

February 6, 2020

Mr. Daniel Lee
Acting Assistant United States Trade Representative
for Innovation and Intellectual Property
Office of the United States Trade Representative
600 17th Street, N.W.
Washington, D.C. 20508

Re: Written Submission in Response to USTR’s Request for Comments and Notice of a Public Hearing Regarding the 2020 Special 301 Review [Docket No. USTR–2019–0023]¹

Dear Mr. Lee:

The Independent Film & Television Alliance® (IFTA®)² respectfully submits these written comments in response to the above-referenced matter as part of the annual “Special 301” review set out in Section 182 of the Trade Act of 1974, that requires the Trade Representative to identify countries that deny adequate and effective IP protections or fair and equitable market access to U.S. persons who rely on IP protection.³

IFTA has also joined with the other members of the International Intellectual Property Alliance (IIPA)⁴ to file collectively in this proceeding. While fully endorsing the IIPA comments, this separate IFTA filing provides further information to highlight the specific acts, practices, and policies of the Chinese government that are shutting out the U.S. Independent film and television industry from access to the largest exhibition market with nearly 70,000 screens servicing the world’s most populous nation and online platforms with the ability to reach an unprecedented number of consumers.

With this background, IFTA offers the following comments and recommends that USTR maintain China on the Priority Watch List in 2020 and that China be monitored under Section 306 of the Trade Act.

About IFTA and its Member Companies

Headquartered in Los Angeles, IFTA is the trade association for the independent motion picture and television industry worldwide, representing more than 145 companies in 23 countries, the majority of which are small to medium-sized U.S.-based businesses, which have financed, produced and distributed many of the world’s most prominent films, including **60% of the**

¹ See [84 Fed. Reg. 70613 \(December 23, 2019\)](#).

² A complete list of IFTA Members is available online at: <https://ifta-online.org/who-we-represent/>.

³ 19 U.S.C. 2242.

⁴ The International Intellectual Property Alliance (IIPA) is a private sector coalition of trade associations representing U.S. copyright-based industries working to improve international protection and enforcement of copyrighted materials and to open foreign markets closed by piracy and other market access barriers. Members of the IIPA are the Association of American Publishers, Entertainment Software Association, Independent Film & Television Alliance, Motion Picture Association, and Recording Industry Association of America. See <http://www.iipa.org>.

Academy Award® winners for “Best Picture” since 1980, most recently with *Green Book*, at last year’s Oscars®.

Independent films and television programs are made in every genre and budget level by companies that take on the majority of the financial risk for the production and control the licensing of its distribution to third-parties around the world. In 2019, independent producers shot 520 feature films and countless hours of television programming in the U.S., accounting for 70% of our country’s production activity and supporting small businesses and tens of thousands of jobs.

As in other industries, the label “independent” refers to companies that operate without the safety net of a large, vertically integrated enterprise. U.S. Independents do not own and are not exclusively or preferentially affiliated with worldwide distribution channels. Consequently, independent film and television producers are completely reliant on third-party distributors to reach audiences worldwide, including in China.

Independents secure both financing and distribution in substantial part by entering into license agreements with these unaffiliated third-party distributors in key geographic territories in exchange for advance financial commitments to secure the exclusive right to exploit the finished product in the licensed territory. Such agreements are concluded well before any camera begins to roll and are collateralized by banks to secure loans to support the physical production (or are informally used to support private investment). Once revenue is generated from exploitation, the production loan is repaid and the parties endeavor to recoup their investment.

IFTA has a strong interest in fostering the growth of a safe, accessible, and competitive marketplace in China. As the largest theatrical exhibition market in the world, and with its expansive array of television channels and online distribution platforms to reach local consumers, China is an increasingly critical element in the independent production finance model. However, ongoing uncertainty of government restrictions, combined with market manipulation, and lack of implementation of the country’s bilateral commitments, have effectively shut out the U.S. independent sector from access to the marketplace in China.

China’s Theatrical Distribution System for Imported Films Shuts Out U.S. Independent Films

Last year, the U.S. Independent industry had an all-time low of \$115 million in box office revenue in China, corresponding to a paltry 1.29% share of box office for only 13 U.S. independent films exported from our country. This is a tiny percentage -- .02% -- of the 520 films U.S. Independents shot in the U.S. in 2019. The 13 independent films represents 2.6% of all films theatrically released in China in 2019⁵. To understand the market access barriers for U.S. independent producers in China, it is important to understand the country’s two-tiered theatrical distribution system that remains firmly in place.

This two-tiered theatrical system is outlined in the terms of the 2012 U.S. China Film Agreement which allows China to continue its government control of and numerical quota on the foreign films for exhibition in Chinese theaters for which the producer is paid a share of actual box office revenues (“revenue sharing films”), as was allowed when it joined the World Trade Organization (WTO) in 2001. Revenue sharing films are imported and distributed to theaters by

⁵ See **Exhibit A**, IFTA Research and Analysis China Theatrical Market 2010 – 2019.

State Owned Enterprises (SOEs), China Film Group (CFG) and sometimes Huaxia Film Distribution. U.S. Independent films are infrequently able to directly secure revenue sharing quota slots from CFG and receive the agreed 25% share of the box office revenue (a percentage still far below international standard) so their access is via “flat fee” licensing (not tied to box office revenue). These “flat fee” or “non-revenue sharing” films – including most U.S. independent films -- are licensed by the producer to private Chinese distributors who must seek import permits from CFG, obtain censorship clearance, negotiate with CFG for a release date, and make all other arrangements necessary to market and secure distribution for the film. The vitality of this system is critical to U.S. Independent access to the theatrical market. Despite the clear terms of the 2012 Agreement, and subsequent bilateral commitments, China has failed to facilitate this private distribution market and almost immediately reduced the number of imported flat fee films to accommodate the new, increased quota for revenue sharing films.

Access to the Chinese Marketplace Has Never Been More Restrictive

IFTA endorses the immediate and full implementation of the Film Agreement and formal action to compel China to expand market access for U.S. films. IFTA’s decade-long statistical analysis demonstrates that the U.S. Independents are in a worse position today than before the Film Agreement was signed. The total number of all U.S. films imported for theatrical release in China annually remains the same as pre-Agreement levels due to Chinese government informal cap of about 60 films each year, despite the meteoric rise from 6,256 screens in 2010 to nearly 70,000 screens in 2019, now representing the world’s largest cinema market. During the same period, the total box office revenue in China has also skyrocketed from \$1.4 billion to \$8.9 billion, with the U.S. Independents share dramatically decreasing from 5.6% in 2010 to a near bottom 1.29% in 2019 (\$115 million).⁶

The Film Agreement was agreed to at a time when the Chinese theatrical sector was the primary source of revenue in that market, and the vast expansion of cinemas had not yet occurred. China also did not have a thriving production sector able to compete with U.S. films for theater audiences as it does today, and online streaming services were not actively licensing U.S. content. The Agreement provided two pathways to cinemas: the formal revenue-sharing quota films controlled by the government and the informal non-revenue sharing (or flat fee) films outside that quota. Unknown to the U.S., which had negotiated successfully an increase in the quota films, China subtracted the increase from the number of non-quota (flat fee) films that it allowed into its market. Private distributors were not fully licensed; the Chinese government interposed its own entities into the process of assigning a release date and bringing films to market with massive fees to the distributors; and it failed to operate a censorship process that enabled U.S. Independent films to reach the marketplace in a commercially reasonable timeframe.

Private Chinese distributors have yet to be able to license and distribute U.S. films without the interference of CFG or Huaxia since both are the government owned, sole importer that also controls censorship review, release dates, cinema management, and processing facilities for digital prints. China continues to pursue policies and practices that undermine the purposes of the Film Agreement, including (1) failure to fully license private companies to distribute films theatrically without any involvement by China's state-owned enterprises, including CFG; (2) an informal import quota that has reduced the number of foreign flat fee films and ensures that Chinese films generate at least 51% of the annual box office revenue in the country; (3) introduction of informal

⁶See **Exhibit A**, IFTA Research and Analysis China Theatrical Market 2010 – 2019.

or nontransparent policies which result in the inability of private Chinese distributors to secure censorship or release dates for U.S. origin films from the Chinese government and prevent payment of minimum guarantees for license fees to U.S. producers; (4) black-out periods that prevent U.S. films from screening during high holiday seasons; and (5) requiring producers to finance broad releases (10,000 screens) for all films and rely upon SOEs for digital key services, thus pushing costs to noncompetitive levels.

IFTA Members also report delays of up to a year between the U.S. theatrical release and the Chinese theatrical release of films, which impacts box office revenue and creates a vacuum for online piracy. Significant delays also dilute the effective marketing campaign launched by the producer at the time of its U.S. release. For example, Millennium's *Angel Has Fallen* was released theatrically in the U.S. on August 23, 2019 generating over \$69 million in box office receipts, but despite efforts by the U.S. producers to obtain an earlier release date, the film was not released in Chinese theaters until December 31st and three weeks into a typical six week theatrical run has made \$9 million⁷. The producers are still assessing the full damage of delayed release in China to their film. However, they estimate that the film will generate at least \$50 million dollars less at the Chinese box office than reasonably forecast based on the past success in China of the producer's other film, *London Has Fallen*. That film had a United States' theatrical release in March 2016, and a Chinese release in April, making \$62 million, and \$53 million in box office, respectively⁸.

New and Increasing Online Market Access Barriers

The IIPA filing outlines in detail the discriminatory regulations that have been erected over the past few years and that should be revoked or revised. It is important to note that the U.S. Independents are especially harmed by the collective impact of these new restrictions, including, the 2014 Notice on Further Implementation of Provisions Concerning the Administration of Online Foreign Films and TV Dramas"; the Notice and Measures on Administration of Online Foreign Films, the Statement and Rules on Importing TV Formats; and the discriminatory and unclear censorship approval process. This web of regulations imposes onerous, opaque, and *de facto* discriminatory requirements for U.S. Independents and their Chinese distributors for registration, censorship, as well as a 30% foreign content caps for broadcast, pay TV, and online video. Chinese distributors have delayed or decreased licensing activity through layers of unclear restrictions for censorship, delaying and limiting U.S. Independents access to these marketplaces resulting in increased piracy.

Another market impediment is the result of pressure on private Chinese distributors, including VOD platforms, without clear explanation, to require U.S. producers to obtain and deliver an excessive and particularly burdensome amount of legalized documentation regarding production and distribution in order to complete a license agreement or obtain government approvals that permit access to China's online marketplace. These documentation requests (unique to China's marketplace) and stemming from unknown government requirements cause uncertainty and additional expense that slow or kill negotiations for licensing films to China, and have become yet another obstacle for U.S. producers to access the Chinese marketplace. In some instances, the cost of delivering such legalized documentation amounts nearly to the value of the underlying license fee.

⁷ Box Office Mojo.

⁸ Box Office Mojo.

In addition to all of these barriers to the theatrical and online markets, beginning mid-2019, without any formal announcement, the Chinese government agencies and distribution platforms first halted the distribution of new U.S. content on Chinese online streaming platforms, in what is being called a “soft ban.” This market disruption continues today with most U.S. content held up in censorship. Private Chinese distributors have been financially compromised by the inability to secure distribution through any channel for U.S. films, driving some out of business and discouraging any further acquisitions of U.S. films or programs for the Chinese market. For U.S. Independents in particular, this cuts to the heart of both production financing and long-term revenue prospects for any film.

Conclusion

The barriers in China for U.S. Independents today highlight China’s failure to meet its commitments in the 2012 U.S.-China Film Agreement and its adoption of new and informal barriers to U.S. imports. Notwithstanding China’s booming theatrical market and the rise of Chinese production, the U.S. film industry is severely limited in its access to this critical marketplace, with opportunities in China for U.S. Independents at historic lows. IFTA urges that China be designated Priority Watch List in 2020 and that China be monitored under Section 306 of the Trade Act.

Respectfully submitted by,

Independent Film & Television Alliance

China Theatrical Market - 2010 - 2019

Figures by Year

US Box Office in China 2010- 2019

Film Source	2010		2011		2012		2013		2014		2015		2016		2017		2018		2019	
	US\$M	% Yr's Total	US\$M	% Yr's Total	US\$M	% Yr's Total	US\$M	% Yr's Total	US\$M	% Yr's Total	US\$M	% Yr's Total	US\$M	% Yr's Total	US\$M	% Yr's Total	US\$M	% Yr's Total	US\$M	% Yr's Total
Total US Box Office Share in China	\$676.06	45.5%	\$935.38	46.3%	\$1,305.04	49.3%	\$1,384.64	41.5%	\$1,991.91	44.9%	\$2,216.70	31.6%	\$2,367.49	34.0%	\$2,916.89	36.3%	\$3,098.04	34.9%	\$2,838.90	30.9%
US Independent Box Office Share in China	\$82.95	5.6%	\$112.48	5.6%	\$188.03	7.1%	\$147.16	4.4%	\$168.43	3.8%	\$108.73	1.5%	\$367.94	5.3%	\$100.70	1.3%	\$109.81	1.2%	\$115.17	1.3%

Source: IFTA analysis of data from Ent Group as listed on douban.com; Variety; Box Office Mojo, IMDB Pro, Baseline Studio Systems, Chinesemov.com, ENT Group Box Office, and Film Business Asia.

US Feature Films Released in China - 2010 - 2019

Film Source	2010		2011		2012		2013		2014		2015		2016		2017		2018		2019	
	# Titles	% Yr's Total																		
Total US Films Released in China	33	24.3%	39	21.0%	46	24.5%	46	28.2%	43	23.8%	44	13.8%	59	15.1%	52	13.1%	66	15.2%	58	11.8%
US Independent Films Released in China	12	8.8%	15	8.1%	19	10.1%	10	6.1%	14	7.7%	12	3.8%	22	5.6%	18	4.5%	19	4.4%	13	2.6%

Source: IFTA analysis of data from Ent Group as listed on douban.com; Variety; Box Office Mojo, IMDB Pro, Baseline Studio Systems, Chinesemov.com, ENT Group Box Office, and Film Business Asia.

China Box Office Growth 2010- 2019

Total Box Office	2010		2011		2012		2013		2014		2015		2016		2017		2018		2019	
	US\$M	% Change																		
	\$1,487.31		\$2,020.74	36%	\$2,646.01	31%	\$3,334.08	26%	\$4,436.44	33%	\$7,025.72	58%	\$6,953.48	-1%	\$8,046.16	16%	\$8,877.70	10%	\$9,200.00	4%

Source: IFTA analysis of data from Ent Group as listed on douban.com; Variety; Box Office Mojo, IMDB Pro, Baseline Studio Systems, Chinesemov.com, ENT Group Box Office, and Film Business Asia.

Nominal Growth for Period: \$7,712.69 billion

Percentage Growth for Period: 618.6%

Average Yearly Growth: 21.3%

China Cinema Screen Growth 2010 - 2019 (est.)

	2010		2011		2012		2013		2014		2015		2016		2017		2018		2019*	
	# Screens	% Change																		
	6,256	32.5%	9,286	48.4%	13,118	41.3%	18,195	38.7%	23,592	29.7%	31,627	34.1%	41,179	30.2%	50,776	23.3%	60,079	18.3%	66,028	9.9%

* Estimate

Nominal Growth for Period: 59,772 screens

Percentage Growth for Period: 955.4%

Average Yearly Growth: 30.6%

Source: IFTA analysis of data from Statistica