 500 *titles*. As a result, a single television episode is not considered a “title”; rather an entire season or even all seasons of a television program is calculated as a single title.

<sup>20</sup>The music industry reported 15 infringing Apple apps, and 239 infringing Android apps.

<sup>21</sup>Certain Chinese IP judges have unfortunately embraced the “server principle,” interpreting current law to require that infringement only occurs when the infringing content resides on the server or device of the operator of the app.

- 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 monetary 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.

## 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 be at a critical stage. The Ministry of Justice (which has taken over the functions of the now-abolished State Council Legislative Affairs Office) 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 Ministry and the NPC 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 Ministry and NPC. 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 operators 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 and websites that facilitate unauthorized access to copyrighted works. The Copyright Law amendment should confirm that the existing right of "communication over information networks" clearly permits action against an app or site that makes available content to users without authorization, regardless of where the content is stored. Clarifying the law,

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<sup>22</sup>See, e.g., IIPA 2018. Previous developments included the National People's Congress passing legislation to establish IP Courts in Beijing, Shanghai and Guangzhou. 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 court in Beijing opened in November 2014, and 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, and additional cyber courts opened in Beijing and Guangzhou in September 2018. These courts accept all Internet-related civil and/or administrative cases (including online copyright infringement disputes) within their respective jurisdictions, as well as those cases assigned by the higher people's courts. The courts have the potential to increase convenience, efficiency and cost-effectiveness mainly by using the Internet to handle much of the litigation process; however, as we note in this and in prior reports, without adequate legal tools to combat infringement, enforcement will be inadequate.

<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.":).

in line with international standards including the WIPO Internet Treaties, to reject the “server principle” is necessary because these illicit apps and streaming and indexing/linking sites typically facilitate unauthorized access to content stored on remote servers. Furthermore, liability should attach when an app or service 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, websites, or other services that allow a user to access unauthorized content undermine business models that are essential to a healthy online ecosystem. Therefore, to the extent current law on the right of “communication over information networks” and access controls does not clearly permit 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 passive and neutral intermediaries that do not contribute to infringing activities are eligible for the limitations on damages for infringements (i.e., safe harbor). 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 neutral and passive intermediaries and that, upon notice or otherwise obtaining knowledge of infringement, 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. These requirements should similarly be reflected in the Copyright Law amendment.

Other changes that should be made to the draft include providing protection against unauthorized retransmissions of copyrighted content over the Internet (including live streaming), and 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.

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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 include the fraught concept of “extended collective management” and improper limitations on rights 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 75 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 in line with the international trend, including 30 out of the 32 member countries of the OECD, and nine out of the top ten music markets.

**Criminal Code Reform:** China's Ninth Amendment to its Criminal Law ("Ninth Amendment") in 2015 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, but it has not been tested yet. 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 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> In particular, China should meet its international obligations by revising the criminal threshold to ensure that criminal penalties are available for all online piracy on a "commercial scale," and separately defining criminal violations regarding circumvention of TPMs, or trafficking in circumvention technologies.

**E-Commerce Law:** On January 1, 2019 China's first "e-commerce" law entered into force. The new law is wide in scope, intending to broadly regulate e-commerce activities, but does not cover the online dissemination of "audiovisual programs, publications, cultural products, and other content provided through information networks." Therefore, we understand that the copyright liability limitations for digital content platforms continue to be decided exclusively in the framework of the existing copyright law and related regulations, and subsequent amendments thereto. Regarding intellectual property rights, the new e-commerce law appears to apply to online transactions of physical infringing goods. The law requires platform operators to take "necessary measures" against infringing goods or services. Importantly, the law indicates that the required 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 of the new law 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 the rights holder's notice of infringement. The Chinese Government should interpret and implement the law to prevent this outcome.<sup>28</sup> High-quality Chinese counterfeit goods remain a problem for some creative industry sectors internationally, and effective enforcement action is required to prevent the supply of such goods to online market places. Likewise, Piracy Devices and circumvention devices, both used primarily to access pirated content, remain a significant problem in China. It is critical that the new e-commerce law support rights holder action to prevent the illegal trafficking on e-commerce platforms of these illicit goods, and for those rights holders that already experience good cooperation with some e-commerce platforms through voluntary arrangements, any implementation of this e-commerce law should not upset those existing arrangements. The interpretation and implementation of this new law should be monitored closely, including with respect to its stated scope of coverage as well as any expansion of such explicit coverage.

**Property Rights Protection Guidelines:** As previously reported, 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 include a number of guidelines

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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.

<sup>28</sup> IIPA has just recently learned that China is presently considering amendments to its tort law that also include notice and takedown provisions. While IIPA has not fully analyzed the amendments, the notice and takedown provisions appear to include many of the same shortcomings as those in the e-commerce law, including a failure to adopt effective practices for handling counter-notices, raising the concern that sellers of infringing products could avoid responsibility by merely objecting to the rights holder's notice of infringement.

regarding IPR.<sup>29</sup> 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 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>30</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. IIPA hopes the Detailed Measures are brought into force and implemented.

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

The Chinese Government continues to pursue some policies that have the effect of impeding foreign creators from accessing the Chinese marketplace. The direct relationship between the fight against piracy in China and the need for liberalized market access to supply legitimate product, 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>31</sup> Yet many core activities of copyright industries remain restricted or prohibited. For example, the Negative Investment List, which was revised in 2018, prohibits, among other things, foreign investment in the “publication and editing of books, newspapers, journals, audiovisual products and electronic publications,” and foreign investment in television VOD services. While IIPA has been hopeful China would address longstanding market access barriers, the Chinese Government has recently been moving in the opposite direction.

**Increasing Online Market Access Barriers:** As we have noted in prior reports, SAPPRT’s Online Publishing Rules, which took effect in March 2016, appear to expand the scope of longstanding restrictions on the involvement of foreign entities in online publishing activities.<sup>32</sup> The full impact of these measures on activities newly covered under the revised regulations remains unclear; unfortunately, these measures can have a chilling effect on

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<sup>29</sup>The guidelines 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.

<sup>30</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>31</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>32</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 SAPPRT.

foreign investment in online publishing services where, prior to the rules, some latitude appeared to have been granted.<sup>33</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. Also in 2017 Ministry of Industry and Information Technology (MIIT) regulations became effective that, among other things, would require all Internet domain names available in China to be registered through a licensed, domestic service provider.

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 September 2018, the CFA proposed two draft regulations regulating the production and distribution of foreign audiovisual content. The “Administrative Provisions on the Importation and Broadcasting of Overseas Audiovisual Programs” would further tighten regulations on foreign broadcasting, banning foreign films, TV dramas and animation from broadcasting during prime time, putting a 30% maximum cap on foreign audiovisual content in certain circumstances, and restricting content that can be disseminated online. The “Administrative Provisions on Overseas Personnel Participation in the Production of Radio and Television Programs” seeks to regulate the participation of foreigners in the production of radio and TV programs by, for example, banning the employment of foreigners as broadcast TV presenters or newscasters, and banning programs having both a foreign screenwriter and a foreign director. In May 2016, SAPPRT proposed policies that, if implemented, would provide state-owned media companies with voting control over leading online platforms for films and TV content.<sup>34</sup> While this proposal was 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 would discriminate against foreign suppliers; and in June 2016, China published new content approval regulations for mobile games that would 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 SAPPRT 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, submit content for censorship review. There are only two opportunities 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. A 2017 SAPPRT notice further restricted the 30% cap by requiring that it be applied by genre. Consequently, the rules significantly delay and curtail the legitimate access of Chinese consumers to the most valuable current 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>35</sup> impossible. Chinese distributors have delayed or decreased 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 in the audiovisual sector that harm the U.S. industry, limiting its ability to compete fairly and inhibiting its potential growth in this massive and fast-growing market.<sup>36</sup> Among other barriers, China prohibits 100% foreign-owned investment in audiovisual production studios, movie distribution, and online video services. Each of

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<sup>33</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>.

<sup>34</sup>The proposal was for leading online video platforms to sell up to a 10% “special management stake” and cede at least one board seat to a selected state-owned media company.

<sup>35</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>36</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.

these are sectors in which U.S. firms are highly competitive globally. Moreover, China continues to introduce additional impediments to its market for U.S. film and television content. In June 2016, SAPPRFT issued a Statement and Rules on Importing TV Formats that was clearly intended to promote indigenous Chinese radio and television programs at the expense of foreign content. Among other things, the rules established a procedure for filing/registration of foreign content by satellite television channels that would apply to jointly developed programs or programs with foreign personnel playing a “major guiding role” in production if the Chinese party does not “fully obtain intellectual property rights” in the program. Only two of these “foreign” programs are permitted to be broadcast in prime time per year; and no more than one new foreign program may be broadcast at any time per year, but it cannot be broadcast in prime time for that first year. This distortion of China’s market for television and radio content has negatively impacted U.S. producers and appears to contravene China’s WTO obligations.

Another market impediment is that private Chinese distributors, including VOD platforms, arbitrarily, without clear explanation, request from U.S. producers an excessive and particularly burdensome amount of legalized documentation regarding production and distribution in order to complete a license agreement or obtain government approvals that permit access to China’s online marketplace. These types of documentation requests (unique to China’s marketplace) cause uncertainty and additional expense that slow or kill negotiations for licensing films to China, and have become yet another obstacle for U.S. producers to access the Chinese marketplace. Overall, there is an urgent need to improve transparency of all processes affecting the importation, exploitation, remuneration, and license payments of foreign films and programming.

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.

**U.S.-China Film Agreement Implementation:** To settle a decade old WTO dispute, China agreed to, but still has not implemented, certain key provisions of the 2012 U.S.-China Film Agreement, including its obligation to provide further meaningful compensation on revenue share and other issues in 2017. Swift, robust implementation of the Agreement is critical to bring broad reforms and introduce competition. This would benefit both revenue sharing films and flat fee films imported into China. Despite the establishment of China as the world’s largest theatrical market in terms of number of screens and the second largest in terms of total box office, 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 number of these films that can be imported and limits on 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 SOE, including China Film Corp (CFC) and Huaxia. Although CFC held an initial public offering in 2016, the majority of its 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 to a historical low.

The U.S. Government should, therefore, press China for immediate, full, and transparent implementation of all the terms of the 2012 U.S.-China Film Agreement, including the obligation to provide further meaningful compensation on revenue share and other issues in 2017, by 1) liberalizing the distribution market for private third party Chinese distributors to engage in theatrical distribution without the interference of SOEs, in accordance with China’s commitment in the Agreement and at the June 2015 S&ED; 2) substantially increasing 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) fulfilling its commitment for Box Office audits under the Agreement by adopting internationally recognized methodologies; 4) allowing U.S. producers more control over release dates, addressing the problem of the Chinese locking out U.S. films from the prime release dates, and ending the practice of “double booking” theatrical releases;

5) eliminating informal restrictions on the number of imported “flat fee” films so that more independent producers have unimpeded access to the Chinese market; 6) further relaxing 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; 7) ensuring 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; 8) providing a timely and transparent censorship process for imported content; and 9) refraining from imposing any other barriers or discriminatory restrictions that hinder the ability of U.S. producers to engage in or conduct business with Chinese distributors or the Chinese Government.

## **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>37</sup> In particular, China must do more to open its market to U.S. films, and take further steps to implement the WTO ruling regarding all the sectors of its online marketplace. 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>38</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 commercial scale infringements are without a criminal remedy because of thresholds that are too high and 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.

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<sup>37</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>38</sup>In the 2018 Report to Congress on China’s WTO Compliance, USTR acknowledged that the Network Publishing Service Management Regulations raise concern “relative to China’s GATS commitment.” See p. 157, report available at <https://ustr.gov/sites/default/files/2018-USTR-Report-to-Congress-on-China%27s-WTO-Compliance.pdf>.