

CHINA (PRC)

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

2016 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

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

Executive Summary: China's marketplace for creative content is developing rapidly, although for some industries, growth, particularly in the digital marketplace, is stunted. New generations of Chinese consumers are enjoying content in more ways than ever before. There are a growing number of services for licensed online delivery of music, movies, TV programming and other works, as well as expanded legitimate avenues for accessing content outside the online realm, including now 31,000 movie screens with many offering enhanced formats such as IMAX and 3D. Yet China's overwhelming legacy of piracy continues to distort the market, and has driven down the market value of creative works toward the vanishing point. As a result, China has far to go to become a market that produces licensing revenue on anywhere near the scale needed to sustain legitimate and innovative services.

IIPA is encouraged by some actions China took in 2015 to combat piracy, including the crackdown in July and October 2015 by the National Copyright Administration of China (NCAC) on unlicensed music platforms; the ban by the State Administration of Press, Publication, Radio, Film and Television (SAPPRFT) on 81 third-party apps that facilitate media/set-top box piracy; a new watermarking requirement for film post-production units; and some steps by SAPPRFT to combat the problem of unauthorized camcording in Chinese cinemas. Nonetheless, the piracy landscape in China is changing, and Chinese authorities must adapt. For example, media/set-top boxes (STB) have become a key platform through which pirated materials are accessed in China. Dedicated piracy apps that run on multiple platforms, including STBs and mobile devices, are a relatively new challenge that must be met. Progress against piracy sites is being undermined by the emerging propagation of "do-it-yourself" piracy sites and the online ecosystem that supports them. China has yet to respond satisfactorily to online piracy of journals of scientific, technical, and medical (STM) materials, and new services facilitating unauthorized access to STM materials threaten the professional publishing market. Regrettably, no action was taken in 2015 to move forward amendments to the Copyright Law or to reform the Criminal Law to provide much needed tools to assist in combatting these problems.

China also needs to do more to remove barriers that prevent U.S. creative industries from fully accessing the Chinese market. For example, notwithstanding amendments to the Foreign Investment Catalogue, it appears China's restrictions on investment in online music distribution services may remain in place. SAPPRFT's 2014 Notice imposing onerous requirements and a cap on the online distribution of foreign films and TV dramas threatens the licensing market for audiovisual content, and follow-on measures issued in June 2015 did not alleviate concerns. China's reported clampdown on foreign DVD imports will further restrict foreign content to the detriment of China's audiovisual market.

IIPA seeks further reforms to improve access to China's growing theatrical film market for U.S. film producers. Completion of the "long form" agreement is a positive development. Now China must fully implement the 2012 U.S.-China Film Agreement by enabling competition in the distribution marketplace benefitting all producers. This implementation shortfall, 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 the consultations on the Agreement scheduled for next year.

¹For more details on China's Special 301 and Section 306 monitoring history, see previous years' reports at <http://www.iipa.com/countryreports.html>. For the history of China's Special 301 placement, see <http://www.iipa.com/pdf/2016SPEC301HISTORICALCHART.pdf>.



PRIORITY ACTIONS REQUESTED IN 2016

Enforcement:

- Take further action against websites offering infringing content, such as *LeTV*, *ColaFile.com*, and *Sohu*, and/or those deploying non-hosted platforms such as *Xunlei* (sued again over video piracy).
- Bring more targeted and deterrent actions, with transparency, against media box/set-top box (STB) piracy (including against dedicated piracy apps), “do-it-yourself” piracy sites and the Internet ecosystem that supports them, and unauthorized camcording.
- Expand resources at National Copyright Administration of China (NCAC), local Copyright Administrations (CAs), and Law and Cultural Enforcement Administrations (LCEAs), commensurate with the scale and technical complexity of piracy problems.
- Fully implement 2012 Network Rules with regard to liability, and have SAPPRFT, the Ministry of Culture (MOC), and the Ministry of Industry and Information Technology (MIIT) revoke business licenses and stop enterprises from providing access to infringing content.
- Facilitate more efficient transfer of copyright cases between administrative and criminal authorities, and make clear that such transfers are required upon “reasonable suspicion” that the criminal thresholds are met.
- Follow through on US-China Joint Commission on Commerce and Trade (JCCT) commitments for transparent, comprehensive, and verifiable progress for strengthening intellectual property rights (IPR) protection for published materials and other copyrights in university (including library) settings.
- Ensure that SAPPRFT, theater owners, and others associated with the chain of theatrical distribution of films, take further efforts to crack down on unauthorized camcording.

Legislation:

- Enact comprehensive copyright law reform as “first tier” legislation, incorporating changes recommended by IIPA and member associations in various past filings (including, e.g., adopting rights of communication to the public and broadcasting for sound recordings; clarifying safe harbor requirements, extending term of protection in line with the international trend; and ensuring exceptions to and limitations on copyright are adequately defined and appropriately narrow in scope).
- Include intellectual property provisions in the ongoing Criminal Law reform process, including: 1) lowering thresholds; 2) ensuring criminalization of Internet piracy, including infringements undertaken for purposes other than commercial gain, as well as circumvention of technological protection measures (TPMs) and trafficking in circumvention technologies, software, devices, components, and services; and 3) establishing the appropriate presumptions of copyright ownership in criminal proceedings.
- Enact a criminal prohibition on camcording in theaters.

Market Access:

- Recognizing that the United States and China are set to engage in consultations on key elements of the U.S.-China Film Agreement in 2017, ensure full implementation of all commitments contained in the Agreement, including China’s commitment in the Agreement and at the June 2015 Security and Economic Dialogue (S&ED) to promote licensing of independent (private) national distributors in competition with State-owned China Film Group (CFG) and Huaxia. While China has made progress with the Agreement with respect to imported films that receive quota slots and share in box office revenue with CFG, no reforms have been made on “flat fee” imported films and no private Chinese national distributor has been licensed by the government to engage in national theatrical distribution of imported films independently of CFG.² In 2016, 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.

²Films exported to China on a flat fee basis have steadily decreased since 2012 and opportunities for these films are disappearing quickly due to China’s maintenance of the barriers that it has committed to dismantle and remove in the Agreement and again at the 2015 S&ED.

- Revoke all measures, including the Notice and the Draft Measures, imposing registration requirements, onerous and opaque censorship, and strict quotas on foreign films and television programming for online distribution.
- Clarify that revisions to the *Catalogue of Industries for Guiding Foreign Investment* allow foreign investment in online music services and do not prohibit foreign investment in audio and audiovisual production and distribution activities.

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.³

Evolving Online/Mobile Piracy in China: Online piracy in China is constantly evolving and takes a variety of forms, including illegal download sites, peer-to-peer (P2P) piracy sites, deep linking sites, cyberlockers, BitTorrent indexes or trackers, forums, streaming sites, and auction sites selling pirated goods and high quality counterfeits. Streaming sites have grown in significance. The music industry reports that, based on their monitoring, 77% of the infringing links they discovered in 2015 were to music streaming websites, 16% were to video streaming websites, and just 5% were to cyberlockers. Notorious websites offering infringing content include *LeTV*⁴ and cyberlocker *ColaFile.com*, which operate unlicensed music and music video platforms, and *Sohu*, which operates a user-uploaded site "my.tv.sohu.com" for which the music industry reports a woeful takedown rate of only 31%. Mobile piracy has also become an increasing threat to all copyright sectors. In 2015 the music industry reported 261 infringing apps to mobile app marketplaces.

Moreover, in a virulent new 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) to view the infringing content. 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 website links back to the original website, generating traffic (and income) for its owners. Chinese enforcement authorities must investigate and take action against this network of "do-it-yourself" 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.

Media Box/Set-Top Box (STB) Piracy: Media boxes or set-top boxes are proliferating throughout Asia. These devices can be used to permit users to access the Internet, and in many cases allow users to stream or download unauthorized motion picture and television content. China is a hub for the manufacture of these devices, which are not only distributed domestically but also exported to overseas markets, particularly throughout Asia (Hong Kong, Taiwan, Singapore, and elsewhere), compounding piracy problems in the region. The devices are often manufactured or promoted and advertised to enable infringement of copyright or other illegal activities. Chief among these activities are: 1) enabling users to access unauthorized decrypted motion pictures or television programming; 2) facilitating easy access, through apps, to remote online sources of unauthorized entertainment content including music, music videos, karaoke, motion pictures and television programming, video games, published materials and TV

³See, e.g., IIPA 2015, <http://www.iipa.com/rbc/2015/2015SPEC301CHINA.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"* (80 Fed. Reg. 47985, August 10, 2015), September 23, 2015.

⁴*LeTV* is not merely a network service provider offering storage space for users to upload content, but is directly making available infringing content; thus, any limitations on liability should not be applicable.

dramas; and/or 3) pre-loading the devices with hundreds of high definition (HD) motion pictures prior to shipment or allowing vendors to load content upon import and prior to sale, or as an “after sale” service.

STBs are part of a sophisticated and integrated online ecosystem facilitating access to pirated audiovisual materials. The boxes are either pre-installed with “apps” that facilitate infringement or users are easily able to obtain apps required to access unauthorized motion picture and television content. Some STB manufacturers also produce the apps that facilitate piracy. These “apps” allow the user to connect to a supporting over-the-top (OTT) online infrastructure that provides users with instant access to infringing audiovisual content. Many of these piracy apps cross over to other platforms besides STBs, such as mobile phones and computers. SAPPRT’s notices that led to the banning of 81 third-party apps that facilitate media/set-top box piracy is a positive development, but China must do more, including cracking down on box manufacturers who preload the devices with apps that facilitate infringement. Moreover, because China is the main source of this problem spreading across Asia, the Chinese Government should take immediate actions against identified manufacturers and key distribution points for boxes that are being used illegally.

Additional Online Piracy Problems: Internet platforms that provide illegal content unfortunately continue to proliferate in China. Among the websites cited by IIPA members in their “notorious markets” Out-of-Cycle Review (OCR) filings to the U.S. Trade Representative in the fall of 2015, *Ebookee.org*, a top indexing site for pirated books, magazines, and other media, has connections to China. Piracy concerns over the *Xunlei* video-on-demand service were thought to have been addressed in a Content Protection Agreement entered into between *Xunlei* and the Motion Picture Association of America in June 2014, designed to “promote legitimate access to film and television shows online.”⁵ But, after continued concerns over various acts of copyright infringement, on January 19, 2015, motion picture studios announced that they had filed civil actions against the operators of Shenzhen Xunlei Networking Technology Co. Ltd., the proprietors of *Xunlei*, seeking damages, orders to stop the infringing activity, a public apology, and costs.⁶

As the leading 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 in a video game console in order to download and play illegal video games. Customs authorities in at least seven countries, including the United States, have seized tens of thousands of these devices originating from China in 60 separate seizure actions. The devices are sold by thousands of vendors in online marketplaces such as *Taobao*, *DHGate*, and *AliExpress*, and constant monitoring and scrutiny is required to achieve a modicum of enforcement. These devices allow illegal 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.

The problem of online journal piracy in China unfortunately continues to be without a satisfactory resolution. 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, prosecutors declined to pursue a criminal case against its operators. This unfortunate development underscores the lack of effective criminal remedies against even the most egregious infringers in China, highlighting both significant limitations in evidence gathering by criminal law enforcement authorities and their unreasonably narrow interpretation and application of the law. Deterrence against copycat and similar services thus remains elusive, much to the detriment of STM publishers. In addition to entities like *KJ Med*, a new variation is a service that allows subscribers to “view” (without publisher permission) ebooks and

⁵*Xunlei* is extremely popular in China, being the 99th most accessed site in China. The site is also ranked 638th most accessed in the world, and ranks extremely high in Hong Kong (408th), Taiwan (481st), and Korea (637th) as well.

⁶Motion Picture Association, *MPAA Studios File Civil Actions Against Xunlei for Mass Infringement of Copyright*, January 20, 2015, available at <http://www.mpa-i.org/wp-content/uploads/2015/01/MPAA-Studios-File-Civil-Actions-Against-Xunlei-For-Mass-Infringement-of-Copyright.pdf>.

journal articles. Known as “UReader”, this service reportedly has upwards of 167,000 ebooks available to its subscribers.

Next-Generation Pay-TV Signal Theft: Pay-TV piracy is a growing concern in China, as is China’s role in the worldwide manufacture and export/distribution of pay-TV circumvention devices. In addition, concerns have been raised about the deployment of services providing unauthorized retransmission (including over the Internet) of digital pay-TV services. The film and TV industries are still learning about the size and scope of the problem, but the emergence of this next-generation digital pay-TV piracy must be addressed.

Unauthorized Camcording Leads to Online Piracy, Harms Audiovisual Right Holders: 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.⁷ The motion picture industry has raised this issue with relevant Chinese Government agencies, e.g., NCAC, Office of Anti-Piracy and Pornography (NAPP), and SAPPRFT, and with the China Film Distribution and Exhibition Association. The November 2014 criminal conviction of a Hefei camcording broker was a positive sign. 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. 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. In addition, although the SAPPRFT notices are an encouraging step, 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 JCCT commitments 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 has declined over the years, 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 to address pirate document delivery services, and the Chinese Academy of Sciences should do more to educate information officers/librarians of the 100 research institutes in China. China remains a major 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, often through e-commerce platforms.

ENFORCEMENT UPDATES IN CHINA

IIPA is encouraged by certain positive steps China took in 2015 to combat piracy, which contributed to commercial gains in some creative sectors. But China still has significant work to do to overcome its historic lack of enforcement, which is why, notwithstanding recent actions, online piracy, and its negative impact on licensing negotiations between right holders and licensed platforms, remains the dominant issue in China. As of June 2015, China had the largest Internet user base in the world, estimated at 668 million users, including 594 million mobile web users. This creates the potential for enormous market opportunities for right holders, but they must swim upstream against a historical tide of toleration for piracy that has devalued creative content. Although the market for

⁷As of November 2015, 9 forensic matches (3 video and 6 audio) of MPAA studio titles available online have been traced to camcording in Chinese theaters, with half originating in cinemas in Beijing.

legitimate content has improved, more progress must be achieved for this potential to be realized because piracy hinders the development of legitimate services.⁸

Signs of Improved Enforcement, But Still Work To Do: There were notable signs of progress in enforcement against online piracy in China over the past year, particularly regarding efforts to combat unlicensed music. In January 2015, NCAC, together with State Internet Information Office, MIIT, and Ministry of Public Security (MPS), jointly held a press conference to announce the results of the 2014 “Sword Network Campaign” against Internet piracy. Among other things, NCAC announced that the results of the Shanghai Cultural Task Force’s investigation of *Shooter.cn*, which was engaged in the flagrant mass dissemination of unauthorized copies of foreign films and TV shows with Chinese subtitles. *Shooter.cn* was shut down and the owner of the website, Sagittarius Technology Co. Ltd., was fined RMB100,000 (US\$15,203). This was one of a number of successful enforcement actions brought in China in 2014 against leading piracy services, such as QVOD, Yyets, and DY161, which IIPA noted in its 2015 submission.⁹

The 2015 version of China’s “Sword Net” anti-piracy campaign included a focus on unlicensed music. In June 2015, NCAC ordered all online music platforms to take down unlicensed tracks by the end of July 2015 and, reportedly, more than 2.2 million unlicensed works were taken down by 16 music platforms in response. NCAC gave a further transition period for the removal of all unlicensed material until the end of October 2015 to allow for cross licensing of rights. Various Chinese online music platforms including *Kuwo*, *Kugou*, *QQ Music*, *Xiami*, *TTPod* and *NetEase* have recently released statements claiming that they have taken down all unlicensed material from their sites, while *Kugou* and *QQ Music* stated that they have 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. NCAC is reportedly reviewing the results of this campaign to determine its next steps, which could include enforcement actions against noncompliant platforms. Also as part of “Sword Net” 2015, the local music industry informed NCAC of about 410 infringing websites. In response to the NCAC notifications, LCEAs from Fujian, Jiangsu, Hunan, Hubei, Shenzhen, Guangxi, Sichuan, Zhejiang, Anhui, Chongqing and Shanxi have contacted the industry for assistance, resulting in the closure of 42 websites, changes in business models for 32 websites (ceasing to offer music), and deletion of alleged infringing tracks on 129 websites.¹⁰

In October 2015 the NCAC issued a Notice requiring online storage service providers to take proactive measures to prevent users from uploading copyright infringing content, including works that have been previously removed, works that are the subject of a notice and takedown, and works specifically listed by NCAC. 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. IIPA is encouraged by this development.¹¹ Cooperation with authorities and some ISPs to take down infringing content had some effect over the past twelve months, as ISPs continue to be generally responsive to notices or cease and desist (C&D) letters. The music industry reports that the takedown rate of infringing links is

⁸It 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 monetary thresholds triggering criminal liability are extremely difficult to reach.

⁹See IIPA 2015 at 17-18. As IIPA also noted in the 2015 report, the commencement of official operations of the National Leading Group (NLG) in July 2013 has been helpful in mobilizing greater resources to address copyright infringements throughout the country.

¹⁰Difficulties 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.

¹¹Since issuance of the Notice, 185,173 links were sent to *Baidu* and 177,588 links were taken down. 21,000 links were taken down by Sina Disk (a cyberlocker service provided by Sina) and Sina has stopped the streaming play function on Sina Disk and the function of uploading and downloading files larger than 100MB. NCAC also released a list of 131 movies and TV episodes that needed to be specifically monitored.

approximately 90%. Regarding the 261 infringing mobile apps noted above, mostly from the Apple Store, the takedown rate upon notice to Apple was 89%, while the takedown rate for infringing Android apps was 52%.¹²

Recent innovative industry approaches to the problem have included China's Capital Copyright Industry Alliance (CCIA), which brought together more than 70 local organizations to strengthen copyright protection. Under its auspices, the record and motion picture industry associations have commenced a "Qingyuan Action." The action requests that the Internet Advertising Alliance (IAA) stop advertising support of pirate websites. *Baidu*, being an IAA member, has joined the Action, and agreed that it will stop advertisements on infringing websites on receipt of complaints. The local record industry association also signed a Memorandum of Understanding (MOU) with CCIA for an expedited method ("green channel") to mark websites infringing music, and for *Baidu* to halt advertisements on such marked websites. The first stage of the action was launched in April 2014 and the action is still ongoing. According to the music industry, 2036 links have been reported to *Baidu* since the launch of Qingyuan Action, but, notwithstanding that *Baidu* has taken down all of its advertisements on the reported infringing websites, infringement on most of these websites still remains.

China has made significant progress in cracking down on many unlicensed music services,¹³ which has contributed to an uptick in revenues for the music industry. In 2014 the total music market was US\$105.2 million, up 5.6% from the previous year, and revenues from digital sales were US\$91.4 million, up 11.2%.¹⁴ Early indications are music revenues in 2015 will be significantly higher for both overall music revenues and digital revenues.¹⁵ That said, the legitimate music market in China remains nowhere near its potential. Despite boasting the largest number of Internet users in the world, China's music market is ranked just 19th globally, behind much smaller markets such as Switzerland, Belgium and Austria. Revenues are a small fraction of what they should be even when compared to revenues seen in comparably developed markets.¹⁶ And online music piracy sites and hard goods exports from China continue to negatively affect foreign markets, e.g., Hong Kong, Taiwan, Japan, Singapore, and Malaysia, among others.

Continued Need for Enhanced Chinese Government Resources to Tackle Piracy: The disproportionately small amount of resources devoted to fighting piracy in China, when compared for example, with those deployed to stop counterfeiting, creates a recipe for failure. 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. Civil enforcement efforts are plagued by non-deterrent remedies (e.g., low damages and limited injunctive relief) and overly burdensome procedures (e.g., extensive documentation and legalization requirements). Criminal enforcement efforts are hampered by a lack of expertise among police throughout the country to effectively bring criminal piracy investigations, resulting in very few successful investigations and many cases that are not handled appropriately. There is an urgent need in China for police investigators who have the technical understanding and expertise necessary to investigate piracy cases. Furthermore, as noted above regarding the growing problems of media box piracy and networks of "do-it-yourself" piracy websites, the piracy challenges in China are constantly evolving and becoming more complicated. Chinese enforcement authorities must adapt to keep pace with illegal piracy activity. As such, the Chinese Government should

¹²The music industry reported 240 infringing apps to Apple, and 21 infringing Android apps to Chinese marketplaces such as *Baidu* and *Tencent*. Google Play is not yet available in China, although as of November 2015, reports indicated Google was working on entering the market by early 2016. See, e.g., Paul Carsten and Yimou Lee, *Google aims for China launch of Google Play app store next year: sources*, Reuters, November 20, 2015, available at <http://www.reuters.com/article/us-alphabet-china-idUSKCN0T91K420151120>.

¹³Many music services remain unlicensed, and even those that are licensed may not cover all rights (for example, some licenses only extend to streaming), and the licenses are restricted to the territory of China, so these sites' availability in foreign markets is particularly damaging.

¹⁴Total music revenues in 2013 were US\$99.6 million, and revenues attributed to digital sales were US\$82.2 million.

¹⁵Comparing revenues from the first half of 2014 to the first half of 2015, overall music revenue increased 38.5% with digital revenues increasing by 43.5%.

¹⁶On a per capita basis, in 2014, Chinese consumers spent only 7.8 cents each on recorded music, the lowest figure of any major market anywhere in the world. Even India (8.1 cents per capita), Indonesia (10.4 cents), and the Philippines (11.9 cents), countries that are much poorer than China with GDP per capita figures about half as large, spent more than China in 2014. The music markets in India and Indonesia were two-and one-half times larger than China's in terms of the percentage of GDP per capita devoted to recorded music. The Asian market with a per capita GDP closest to China's is Thailand, which has a per capita music spending more than eight times that of China's.

be encouraged to expand resources and capability at NCAC, local CAs, and LCEAs, commensurate with the scale and complexity of the piracy problem. 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.

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.¹⁷ These reform processes provide important opportunities to update the legal regime in China for more effective copyright protection and enforcement.

Copyright Law Reform: IIPA has serious concerns that no progress was made in 2015 to enact and implement amendments to the Copyright Law. The draft currently sits with the State Council Legislative Affairs Office (SCLAO), which received further public comments in July 2014. IIPA commented on the SCLAO draft, noting numerous improvements in the draft compared with prior efforts, and believes that time is of the essence to adopt the Bill.

The current draft 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. In so doing, the law may make it possible to efficiently remove infringing materials from the Internet as well as to halt people from engaging in massive infringements, but much will depend on the implementation of these measures.¹⁸ Many other important topics are taken up in the draft Copyright Law revision. In particular, the draft introduces rights of remuneration for 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.

Some of the current proposals, however, may require revisions before enactment to avoid conflicts with China’s WTO obligations, or inconsistencies with current international or best commercial practices.¹⁹ For example, the ISP liability provisions should be revised to ensure 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 either have not been notified of the infringement or, upon notice, promptly took reasonable steps to limit or stop the infringement, including expeditious takedown of infringing content; and 3) ISPs cannot modify the content or interfere with the technical protection measures used by copyright owners to protect their works.²⁰ In addition, IIPA is disappointed that the present draft leaves in place China’s inadequate term of copyright protection. China should extend its term of protection in line with the international trend (to 70 years after the death of

¹⁷Previous 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 will 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 November 2014 to November 2015, 8219 have been accepted by the Beijing IP court, with 3859 cases closed; 1488 cases have been accepted by the Shanghai IP court with 887 closed; and 4612 cases have been accepted by the Guangzhou IP court, with 2613 cases closed..

¹⁸The latest draft has deleted the reference to “blocking” which was in previous drafts, but retains the request that 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.”).

¹⁹The 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. 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 right holders. The legacy of years of toleration of piracy, referenced above, not only drives licensing revenues to exceedingly low levels, but also compounds current enforcement challenges in China because, for example, compensatory damages are calculated at inordinately low levels and monetary thresholds triggering criminal liability are extremely difficult to reach.

²⁰These safe harbor requirements are set forth in the 2006 Regulation on Protection of the Right of Communication Through Information Networks and 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), and should also be clearly stated in the draft Copyright Law.

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 to provide greater incentives for the production of creative works, but also to provide producers with a stronger incentive to invest in local industry, spurring economic growth and tax revenues and enabling producers to continue offering content to local consumers in the latest formats.²¹ 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.

Criminal Code Reform Should Include Intellectual Property: According to the latest reports, the intellectual property provisions of the Criminal Law (e.g., Articles 217 and 218 and accompanying Judicial Interpretations) and other related provisions are not set to be considered in China's Criminal Law reform process. This would be a major missed opportunity, and we urge the Chinese Government to reconsider this decision. Remaining gaps include:

- Thresholds that are too high (in the case of illegal income) or unclear (e.g., in the case of the copy threshold).²²
- Leaving some critical commercial scale infringements 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. It is often difficult for law enforcement authorities or right holders to prove that the infringer is operating for the purpose of making profits in cases of Internet piracy.
- Failure to separately define criminal violations related to the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT), for example, circumvention of technological protection measures, or trafficking in circumvention technologies, software, devices, components, and services.
- Failure to establish appropriate presumption of copyright ownership.
- Limited criminal accomplice liability with respect to imports and exports (with lower penalties available).
- Uncertainties with respect to increased penalties against repeat offenders.
- The jurisdictional bar limiting foreign right holders from commencing a private “civil claim” against those being prosecuted for copyright crimes in local district courts.

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.²³

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 Internet service providers 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

²¹More than 80 countries protect some or all creative materials per the terms stated. 28 out of the 32 member countries of The Organization for Economic Cooperation and Development (OECD) and 9 out of the top 10 music markets (by total revenue in 2014) protect sound recordings for at least 70 years. The recently concluded Trans-Pacific Partnership (TPP) requires copyright terms to meet this minimum.

²²The Supreme People's Procuratorate has expressed interest in prosecuting online piracy cases, and is exploring issues related to the evidence needed to meet the thresholds for criminal liability. There may be a need to address thresholds so that non-hosted online services such as P2P streaming services can no longer escape liability. For musical works, IIPA urges the SPC to clarify that thresholds for infringing works are calculated by track rather than by album.

²³Presently, 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 all or nearly all the evidence that a crime has been committed rather than a reasonable suspicion standard.

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

IIPA has consistently stressed the 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. When legitimately licensed content is blocked from the marketplace for any reason, a vacuum for piracy is instantly created. This 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, which concluded in 2009.

Since the WTO case, China has 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.²⁴ 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 has 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 introduced for more film co-productions in China.

IIPA urges China to continue liberalizing its market for creative content. We are concerned that the amended Foreign Investment Catalogue, which Ministry of Commerce (MOFCOM) released in March 2015 and which lifts investment restrictions in many sectors, may not substantially ease restrictions for audiovisual products and services. Although the restriction on foreign investment for distributing and selling of audiovisual products has been removed, the amended Catalogue adds “network publication service” to the “Prohibited” list, raising questions regarding whether foreign investment in online music services will be allowed.²⁵ The recent launch of Apple Music indicates foreign investment in online music services is no longer prohibited, but IIPA urges the Chinese Government to provide written clarification of these investments. Additionally, a November 2014 draft of the Catalogue indicated that “publication and production of audio and visual products” would be moved from the “Prohibited” list to the “Restricted” list, but this change was not reflected in the final amended version.

In addition to these investment liberalization concerns, IIPA also remains concerned about the uncertainty regarding the decisions to allow foreign entities to choose their licensees for online music distribution and to allow foreign entities to engage in content self-review. In October 2015 the MOC issued a “Circular on Further Strengthening and Improving Online Music Content Examination” requiring all online music services to self-censor their music. Accordingly, it should no longer be necessary for MOC to require foreign entities to have an exclusive licensee for online music distribution, which was required under previous censorship procedures. IIPA urges China to formally revoke this requirement so that foreign music companies are free to designate licensees of their choosing.²⁶

Furthermore, many core activities of copyright industries remain restricted or prohibited. 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

²⁴For music, it remains somewhat unclear whether “music videos” are open to distribution in China, and whether a foreign-invested entity established in the Shanghai FTZ is able to distribute music throughout China. Confirmation of the inclusion of “music videos” as permissible, and the ability to make music available throughout China, would be helpful.

²⁵Any such prohibition appears to be contradictory to the MOC’s Notice on amending the Interim Provisions on the Administration of Internet Culture, which stipulates that foreign entities may apply for Internet Cultural Publication Permit for online music distribution.

²⁶The Chinese Government verbally indicated in 2013 that it is no longer necessary to appoint an exclusive licensee for online music distribution and the 2015 Circular did not distinguish between exclusive and non-exclusive licensees. However, to avoid any uncertainty, it is recommended that the Chinese Government formally revoke this requirement in writing

engaged or involved in operation of online video games directly or indirectly.” Publishing likewise remains a prohibited investment category, with publishers unable to determine which works, and how many, to bring to market. Other rules of the Ministry of Culture also appear to create conflict with respect to foreign-invested entity involvement in Internet distribution of music.²⁷

U.S.-China Film Agreement Implementation: Implementation of certain provisions of the February 2012 U.S.-China Film Agreement have progressed for those films that are awarded a quota slot available to share in box office revenue. With respect to those 34 films only, China has increased the box office revenue sharing participation from 13-17.5% to 25%. With the Agreement set to be reviewed and in its fifth year, China has not implemented key provisions of the Agreement that would bring broad reforms and introduce competition to the distribution marketplace benefitting more producers and increasing the export to China of “flat fee” films (films imported outside of the quota system that do not share in the box office revenue). China committed in the Agreement to promote and license privately-owned Chinese distributors to engage in national theatrical distribution of imported flat fee films, independent of the State Owned Enterprise CFG and Huaxia. Despite the rapid growth of screens in China and the strengthening of local productions, the market is still deliberately distorted to limit the number and impact of imported films.

Commitments made by China at the conclusion of the S&ED to promote private distributors remain unmet. The Chinese Government has not officially posted or released in China anything about those commitments or publicized how it will implement the reforms, which would allow Chinese distributors to understand how licensing and distribution would practically work for imported films outside of the quota system. As a result, many U.S. producers (principally independents) have very limited export opportunities in China, and flat fee releases have seen a decline in revenues.²⁸

In consultations regarding the Agreement in 2017, IIPA recommends that the following issues be at the forefront of the discussions:

- further relaxing the quota for revenue sharing films so filmmakers and audiovisual companies may enjoy the rapidly growing marketplace for films in China;
- increasing U.S. producers’ share of revenues from the current 25%;
- allowing 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
- ensuring U.S. producers have access to ticketing system information to ensure proper reporting of revenues.

Unacceptable New Barriers for Online Audiovisual Content: SAPPRT published Draft Measures for the Administration of the Distribution of Audiovisual Programs over the Internet and Other Information Networks for public comment in June 2015. The Draft Measures describe the application process and eligibility criteria for service providers to show audiovisual content on the Internet and mobile platforms, following on the September 2014 SAPPRT Notice on Further Implementation of Provisions Concerning the Administration of Online Foreign Films and TV Dramas. That September 2014 Notice required online distributors of foreign films and TV dramas to obtain

²⁷For 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 SAPPRT. 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.

²⁸The independent film industry, which produces the majority of U.S. films, continues to experience limited access to the Chinese marketplace, and is only able to secure a very limited number of revenue sharing quota slots. Most independent films are still imported and theatrically distributed in China on a non-revenue share basis, and suffer from lack of distribution options and below-market commercial terms. Both the financial return and the license fees for the underlying films are massively eroded by the lack of qualified theatrical distributors who can adequately support a nationwide theatrical release, and by a relatively non-competitive and non-transparent marketplace. The lack of legitimate distribution opportunities for independent films make these films particularly vulnerable to piracy, as Chinese consumers struggle or are unable to find the content they want through legitimate channels. See IFTA Comments Concerning China’s Compliance with WTO Commitments filed September 23, 2015 in Docket USTR-2015-0010 available at <http://www.ifta-online.org/sites/default/files/IFTA%20Comments%20in%20response%20to%20USTR%20Request%20Concerning%20China%27s%20Compliance%20with%20WTO%20Commitments%202015-0010%20September%2023,%202015.pdf>

permits, submit content to SAPPRFT for censorship review, and register and upload relevant information by March 31, 2015 on SAPPRFT's official registration platform. The Notice also capped foreign content at 30% and declared that foreign films and TV dramas not registered by April 1, 2015 would not be allowed for online transmission.

The September 2014 Notice has had a damaging effect on Chinese websites and the licensing of audiovisual content. Chinese distributors are delaying or decreasing licensing activity, pointing to the uncertainty of the new Notice, and have cited conflicting reports on the corresponding requirements. There is serious concern that delays in clearing legitimate content will inadvertently result in a resurrection of rogue sites providing uncensored content. The Notice also imposes a new formality — a registration requirement — which will be difficult and costly to meet; creates censorship delays, which will undoubtedly lead to increases in online piracy; and imposes an unwelcome new quota that will do nothing but stifle the industry. Raising new market access barriers for online distribution of films and television programming impairs legitimate licensing relationships and revenue streams, and further limits opportunities in what is already an opaque marketplace that imposes burdens on U.S. productions.

The SAPPRFT Draft Measures could have a detrimental effect on China's audiovisual market, depending on how they are finally issued and implemented. For example, one of the basic conditions for a work unit to engage in online radio and television services is that it is an exclusively State-owned or State-held work unit. As another example, there are other provisions that appear to invite or even require approved work units to engage in all kinds of content review or censorship (for example, Articles 5, 21). It also appears (but is unclear) that foreign news organizations may be excluded by virtue of Article 22. Other aspects of the Draft Measures seem fairly positive, such as the ability to enforce against one who, without permission, retransmits, links to, compiles, integrates (Article 23), or inserts content into, withholds or modifies (Article 17) audiovisual programming.

Further, in November 2015 a news report indicated that China may cut import licenses for legitimate DVD imports in an effort to further restrict the online distribution of foreign movies and television shows.²⁹ China's lapse toward protectionism in the audiovisual sector is a mistake, and it is critical to send a strong message that these policies are unacceptable, particularly at a time when China's marketplace in this sector has the potential for explosive growth. China should instead focus its attention on complete implementation of the WTO market access decision, the 2012 U.S.-China Film Agreement, and other market opening steps for the music, publishing, video game, and motion picture and television industries.

²⁹According to a report, DVD imports affect online content because "[w]hen a distributor gets a government license to physically import a TV show or movie, usually in the form of DVDs and Blu-ray discs, it is also permitted to post the content online..." See *China to Tighten Limit on Foreign TV and Video Imports*, November 16, 2015 available at <http://www.wsj.com/articles/china-to-tighten-limit-on-foreign-tv-and-video-imports-1447672849>.