Independent Film & Television Alliance®

10850 Wilshire Boulevard / 9th Floor
Los Angeles, CA 90024-4321
310-446-1000 TEL / 310-446-1600 FAX
www.ifta-online.org / info@ifta-online.org

Filed Via Regulations.gov, Docket USTR–2015–0010

Mr. Edward Gresser
Acting Chair, Trade Policy Staff Committee
Office of the United States Trade Representative
1724 F Street, NW
Washington, DC
20508

Re: **China's WTO Compliance** - Comments Re: "Request for Comments and Notice of Public Hearing Concerning China's Compliance With WTO Commitments"

To the Trade Policy Staff Committee:

IFTA submits these Comments in response to the TPSC's Request for Comments and Notice of Public Hearing Concerning China's Compliance With WTO Commitments and in connection with a hearing that will be held in Washington, DC on October 7, 2015[1]. The Independent Film & Television Alliance is the trade association for the independent film and television industry worldwide. Our nonprofit organization represents more than 150 member companies from 23 countries, consisting of independent production and distribution companies, sales agents, television companies, studio-affiliated companies and financial institutions engaged in film finance. IFTA defines "independent" producers and distributors as those companies and individuals apart from the major studios that assume the majority (more than 50%) of the financial risk for production of a film or television program and control its exploitation in the majority of the world.

Collectively, IFTA Members produce over 400 feature films and countless hours of programming annually. Over the last seven years, independent production companies have produced nearly 80% of all U.S. feature films. Since 1982, IFTA Members were involved with the financing, development, production and U.S. and international distribution for 63% of the Academy Award Winning Best Pictures® including *Gandhi, Dances with Wolves, Braveheart*, *Million Dollar Baby*, *Crash*, *Lord of the Rings*, *The Departed*, *No Country for Old Men*, *Slumdog Millionaire*, *The Hurt Locker*, and *The King's Speech.*

IFTA Members are active in the licensing of their television programming and feature films in China but have still not secured the distribution opportunities commensurate with a booming Chinese exhibition marketplace. Independents have been blocked out of theatrical distribution on a revenue share basis since the films selected for quota slots by the Chinese are by and large major Hollywood studio blockbuster films, but have found some limited access to the Chinese marketplace through non-revenue-share arrangements. These non-revenue sharing

[1] http://www.gpo.gov/fdsys/pkg/FR-2015-08-10/pdf/2015-19523.pdf

arrangements are with private Chinese distributors in which theatrical, television, DVD and online distribution rights are licensed together in order to try and secure some distribution. Failure to fully implement the U.S. – China Film Agreement provisions that promote broader reform and more competition as well as the introduction of new regulatory barriers for online distribution have hampered licensing and export activity of independent films and television programming. Recently, the Chinese have made recommitments at the U.S. - China Strategic and Economic Dialogue (S&ED)[2] with respect to the Film Agreement provisions that would promote competition in the marketplace (see *Attachment 2*). However, it is not clear if and how quickly those recommitments will be implemented in China nor do these promises address other marketplace restrictions.

China's two tiered theatrical distribution system for imported films

In order to understand the market access barriers for U.S. independent producers, it is important to understand the two tiered distribution system that remains firmly in place. China's WTO accession agreements (2000) preserved an official quota on the number of foreign films that could enter China for exhibition in theaters for which the producer would be paid a share of actual box office revenues ("revenue sharing films"). These films are imported and distributed to theaters by China Film Group (CFG), a state owned enterprise (SOE). CFG is the sole authorized film importer and also substantially controls the national distribution of imported films to theaters across China. While Huaxia Film Distribution, another SOE, may theatrically distribute imported films in China, it is a minor player to the dominant CFG.

In addition to "quota" or "revenue sharing films," China also allows additional foreign films to be imported for which "flat fees" are paid – that is, the license fee is a specific amount or set by a formula that does not tie back directly to box office collections. These "flat fee" or "non-revenue sharing" films are licensed by the producer to private Chinese companies that assume the obligation to seek import permits from CFG, to obtain censorship clearance from the government, to negotiate with CFG for a date to release the film to the theaters and make all other arrangements necessary to market and secure distribution for the film. The reality for Independent producers is that revenue sharing slots generally go to major blockbusters produced by the major U.S. studios, but independent producers have been able to find some success in distributing their films on a non-revenue share basis. However, the number of imported films accepted into China under this method has been restricted in recent years.

In 2012, the United States and China concluded the U.S. – China Film Agreement to settle the countries' dispute before the World Trade Organization (WTO) regarding China's film importation and distribution practices. While China agreed to increase the formal annual quota for revenue sharing films from 20 to 34, and has abided by this commitment, this has only benefitted the U.S. major studios. For those lucky few "quota films" able to share in box office revenues of their film, China did raise the producer's share of box office receipts to 25% (much lower than markets of similar size such as Germany and France). Other provisions of the Film Agreement relating to the commercial terms on which CFG will distribute quota films have not been fully implemented to date.

[2] http://www.treasury.gov/press-center/press-releases/Pages/jl0092.aspx

As of 2011 and prior to the Film Agreement, *China imported from all countries approximately 60 films a year for theatrical release* – (20 under the formal quota system and 40 other imported films under the non-revenue-sharing system). The Film Agreement promised an increase of 14 more imported films under the quota system, which should yield a marketplace of no less than 74 imported films (34 revenue-share quota films plus 40 other, non-revenue-share films). This is consistent with the rapid build-out of cinema capacity throughout China.

However, since 2012, China has allowed CFG to impose an unwritten limit of 60 on the total number of imported films entering the market, achieved by restricting the non-revenue-sharing films to offset for the additional quota films. In parallel, China and CFG have also manipulated the titles and release dates to ensure that U.S. (and all imported) films generate no more than 49% of total box office revenue. As a result of this conduct, in the past 4 years, the U.S. Independents' share of box office has dwindled from 7% to a paltry 2% for the first half of 2015 as films are turned away or subjected to unfavorable release conditions. (*Attachment 1, Table 1*). More lost opportunities for American independent films are likely since China now also uses variable methods to allocate revenues from Chinese co-productions between "domestic" and "imported film" box office figures, further skewing the decisions on allowing additional non-revenue-share films into the market (*Attachment 1, Table 2*). Based on mid-year results, if the informal cap on total imported films is maintained for the second half of 2015, it is not clear if the number of independent films released in 2014 (14 films) will be maintained in 2015 (9 films as of June 30, 2015)(*Attachment 1, Table 3*).

Under the Film Agreement, China also undertook to introduce transparency into its film censorship process, which continues to operate on unwritten standards and procedures. Prior to the Film Agreement, most film licensing agreements for China were contingent upon censorship approval and this added a high degree of uncertainty for the producer and distributor. Censorship rejection has been used by distributors as a basis to cancel agreements and to demand the return of minimum deposits on license fees or as a possibility to require that producers sign two agreements of differing value (one higher license fee if approved for censorship, another much lower license fee if rejected). The lack of official, written approval or rejection letters coupled with a censorship process that may arbitrary and of uncertain duration has made Chinese distributors reluctant to take on licensed rights. Provisions in the Film Agreement requiring official notice of censorship decisions and an opportunity to remediate any problems have not been implemented: today, distributors are still unsure of the censorship procedures and how they will impact each film or program licensed.

The Film Agreement contemplated that U.S. Independent films would depend upon private Chinese distributors and the non-revenue-share system to reach the theatrical marketplace. But the Film Agreement also anticipated that the Chinese marketplace would grow dramatically and it called for the introduction of competition to CFG's effective monopoly on theatrical distribution. In the three years following the Agreement, China has failed to implement the key provisions of the Agreement which would bring these broad reforms and introduce competition to the distribution marketplace benefitting **all producers**.

Recommitments by China at U.S. - China Strategic & Economic Dialogue

Despite the outcomes of the recent S&ED and specifically, the recommitments by the Chinese government related to theatrical film distribution, where China essentially agreed to do now what it had agreed to do in 2012 by introducing broader market reforms and licensing private distributors to engage in theatrical distribution of imported films without interference from CFG (see *Attachment 2)*, it is too early to predict how quickly China's policy statement will result in less trade barriers and increased opportunities for American Independents. One thing is certain, the recommitments made at S&ED with respect to the Film Agreement was not publicized within China nor have these recommitments by the Chinese Government had any positive impact on the local marketplace or the private Chinese distributors.

New Barriers for Online Distribution

China also has introduced new regulations that create new market access barriers for online distribution of films and television programming, an area in which Independents hope to secure legitimate licensing relationships and revenue streams. Regulations just implemented by the State Administration of Press and Publications, Radio, Film, and Television (SAPPRFT) cap online foreign content at 30%, introducing a new quota for online distribution.

Specifically, Chinese distributors and American producers are concerned about the SAPPRFT *draft Measures for the Administration of the Distribution of Audiovisual Programs over the Internet and Other Information Networks*[3], which were published for public comment by SAPPRFT 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. It is not clear when or how these new regulations will be implemented but they could further limit any new opportunities in the online marketplace and add to an already opaque marketplace that disfavors U.S. production.

Also concerning is the newly effective *Notice on Further Implementation of Provisions Concerning the Administration of Online Foreign Films and TV Dramas* published in September 2014. This Notice requires online distributors of foreign films and TV dramas to obtain permits, submit content to SAPPRFT for censorship review, and register and upload relevant information on SAPPRFT's official registration platform. The Notice also caps online foreign content at 30% which introduces another barrier to the licensing of imported films and programming. These regulations were effective April 1, 2015 and dictate that foreign films and TV dramas not registered by website operators by February 1 of each year not be allowed to be distributed or transmitted online. The Regulations require registration for the purpose of confirming or obtaining upfront censorship approvals and have had a damaging effect on Chinese websites and the licensing of audiovisual content[4] because they have interrupted the flow of licensing especially of television series which are produced over the course of a year and not able to be registered or censored by February of each year. It also has created the need for producers and

[3] *See* http://www.chinalaw.gov.cn/article/cazjgg/201506/20150600399159.shtml.

[4] *See* http://english.eastday.com/auto/eastday/nation/u1ai8478466.html (noting House of Cards Season 3 was "downloaded to 60,538 unique devices in China within a day of becoming available" because of the uncertainty created by the new SAPPRFT rules).

distributors to readily access elusive records of censorship approvals to prove that their licensed films and programming have already received censorship clearance and can therefore be licensed for online distribution.

IFTA Members report that Chinese distributors are delaying or decreasing licensing activity, pointing to the uncertainty of the new regulations and have cited conflicting reports on the corresponding requirements. There is great concern that delays and barriers in providing licensed content will inadvertently result in a resurrection of rogue sites providing unlicensed and uncensored content. The Notice also imposes a new formality – a registration requirement – which will be difficult and costly to meet. Private distributors in China are also concerned with how these regulations will be implemented, and with the overall Chinese economy stalling, they are being very cautious of licensing and acquiring imported films and programming. The combination of mass commercial piracy and these new barriers for imported films and television programming are blocking the limited licensing activity that was beginning to occur.

Conclusion

With only 15 months to go before official review of the Film Agreement, IFTA urges the U.S. Government to act at the highest levels of dialogue on bilateral trade issues between the United States and China including ongoing bilateral engagement such as the S&ED and the U.S. – China Joint Commission on Commerce and Trade (JCCT) to effectuate full compliance of the U.S. China Film Agreement and ensure **- as a matter of priority -** that China fulfills its commitments under the Film Agreement. We also urge the U.S. Government to push China to eliminate bias barriers and unfair regulations affecting U.S. producers' access to online and television distribution.

Attachment 1

China Theatrical Market - 2010 - 2015 *(January - June)*

Figures by Year *(as of 30 June 2015)*

Table 1: China Box Office 2010-June 2015 By Country of Origin

Film Source	2010		2011		2012		2013		2014		Jan-June 2015	
	US$M	*%*	*US$M*	*%*	*US$M*	*%*	*US$M*	*%*	*US$M*	*%*	*US$M*	*%*
US Majors	$593.11	39.9%	$822.90	40.7%	$1,117.01	42%	$1,237.48	37.1%	$1,823.48	41.1%	$1,182.15	37.4%
US Independent	$82.95	5.6%	$112.48	5.6%	$188.03	7%	$147.16	4.4%	$168.43	3.8%	$72.92	2.3%
Other Nationality	$27.87	1.9%	$58.22	2.9%	$108.47	4%	$39.11	1.2%	$111.99	2.5%	$244.21	7.7%
Intl./China Co-Prod^	$43.28	2.9%	$18.73	0.9%	$38.30	1%	$100.50	3.0%	$45.35	1.0%	$386.88	12.2%
China & HK	$740.10	49.8%	$1,008.41	49.9%	$1,194.20	45%	$1,809.83	54.3%	$2,287.19	51.6%	$1,272.59	40.3%
Total	**$1,487.31**	**100%**	**$2,020.74**	**100%**	**$2,646.01**	**100%**	**$3,334.08**	**100%**	**$4,436.44**	**100%**	**$3,158.75**	**100%**

Soure: IFTA analysis of data from Ent Group as listed on doubon.com; Variety; Box Office Mojo, IMDB Pro, Baseline Studio Systems

Foreign Films BO** $1,499.28 47.46%

Table 2: China Box Office 2010-June 2015 By Country of Origin With Intl. / China Co-Productions Apportioned*

	2010		2011		2012		2013		2014		Jan-June 2015	
	US$M	*%*	*US$M*	*%*	*US$M*	*%*	*US$M*	*%*	*US$M*	*%*	*US$M*	*%*
US Majors	$593.11	39.9%	$822.90	40.7%	$1,117.01	42%	$1,237.48	37.1%	$1,823.48	41.1%	$1,335.76	42.3%
US Independent	$82.95	5.6%	$112.48	5.6%	$188.03	7%	$147.16	4.4%	$168.43	3.8%	$72.92	2.3%
Other Nationality	$27.87	1.9%	$58.22	2.9%	$108.47	4%	$39.11	1.2%	$111.99	2.5%	$284.04	9.0%
Intl./China Co-Prod^	$43.28	2.9%	$18.73	0.9%	$38.30	1%	$100.50	3.0%	$45.35	1.0%	$193.44	6.1%
China & HK	$740.10	49.8%	$1,008.41	49.9%	$1,194.20	45%	$1,809.83	54.3%	$2,287.19	51.6%	$1,272.59	40.3%
Total	**$1,487.31**	**100%**	**$2,020.74**	**100%**	**$2,646.01**	**100%**	**$3,334.08**	**100%**	**$4,436.44**	**100%**	**$3,158.75**	**100%**

Soure: IFTA analysis of data from Ent Group as listed on doubon.com; Variety; Box Office Mojo, IMDB Pro, Baseline Studio Systems

Foreign Films BO** $1,692.72 53.59%

** One half of the Box Office for International / China Co-Production was apportioned to either Major Studio partners or Other Nationality participants*

*** Includes Box Office for US Majors, US Independents, Other Nationality*

^ Films in this category include: "Jurassic World;" Zhongkui: Snow Girl & the Dark Crystal;" "Hollywood Adventures;" "Helios;" "Seventh Son;" "Outcast;" "Beijing, New York"

Table 3: Feature Films Released in China - 2010 - 2015 (January - June)

Film Source	2010		2011		2012		2013		2014		Jan-June 2015	
	# Titles	*%*	*# Titles*	*%*	*# Titles*	*%*	*# Titles*	*%*	*# Titles*	*%*	*# Titles*	*%*
US Majors	21	15.4%	24	12.9%	27	14%	36	22.1%	29	16.0%	13	10.0%
US Independent	12	8.8%	15	8.1%	19	10%	10	6.1%	14	7.7%	9	6.9%
Other Nationality	20	14.7%	25	13.4%	24	13%	17	10.4%	18	9.9%	9	6.9%
Intl. / China Co-Prod	2	1.5%	5	2.7%	7	4%	8	4.9%	4	2.2%	7	5.4%
China & HK	81	59.6%	117	62.9%	111	59%	92	56.4%	116	64.1%	92	70.8%
Total	**136**	**100%**	**186**	**100%**	**188**	**100%**	**163**	**100%**	**181**	**100%**	**130**	**100%**

Soure: IFTA analysis of data from Ent Group as listed on doubon.com; Variety; Box Office Mojo, IMDB Pro, Baseline Studio Systems

What U.S. Film Makers and Chinese Film Distributors Should Expect to See Following 2015 U.S.-China Strategic and Economic Dialogue Meeting
As of June 24, 2015

At the conclusion of the seventh meeting of the U.S.-China Strategic and Economic Dialogue on June 24, 2015, China made public commitments to the United States relating to the distribution of imported theatrical films in China, other than those imported pursuant to China's 34-film quota and distributed on a revenue-sharing basis. For ease of reference, these films are referred to herein as "flat-fee films."

With these commitments in place, and consistent with the Memorandum of Understanding between the People's Republic of China and the United States of America Regarding Films for Theatrical Release (MOU), which has been in effect since February 18, 2012, U.S. producers of flat-fee films and Chinese film distributors should have the following expectations:

1. First, China agreed that it would begin to allow U.S. producers of flat-fee films and Chinese film distributors (other than China Film Group and Huaxia) to enter into, and carry out, distribution contracts freely and without any involvement in the distribution of the films by China Film Group, Huaxia or any other state-owned enterprise. Specifically:

    a. China confirmed that a U.S. flat-fee film producer can enter into a distribution contract directly with any Chinese enterprise licensed by the State Administration of Press, Publication, Radio, Film and Television (SAPPRFT) to distribute films in China and that SAPPRFT, China Film Group, Huaxia or any other state-owned enterprise shall not directly or indirectly influence the negotiation, terms or amount of compensation contained in the distribution contract.

    b. Importantly, China further confirmed that the Chinese film distributor that contracts directly with the U.S. flat-fee film producer has the right to distribute the imported flat-fee film on its own, independently of China Film Group, Huaxia or any other state-owned enterprise. In addition, China confirmed that SAPPRFT, China Film Group, Huaxia or any other state-owned enterprise shall not directly or indirectly influence the execution of the distribution contract entered into between the U.S. flat-fee film producer and the Chinese film distributor. In other words, the Chinese distributor does not need to enter into a second distribution contract with, or otherwise partner with, China Film Group, Huaxia or any other state-owned enterprise in order to be able to carry out the distribution of the imported flat-fee film. Rather, the Chinese film distributor can carry out the distribution of the imported flat-fee film entirely on its own, just as it typically does with Chinese-made films.

    c. It is still necessary to contract with China Film Group to import the flat-fee film. However, under the MOU, China Film Group is not permitted to use its exclusive right to import films to directly or indirectly influence the negotiation, terms or amount of compensation contained in the distribution contract between the U.S. flat-fee film producer and the Chinese film distributor, and China Film Group is not permitted to directly or indirectly influence the execution of that distribution contract. In other words, China Film Group can only charge a small fee for importing a flat-fee film, commensurate with the work required of it to carry out the act of importation.

d. It also is still necessary for the imported flat-fee film to undergo content review. However, under the MOU, China is obligated to ensure that the content review process is administered by SAPPRFT in a transparent manner and is completed in less than 30 days. In addition, if for any reason a film is rejected, China is obligated to ensure that SAPPRFT promptly provides notice and the reasons for the rejection in an official writing. More generally, China also is obligated to ensure that the content review process does not undermine its commitments regarding the distribution of imported flat-fee films.

2. Separately, China agreed to begin promoting reform in the distribution of imported flat-fee films. Specifically:

a. China agreed that SAPPRFT would take immediate steps to actively promote reform in the distribution of imported flat-fee films through the licensing of additional distributors.

b. China agreed that Chinese enterprises can apply to SAPPRFT for licenses to distribute imported flat-fee films and that any application received by SAPPRFT shall be approved as long as the applicant satisfies applicable requirements, which must be non-discretionary and non-discriminatory.

The commitments that China made at the seventh meeting of the U.S.-China Strategic and Economic Dialogue can be found on the website of the U.S. Department of Treasury at the following link: http://www.treasury.gov/press-center/press-releases/Pages/jl0092.aspx.