

# CHINA (PRC)

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2017 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that USTR maintain China on the Priority Watch List in 2017 and that China be monitored under Section 306 of the Trade Act.<sup>1</sup>

**Executive Summary:** China's rapidly developing marketplace holds enormous potential for the creative industries. An increasing number of licensed digital services provide Chinese consumers with access to a vast array of legitimate music, movies, TV programming, and other works. Outside the online environment, China now exceeds the United States with over 40,000 movie screens, many of which offer enhanced formats such as IMAX and 3D. Some of the market potential has begun to be realized, thanks in part to improved enforcement efforts, particularly against unlicensed music, which have contributed to accelerated gains for certain sectors. At the same time, China's legacy of piracy continues to distort the market, including by severely depressing licensing revenues, and its continued pursuit of policies that deny fair and equitable market access to U.S. content producers and distributors threatens to undermine the progress that has been achieved.

IIPA is encouraged by some actions China took in 2016 to combat piracy, including the continued crackdown by the National Copyright Administration of China (NCAC) on unlicensed motion picture, television, and music platforms, and some positive steps to combat the problem of unauthorized camcording in Chinese cinemas. Notwithstanding NCAC's announced focus on combatting piracy apps in 2016, NCAC should improve efforts in 2017 against the piracy app ecosystem. That ecosystem, which supports Illicit Streaming Device (ISD) piracy, has emerged as a key means of facilitating access to pirated audiovisual materials in China and requires a sustained response. Chinese authorities' ongoing failure to adequately address blatant online piracy of journals of scientific, technical, and medical (STM) journal articles and academic texts has led to new copycat services, operating undeterred, that facilitate unauthorized access to STM materials and threaten the professional publishing market. The amendments to the Copyright Law are a high priority, which should be made "first tier" legislation and should ensure China effectively addresses its piracy challenges and is in compliance with international norms. The new Criminal Law amendment includes a potentially helpful secondary liability provision, and its implementation should be followed closely.

China should reverse course and abandon proposals that discriminate against U.S. creative industries and should eliminate market access barriers, which exacerbate China's piracy problem. For example, China should abandon a March 2016 proposal that would require registration of Internet domain names through a licensed domestic service provider, and a May 2016 proposal that would require state-owned media companies to have a stake in online platforms for films and TV content. China should also reconsider the revised Online Publishing Rules prohibiting foreign involvement in online publishing activities, and revoke measures—including the Notice and Measures on Administration of Online Foreign Films, the Statement and Rules on Importing TV Formats, and longstanding restrictions on broadcast and pay television—that discriminate against foreign content.

IIPA seeks further reforms to improve access to China's growing theatrical film market for U.S. film producers. China must fully implement the 2012 U.S.-China Film Agreement. Implementation thus far has been incomplete and, combined with new barriers to authorized online distribution of imported films and TV programming, it creates 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 this year's consultations on the Agreement, commensurate with commitments made by China in bilateral engagements.

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<sup>1</sup>For more details on China's Special 301 and Section 306 monitoring history, see previous years' reports at <http://www.iipawebsite.com/countryreports.html>. For the history of China's Special 301 placement, see <http://www.iipawebsite.com/pdf/2017SPEC301HISTORICALCHART.PDF>.



## PRIORITY ACTIONS REQUESTED IN 2017

### Enforcement:

- Take further effective action against the online piracy ecosystem, including against: piracy websites, such as *zimuzu.tv*, *dytt8.net*, *ttmeiju.com*, *dy2018.com*, *cn163.net*, *yyp3.com*, and *freevampires.net*; plugin player *xigua* and its related piracy ecosystem; and apps such as *baofeng*, *MoreTV*, *BeeVideo*, *TVFan*, and *Tian Lai K Ge* (an infringing Karaoke app).
- Bring more targeted and deterrent actions, with transparency, against ISD piracy (including against dedicated piracy apps), unauthorized camcording, and hard goods piracy (including against production and supply of high quality counterfeit optical disks).
- Improve effectiveness of administrative enforcement, including by imposing enhanced penalties against repeat infringers and infringers that make available massive amounts of infringing content; increasing transparency (e.g. notifying rights holders of the results of administrative actions); and 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.

### 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., ensuring a remedy against apps facilitating infringement; adopting a proper right of communication to the public and broadcasting for sound recordings; clarifying safe harbor requirements; providing a term of protection in line with the international trend; and ensuring that exceptions to and limitations on copyright are adequately defined and appropriately narrow in scope).
- Implement the new property rights protection guidelines regarding intellectual property rights (IPR).

### Market Access:

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

## COPYRIGHT PIRACY UPDATES IN CHINA

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

**Persistent Online Piracy in China:** Online piracy in China is persistent and takes a variety of forms, including websites (illegal download sites, peer-to-peer (P2P) piracy sites, deep linking sites, cyberlockers, BitTorrent indexes or trackers, forums, streaming sites, social media websites, and online marketplace/auction sites selling pirated goods and high quality counterfeits); apps facilitating piracy, available on myriad devices; and ISDs such as media box or set-top boxes by which users access infringing content, usually through a television. The piracy app ecosystem, which facilitates piracy on a range of devices (including mobile, handheld, and TVs) has been expanding at an alarming rate. App websites provide a portal allowing users to download an app to their device, giving them access to pirated content, including motion pictures and television programming. Examples of such sites include *BeeVideo.tv* and *MoreTV*, which were 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 2016. Another app provided through a website portal, *Baofeng*, has been downloaded over 400 million times worldwide and has reached far beyond China, facilitating massive piracy of, among other things, latest-run motion pictures. In 2016, the music industry reported 236 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, the Apple App Store has been slow to take down the apps, and Chinese enforcement authorities have been reluctant to take appropriate action.<sup>3</sup> 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. For example, another site identified by IIPA members in its "notorious markets" filings was *freevampires.net*, a "read-online site" that makes available unauthorized copies of books to be read online, which was registered in China in 2015. Other notorious piracy sites that disrupt the audiovisual marketplace include *zimuzu.tv*,<sup>4</sup> *dytt8.net*, *ttmeiju.com*, *dy2018.com*, *cn163.net*, *dygang.com*, *loldytt.com*, *piaohua.com*, *bt1199.com*, *80s.tw*, *meijutt.com*, *ygdy8.net*, *dysfz.net*, and *lbdy.com*. Streaming sites continue to increase. One music streaming service, *yymp3.com*, was hosted in China but now uses a U.S.-based reverse proxy service to obscure its location and has stopped responding to takedown request notices. The music industry reports that based on their monitoring, 55% of the 467,405 infringing music links they discovered in 2016 were to music streaming websites, 28% were to video streaming websites, and just 5% were to cyberlockers.

Moreover, in a recent and virulent form of piracy, those who visit piracy websites are enticed to create their own derivative sites to generate revenue for themselves and for the mother site. The network of such sites currently numbers in the thousands. The users download a proprietary video player (often malware, which links the user's computer to the website), which provides applications allowing users to access infringing content over a proprietary P2P network or a content delivery network (CDN).<sup>5</sup> 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 proprietary video player, and a Video Collection Resource (VCR) website provides these derivatives sites with access to the infringing content. These user-created piracy websites generate traffic (and income) for their owners, and the

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<sup>2</sup>See, e.g., IIPA 2016, <http://www.iipawebsite.com/rbc/2016/2016SPEC301CHINA.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.

<sup>3</sup>Apple has only taken down two of four *Tian Lai K Ge* apps after a protracted complaint process. The music industry has filed an administrative complaint with NCAC. Appropriate action should include at least forfeiture of illegal proceeds, seizure of tools and facilities as well as a fine, in addition to removal of the reported infringing content.

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

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

proprietary video player embedded into these websites links back to the original website, generating traffic (and income) for its owners. Chinese enforcement authorities must investigate and take action against 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.

**Illicit Streaming Device (ISD) Piracy:** ISDs<sup>6</sup> are media boxes, set-top boxes or other devices that allow users, through the use of piracy apps (as discussed above), to stream, download, or otherwise access unauthorized content from the Internet. These devices have emerged as a significant means through which pirated motion picture and television content is accessed on televisions in homes in China as well as elsewhere in Asia and increasingly around the world. China is a hub for the manufacture of these devices. The devices may be promoted and/or advertised to enable infringement of copyright or other illegal activities. These activities include facilitating easy access, through apps, to remote online sources of unauthorized entertainment content including music, music videos, karaoke, motion pictures and television programming (including encrypted content), video games, published materials, and TV dramas. The devices are either pre-installed with apps that facilitate infringement (either prior to shipment or by vendors prior to sale or as an after sale service), or users themselves are easily able to obtain and install the apps required to access the infringing content.

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

**Worsening Online Journal Piracy:** The problem of online journal piracy continues to worsen. China's continued failure to take effective action against the KJ Med entity, including the Beijing Municipal Procuratorate's recent denial of an appeal of the decision not to prosecute, underscores the lack of effective criminal remedies against even the most egregious infringers in China.<sup>7</sup> It also highlights both significant limitations in evidence gathering by criminal law enforcement authorities and their unreasonably narrow interpretation and application of the law. The unfortunate lack of deterrence in the marketplace thus continues to encourage copycat services to operate. In July 2015, the publishing industry filed an administrative complaint with the Guangdong Provincial Copyright Bureau against a new but similar service, Metstr. Although the case remains under investigation by Chinese enforcement authorities, progress is slow. Operating undeterred, these illegal services generate increasing revenues, and their operators receive greater returns on their investment, incentivizing them to provide more sophisticated, user-friendly forms of their services, such as through mobile apps. In addition, a growing number of online platforms have emerged that facilitate access to unauthorized copies of journal articles, including *syyi.com*, Baidu Paperhelp, and UReader. These platforms host unauthorized pdf copies of academic monographs, edited collections, and textbooks. For example, Baidu Paperhelp appears to facilitate the exchange of copyright protected academic papers among its users, and awards credits for providing unauthorized copies of the copyrighted works. Unfortunately, given the difficulties enforcing against online entities, these platforms continue to operate with impunity. Chinese authorities

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<sup>6</sup>In past filings, IIPA has referred to Illicit Streaming Devices (ISDs) as media boxes or set-top boxes. Because media boxes and set-top boxes have non-infringing uses, IIPA is changing our terminology to ISDs to make clear that we are referring to devices that are used to access pirated content.

<sup>7</sup>The KJ Med entity, which offered scientific, technical and medical (STM) journal articles for purchase and delivery by e-mail without authorization from nor compensation paid to journal publishers, was first brought to the attention of Chinese enforcement authorities in 2006. After the original investigation languished, the current investigation began in 2011, but was not referred to criminal enforcement authorities until 2014. Despite the scope, scale, and clear criminal intention of KJ Med's infringing activities, in December 2015, the Haidan Procuratorate declined to pursue a criminal case against its operators. In December 2016, the Beijing Municipal Procuratorate denied an appeal of the Haidan Procuratorate's decision not to criminally prosecute the KJ Med operators.

have thus far failed to take appropriate action on an April 2016 administrative complaint the publishing industry filed against UReader with the Beijing Cultural Enforcement Department.

Furthermore, pirated print publications and compromised log-in credentials continue to be widely available on e-commerce sites. Unfortunately, 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, copyright registration documents, and authorization letters.

**Circumvention Devices:** 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 TPMs in a video game console in order to download and play illegal video games. 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. These 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.

**Unauthorized Camcording Remains a Concern:** Unauthorized camcording of movies in theaters—a key source for online audiovisual infringements—is one of the most damaging problems in China for the film industry, and high quality camcords are increasingly sourced to China.<sup>8</sup> 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 criminal convictions for camcord piracy in Hefei in November 2014 and in Hubei in September 2016 are positive signs. Moreover, in 2015, SAPPRFT issued notices that recognized the threat camcording poses to the film industry, calling for Chinese cinema owners to more effectively address camcording incidents, and requiring all film post-production units to enable digital watermarking to aid enforcement efforts. The new Film Promotion Law, set to take effect on March 1, 2017, allows cinema personnel to take action against camcording, although unfortunately the law fails to provide for any form of sanctions, 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. In addition, the Chinese Government, theater owners, and others associated with the chain of theatrical distribution of films must make still stronger efforts to deter unauthorized camcording under current law.

**Pirate/Counterfeit Books and Hard Goods, Including for Export, Remain Problematic:** The copyright industries continue to report piracy of hard goods, which harm both the domestic Chinese market and markets outside of China. Pirate/counterfeit production of textbooks, consumer books, and trade books is a substantial problem. Reports indicate that pirated (largely consumer and religious) books printed in and exported from China are showing up in parts of Africa. China needs to follow through on commitments made in the Joint Commission on Commerce and Trade (JCCT) for transparent, comprehensive, and verifiable progress for strengthening IP protection for published materials and other copyrights in university (including library) settings. Although physical piracy at universities 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 an export center for pirate DVDs of movies and music CDs as well, feeding the global market with an onslaught of illegal copies of foreign and Chinese movies and music products, including High Quality Counterfeit (HQC) box sets of motion picture and television content and music content, often through e-

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<sup>8</sup>As of November 2016, 15 forensic matches of MPAA studio titles available online have been traced to camcording in Chinese theaters.

commerce platforms. China must implement an effective program to stop and prevent future production and supply of HQC optical disks, sold through popular Chinese and international online marketplaces, including Alibaba, Amazon, Dhgate, eBay and Taobao.

## **ENFORCEMENT UPDATES IN CHINA**

IIPA remains encouraged that China continued to take certain positive steps in 2016 to combat piracy, contributing to commercial gains in some creative sectors. More local Chinese rights holders are initiating lawsuits and seeking enforcement actions against major pirate operators, which has improved the climate for enforcement. But China's historic lack of enforcement remains a substantial impediment, which is why, notwithstanding recent actions, online piracy, and its negative impact on monetization options for licensed platforms, remains the dominant issue in China. As of the end of 2016, China had the largest Internet user base in the world, estimated at 731 million users, including 695 million mobile web users. This creates the potential for enormous market opportunities for rights holders; but a historic toleration for piracy and resulting overlapping consumption of legal and illegal content have kept revenues from creative content far below their commercial potential. Although the market for legitimate content has improved, more progress must be achieved for this potential to be realized, because the ease of access to pirated content hinders the monetization of legitimate services.<sup>9</sup>

**Efforts to Combat Unlicensed Music Bearing Fruit:** There were notable signs of progress in enforcement against online piracy in China over the past year, particularly regarding efforts to combat unlicensed music. As noted in our 2016 submission, the 2015 version of China's "Sword Net" anti-piracy campaign focused on cracking down on unlicensed music.<sup>10</sup> As a result, significant amounts of unlicensed works were taken down from music platforms and there was an encouraging wave of licensing activity, with numerous platforms becoming licensed by many rights holders.<sup>11</sup> NCAC is reportedly reviewing the results of this campaign to determine its next steps, but has not proactively taken enforcement actions against noncompliant platforms. In 2016, the music industry filed 258 administrative cases with NCAC, with a 76% resolution rate, including: closure of 25 infringing websites and apps; punishment against 9 music websites; changes in business models for 31 websites (ceasing to offer music); deletion of infringing tracks on 89 websites; and warnings issued by local law enforcement against 47 websites.<sup>12</sup>

China's progress in cracking down on unlicensed music services has helped contribute to substantially increased revenues for the music industry. In 2015 the total music market was US\$169.7 million, up 63.8% from the previous year, and revenues from digital sales were US\$151.9 million, up 68.8%.<sup>13</sup> That said, the legitimate music market in China is still nowhere near its potential, primarily due to the continued availability of unlicensed music 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 14th globally, behind much smaller markets such as South Korea and Sweden. Revenues remain a small fraction of what they should be even when compared to revenues seen in comparably developed markets. Furthermore, online music piracy sites and hard goods exports from China continue to negatively affect foreign markets, e.g., Hong Kong, Taiwan, Japan, Singapore, and Malaysia, among others.

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<sup>9</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.

<sup>10</sup>See IIPA 2016 at 19.

<sup>11</sup>Various Chinese online music platforms including Kuwo, Kugou, QQ Music, Xiami, TTPod and NetEase 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.

<sup>12</sup>Difficulties in Internet enforcement in China include evasive techniques of the proprietors of the infringing sites. While all Chinese websites have to register with *miibeian.gov.cn*, and while one can search the proprietors (people or companies) by using their registration number, domain name, IP address, or "Whois" data, many infringers use fake registration information, making it much more difficult to locate the actual person or company.

<sup>13</sup>Total music revenues in 2014 were US\$105.2 million, and revenues attributed to digital sales were US\$91.4 million.

**Additional Signs of Progress, But Challenges Remain:** Through industry actions and NCAC support, some online piracy services causing grave harm to the audiovisual industry in China were shuttered in 2016.<sup>14</sup> Five criminal cases were brought by police in Jiangsu Province, and there are 13 ongoing administrative cases (10 referred to NCAC as part of Sword Net, 2 brought by local enforcement agencies in Jiangsu Province, and 1 brought by the Hefei Cultural Task Force). Notwithstanding these actions, as noted above, dozens of notorious piracy websites remain, disrupting the legitimate market for creative content.

While the actions of NCAC and other enforcement authorities have made some progress against infringing websites, the Chinese government has only recently begun to prioritize the growing problem of infringing apps. The 2016 Sword Net campaign included a focus on combatting piracy apps and resulted in some notable enforcement actions. For example, in response to a music industry complaint, in 2016 the Chongqing General Brigade of Cultural Market Administrative Law Enforcement ordered the operator of the infringing mobile music app *Song One* to pay a fine of RMB 30,000 (US\$4,360) and confiscated its illegal income of RMB 3,000 (US\$436). Separately, enforcement authorities in Shanghai fined the operators of infringing mobile apps *QingTing FM* and *ECHO* RMB 20,000 (US\$2,907) and RMB 200,000 (US\$29,060) respectively.<sup>15</sup> Furthermore, effective January 16, 2017, all app stores must register with the State Internet Information Office's local branches, which holds the potential to enhance the Chinese government's ability to take action against piracy apps. In 2016, the music industry reported 236 infringing mobile apps to mobile app marketplaces, mostly Android Markets, and the takedown rate upon notice to Apple was 96%, while the takedown rate for infringing Android apps was 85%.<sup>16</sup> More needs to be done, including an effective enforcement campaign against "rogue" app developers found to facilitate copyright infringement.

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. In July 2016, the music industry monitored 16 major cyberlockers (i.e., online storage providers) and, of the 16, 9 have been closed and 4 have shut down their file sharing functionality. 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.<sup>17</sup> 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 approximately 96%, although infringing content reappears quickly as there is no requirement for ISPs to ensure this content stays down permanently. Also, unfortunately, it is often difficult for rights holders to identify infringers and their locations because ISPs only provide this information in response to government requests. Additional cooperation is needed. In a positive development, Baidu has recently agreed to provide a simplified and expeditious takedown tool for motion picture and television content, and to demote infringing video listings of new release titles on the top ten pages of Baidu search results.

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 with infringing music, and for Baidu to halt advertisements on such marked websites. The first stage of the action was launched in April 2014. Hundreds of links have been reported since. According to the music industry, 4036 links have been reported to Baidu from the launch of Qingyuan Action through December 2016, and Baidu has taken down its advertisements on the reported infringing websites.<sup>18</sup>

<sup>14</sup>These sites include *mp4ba.com*, *xiamp4.com*, *dytt.com*, and *4567.tv*, *bttiantang.com*, *k178x.com*, and *andjvcd.com*.

<sup>15</sup>According to Similarweb, QingTingFM recorded more than 1.5 million visits per month from China during 2016.

<sup>16</sup>The music industry reported 48 infringing apps to Apple, and 148 infringing Android apps to Baidu and 34 to Tencent.

<sup>17</sup>In 2016, 59,056 links were sent to Baidu, and all were removed. Sina Disk (a cyberlocker service provided by Sina) has shut down its sharing and uploading functions. In 2016, NCAC also released a list of 284 movies and TV episodes that needed to be specifically monitored.

<sup>18</sup>Unfortunately, infringement on most of these websites still remains.

In addition, pursuant to Sword Net, NCAC has begun to monitor the top three advertising networks in China, Baidu, Alimama (of Alibaba Group), and 360, to help eliminate illegal advertising revenue to rogue sites. In November 2016, China's top four advertising networks, Baidu, 360, Alimama, and Tencent, jointly called for industry self-enforcement against piracy sites. Among other things, the advertisers committed to terminate advertisements on websites identified by the NCAC and the State Administration for Industry and Commerce (SAIC) on a "blacklist" of piracy sites, or that have been subject to repeated complaints from copyright holders.

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

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

As noted above regarding the growing problems of ISD piracy and networks of "do-it-yourself" piracy websites, the piracy challenges in China are constantly evolving and becoming more complicated. Chinese enforcement capabilities are lagging behind; authorities must adapt to keep pace with illegal piracy activity. Accordingly, the Chinese Government should be encouraged to expand resources and capability at NCAC, local Copyright Administrations (CAs), and Law and Cultural Enforcement Administrations (LCEAs), commensurate with the scale and complexity of the piracy problem. 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.<sup>19</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 Made "First Tier" Legislation:** While amendments to the Copyright Law remain with the State Counsel Legislative Affairs Office (SCLAO), many local stakeholders, including

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<sup>19</sup>See, e.g., IIPA 2016 and IIPA 2015 at <http://www.iipawebsite.com/rbc/2015/2015SPEC301CHINA.pdf>. Previous developments included the National People's Congress passing legislation to establish IP Courts in Beijing, Shanghai and Guangzhou. The IP court in Beijing opened on November 6, 2014, has four hearing rooms, and as of December 2014 had selected 22 of its 30 judges. These IP courts handle civil and administrative cases related to patents, computer software, technology secrets, trademarks and some copyrights (when cases meet certain thresholds), according to the Supreme People's Court (SPC). The IP courts in Shanghai and Guangdong opened in December 2014. According to the SPC, from November 2014 to November 2015, 8219 were accepted by the Beijing IP court, with 3859 cases closed; 1488 cases were accepted by the Shanghai IP court with 887 closed; and 4612 cases were accepted by the Guangzhou IP court, with 2613 cases closed.

Chinese companies, are pressing for the draft to be moved from second tier to first tier legislation to ensure swifter consideration by the National People's Congress (NPC).

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.<sup>20</sup> 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.

The draft, however, contains a number of deficiencies that IIPA hopes will be addressed. First, it is critical that the legislation clarify China's Copyright Law to ensure adequate and effective enforcement against apps that facilitate unauthorized access to copyrighted works. The draft should clarify that the right of "communication over information networks" clearly permits action against an app that makes available content to users without authorization, regardless of where the content is stored. Certain Chinese IP judges have embraced the "server principle," interpreting current law to require that infringement only occurs when the infringing content resides on the server or device of the operator of the app. Clarifying the law to reject the "server principle" is necessary because these illicit apps typically facilitate unauthorized access to content stored on remote servers. Furthermore, it should be clarified that liability should attach where an app circumvents TPMs used by legitimate rights holders to prevent unauthorized access to their content (again, regardless of where that content is stored). Article 48(6) of China's Copyright Law should be clarified to ensure liability for app developers who circumvent TPMs that control access to content (i.e., access controls), without the need to prove a copyright infringement occurred. Apps 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 amendments should address these deficiencies, and judicial interpretations should be issued to provide clear guidance to the judiciary.

In addition, some of the current proposals may require revisions before enactment to avoid conflicts with China's WTO obligations, or inconsistencies with current international or best commercial practices.<sup>21</sup> 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 no knowledge of the infringement or, upon notice or otherwise obtaining knowledge, promptly took reasonable steps to limit or stop the infringement, including expeditious takedown of infringing content; 3) ISPs cannot modify the content or interfere with the TPMs used by copyright owners to protect their works; and 4) ISPs must have policies to take effective action against repeat infringements.<sup>22</sup> In addition, IIPA is disappointed that the present draft leaves in place China's outdated term of copyright protection. China should bring its term of protection in line with the majority of The Organization for Economic Cooperation and Development

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<sup>20</sup>The latest draft has deleted the reference to "blocking" which was in previous drafts, but retains 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.":).

<sup>21</sup>The 2015 IIPA submission identified a more comprehensive list of concerns and suggestions regarding the draft legislation including, notably, regarding the collective management provisions, which includes the fraught concept of "extended collective management" and improper limitations on right holder remuneration and compensation. See IIPA 2015 at 21-22. 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>22</sup>These 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.

(OECD) countries and the international trend (to 70 years after the death of the author, or in cases in which term is calculated based on publication, to the U.S. term of 95 years, but in any case, no less than 70 years). Not only would this ensure Chinese creators receive the full global benefits from their creations, it would provide greater incentives for the production and dissemination of creative works, and provide all producers with a stronger incentive to invest in local industry. This in turn would spur economic growth and tax revenues and enable producers to continue offering content to local consumers in the latest formats.<sup>23</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. In addition, the Copyright Law must include a legal basis for injunctions against ISPs in copyright cases, including against access providers, requiring them to stop providing access to unlicensed copyrighted content in cases where the content is hosted outside of China or where the identities or locations of the website owners are unknown. Once enacted, the government should monitor test cases brought to ensure the law operates effectively and fairly to all parties.

**Criminal Code Reform:** On August 29, 2015, China adopted the Ninth Amendment to its Criminal Law (“Ninth Amendment”), which took effect on November 1, 2015. Among other things, the Ninth Amendment includes a potentially helpful secondary liability provision, adding 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 and 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 the following shortcomings in China’s criminal enforcement framework:

- Thresholds are too high (in the case of illegal income) or unclear (e.g., in the case of the copy threshold).<sup>24</sup>
- 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. 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.
- 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.
- Presumption of copyright ownership is inadequate and creates unnecessary substantial burdens on rights holders, impeding effective enforcement.<sup>25</sup>
- Criminal accomplice liability with respect to imports and exports is limited (with lower penalties available).
- There are uncertainties regarding increased penalties against repeat offenders.
- 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.

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<sup>23</sup>More than 80 countries protect some or all creative materials per the terms stated. Twenty-eight out of the 32 member countries of The Organization for Economic Co-operation 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.

<sup>24</sup>The 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. Thresholds that inhibit effective enforcement against online journal piracy must be updated to reflect reality. There may also be a need to address thresholds so that non-hosted online services such as peer-to-peer (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.

<sup>25</sup>Even after establishing proof of ownership, it is practically impossible to shift the burden to an alleged infringer to demonstrate that use of a copyrighted work is within the scope of a license.

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

**Draft E-Commerce Law:** In December 2016, the NPC released a draft E-Commerce law for public comment. The draft law is wide in scope, intending to broadly regulate e-commerce activities, and includes a section that covers intellectual property rights. It outlines notice and takedown procedures that appear to include a streamlined notification requirement that would be less onerous for rights holders than the requirement in the Network Rules. The requirement for platforms to take down infringing content when they are “aware” of IP infringements should be broadened to require takedown when a platform “knows or should know” that the content is infringing. Furthermore, platforms should be obligated to cooperate with rights holders and take reasonable measures to prevent infringement. Finally, the provision that rights holders are liable for losses suffered by platforms as a result of erroneous notices should be amended to ensure that rights holders are only liable for losses caused by notices in which a rights holder knowingly, materially misrepresented that the content is infringing. Some rights holders already experience good cooperation with some e-commerce platforms through voluntary arrangements by which infringing content is expeditiously removed from the platforms. Thus, any implementation of this e-commerce bill should not upset those existing arrangements.

**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>26</sup>

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

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

The positive actions China has recently taken to improve enforcement against piracy may well be for naught due to the Government of China’s continued pursuit of policies that impede the U.S. creative industries’ access to the Chinese marketplace. This direct relationship between the fight against piracy in China and the need for liberalized

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<sup>26</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 all or nearly all the evidence that a crime has been committed rather than a reasonable suspicion standard.

market access to supply legitimate product, both foreign and domestic, to Chinese consumers was a motivating factor when several IIPA members, believing that China was not living up to its WTO obligations, urged the United States to bring a case against China regarding many market access barriers in music, audiovisual products, and publications. The United States prevailed in that case, and, after the case concluded in 2009, China eased several market access restrictions.<sup>27</sup> Yet many core activities of copyright industries remain restricted or prohibited.<sup>28</sup> While IIPA has been hopeful China would continue to make progress and address longstanding market access barriers, the Government of China has recently introduced a slew of measures that appear to be in violation of its international obligations.

**Growing Online Market Access Concerns:** In February 2016, SAPPRFT released revised Online Publishing Rules, which took effect in March 2016, that appear to expand the scope of longstanding restrictions on the involvement of foreign entities from online publishing activities.<sup>29</sup> The rules follow China's amendment of the Foreign Investment Catalogue, released by the Ministry of Commerce (MOFCOM) in March 2015, which added "network publication service" to the "Prohibited" list. The rules appear to expand the definition of "online publishing" to include maps, games and online databases, and a "catch-all" provision to cover new types of digital works to be determined by SAPPRFT. The full impact of these measures on activities newly covered under the revised regulations are not yet clear; unfortunately, early indications signal that these measures are likely to have a chilling effect on foreign investment in online publishing services where, prior to the rules, some latitude appeared to have been granted.<sup>30</sup>

China has also recently introduced a raft of alarming draft measures that, if implemented, would clearly discriminate against U.S. producers and distributors of creative content. For example, in March 2016, MIIT issued draft regulations that, among other things, would require all Internet domain names available in China to be registered through a licensed, domestic service provider. In May 2016, SAPPRFT proposed policies that, if implemented, would provide state-owned media companies with voting control over leading online platforms for films and TV content.<sup>31</sup> While this proposal was temporarily suspended due to significant opposition from online platforms, there is concern that it may reemerge. In April 2016, China published a set of administrative measures on e-commerce that discriminate against foreign suppliers; and in June 2016, China published new content approval regulations for mobile games that make it extremely difficult for foreign publishers of mobile games to access the Chinese market.

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<sup>27</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>28</sup>For example, the Negative Investment List in the Shanghai FTZ expressly prohibits investment in "online audio and video programs," as well as so-called "Internet cultural business," while the rules also indicate, "Foreign investors are forbidden to be engaged or involved in operation of online video games directly or indirectly." Publishing likewise remains a prohibited investment category, with publishers prohibited from undertaking core publishing activities such as editorial and production work, and unable to determine which works, and how many, to bring to market. Other rules of the Ministry of Culture (MOC) also appear to create conflict with respect to foreign-invested entity involvement in Internet distribution of music. For example, where music files are stored on the servers of the Operating Entity for the purpose of being downloaded or streamed by consumers, such services will be considered as "dissemination of audio-video over Internet" services (IP-TV Service) and an IP-TV Permit must be issued by State Administration of Press, Publication, Radio, Film and Television (SAPPRFT). According to Article 7 of the Management Rules for the Dissemination of Audiovisual Programmes through the Internet (2004), an IP-TV Permit is not available to any Operating Entity that is a foreign-invested enterprise. For imported music files, the relevant license holder also needs to obtain an import-related approval from MOC.

<sup>29</sup>The February 2016 Online Publishing Rules revises and consolidates longstanding regulations, the Provisional Internet Publishing Management Regulations of 2002, that restricted foreign involvement in online publishing activities. A December 2012 draft of the revised regulations was made available for public comment.

<sup>30</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>31</sup>The proposal was for leading online video platforms to sell up to a 10% "special management stake" and cede at least one board seat to selected state-owned media companies.

This flurry of discriminatory measures follows other measures China has introduced in the last couple years to restrict the online distribution of foreign audiovisual content. SAPPRFT recently finalized Measures for the Administration of the Distribution of Audiovisual Programs over the Internet and Other Information Networks that 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 SAPPRFT Notice on Further Implementation of Provisions Concerning the Administration of Online Foreign Films and TV Dramas. That Notice caps the online distribution of foreign films and TV dramas at 30%, and requires online distributors to register content, obtain permits, and submit content for censorship review. The regulations allow only one opportunity to submit content for registration and censorship per year, which, because of the nature of television production, does not allow for submission of a full season of a television series. Consequently, the rules significantly delay and curtail the legitimate access of Chinese consumers to U.S. television content. The Notice also has had a damaging effect on Chinese websites and the licensing of audiovisual content, and has made “day-and-date” releases<sup>32</sup> impossible. Chinese distributors are delaying or decreasing licensing activity, pointing to the uncertainty of the Notice, and have cited conflicting reports on the corresponding requirements. There is serious concern that these systemic delays and limitations on Chinese consumers’ ability to access legitimate content will lead to increased piracy.

In addition, 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 Ministry of Culture (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.<sup>33</sup>

**Additional Audiovisual Market Access Concerns:** China maintains a number of longstanding discriminatory restrictions on audiovisual content that harm the U.S. industry, limiting its ability to compete fairly and inhibiting its potential growth. 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. Furthermore, foreign satellite channels beaming into China are required to downlink from a government owned encrypted satellite platform, and may only be shown in three-star hotels and above and in foreign institutions. The annual fee for each channel remains excessively high at \$100,000. In addition, 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.

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 is clearly intended to promote indigenous Chinese radio and television programs at the expense of foreign content. Among other things, the rules establish a procedure for filing/registration of foreign content by satellite television channels that would apply to jointly developed programs or programs with foreign personnel playing a “major guiding role” in production if the Chinese party does not “fully obtain intellectual property rights” in the program. Only two of these “foreign” programs are permitted to be broadcast in prime time per year; and no more than one new foreign program may be broadcast at any time per year, but it cannot be broadcast in prime time for that first year. This distortion of China’s market for

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<sup>32</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>33</sup>The 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.

television and radio content will negatively impact U.S. producers and appears to contravene China's WTO obligations.

China's further lapse toward protectionism is a mistake. 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:** 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%. However, China has not implemented key provisions of the Agreement that would bring broad reforms and introduce competition, for example, to the distribution marketplace, benefitting more producers and increasing the number of films imported into China. Despite the rapid growth of screens in China and the strengthening of local productions, the market is still deliberately distorted to limit the access for imported films. In the case of "flat fee films," which are imported outside of the box office revenue sharing quota system, China has enforced restrictions, including an informal cap on the amount of these films that can be imported, that limit the ability of private Chinese distributors to import and distribute films outside the box office revenue sharing quota. Furthermore, China committed in the Agreement to promote and license privately-owned Chinese distributors to engage in national theatrical distribution, independent of the State Owned Enterprise CFG and Huaxia. Although China Film Corporation (CFC) recently held an initial public offering, the majority of shares are still owned by the Chinese government and the state owned enterprise tasked with the distribution. In addition, commitments made by China at the conclusion of the June 2015 S&ED to promote private distributors for imported flat fee films remain unmet despite these commitments already being made in the Film Agreement—including specifically paragraphs 4-8. As a result, many U.S. producers (principally independents) have very limited export opportunities to China, and flat fee releases have seen a decline in revenues.<sup>34</sup>

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

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

As noted above, China is still not in full compliance with the WTO's ruling in the landmark market access case (DS 363) brought by the U.S. in 2007 and concluded in 2009.<sup>35</sup> In particular, China must do more to open its

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<sup>34</sup>The 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>.

<sup>35</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>.

market to U.S. films, and take further steps to liberalize its online music market. Moreover, the new online publishing rules are also inconsistent with the WTO's ruling and raise concerns regarding China's obligations under the General Agreement on Trade in Services (GATS), particularly Article XVI on market access and Article XVII on national treatment.<sup>36</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 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 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>36</sup>In the recently published *2016 Report to Congress on China's WTO Compliance*, USTR acknowledges that the draft *Network Publishing Service Management Regulations*, the predecessor to the new rules, raise concern "relative to China's GATS commitment." See p. 157, report available at <https://ustr.gov/sites/default/files/2016-China-Report-to-Congress.pdf>.