

The third time's the charm:
The SCLAO issues its new
Draft Copyright Law

Contents

Summary	1
Introduction	1
Detailed provisions of the Draft	1
Conclusion	4

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Summary

On the 6th of June, the State Council's Legislation Affairs Office ("SCLAO") issued a call for comments on the new Draft Copyright Law, which contains an important overhaul of several provisions of the current Copyright Law. This newsflash aims at summarizing some of the key changes proposed in the new draft.

Introduction

In 2011, the National Copyright Administration ("NCA") was instructed by the State Council to propose a full revision of the Chinese Copyright Law. The goal was to bring the Law in line with international treaties (such as TRIPS), to foster commercialisation via the internet and new media and to encourage the creation of new works. To that end, the NCA had already come up with several drafts, which were each time put up for comment. In this newsletter, we discuss the key changes proposed in this latest draft, which was again put up for comment by all stakeholders.

Detailed provisions of the Draft

1. Clarification and expansion of categories of protected works

Whereas in the current Copyright Law, the definitions of the various categories of works protected by copyright are still contained in the Implementation Regulations, in the new Draft, those definitions are enshrined in the Copyright Law itself, and thus become of statutory nature. Moreover, the category "cinematographic works and works created by a method analogous to cinematography" is rechristened in the Draft as "audiovisual works", which seems a term which is more in line with the various international copyright treaties. Finally, a new category of protected work is inserted into the Draft: the so-called "works of applied art". This category refers to works of art with a certain practical use. As such, the category "works of applied art" is comparable to the category "works of artistic craftsmanship" in the UK Copyright Act. According to the Draft, works of applied art will benefit from a term of copyright protection of only 25 years.

2. Redefinition of certain rights

The rights of alteration, projection, cinematography and compilation are abolished in the Draft, since such rights are encompassed in the existing rights of integrity, performance, adaptation and reproduction respectively. Moreover, the right of broadcasting is substituted by the right of 'broadcasting and telecasting' in the Draft, which is a right which applies to the "non-interactive dissemination" of a work. Non-interactive dissemination means that the audience has to listen to or watch the

work at the time previously scheduled by the program provider, in other words, the public cannot choose the time of broadcast. For example, if a TV-series (e.g. "Downton Abbey") is broadcast on a TV-channel at 10:00 pm on 20 August, viewers have to watch the series at that time.

Further, following the lead of, amongst others, the EU (see directive 2001/84/EC), Australia and the Philippines, the Draft contains a provision which stipulates that the authors of artistic, photographic, literary and musical works are entitled to an inalienable right to "share the profit of the added value obtained through the auction" of such works. In practice, this means that authors of such works will receive a royalty payment upon every second and subsequent public resale of their works. Although the "droit de suite" is provided for in the Berne Convention (art. 14ter), it is but an optional provision. Many jurisdictions (e.g. the USA) have opted not to adopt such *droit de suite* right. How to enforce and determine the amount of the "droit de suite" right (for example, the sum of the "added value" that would have to be "shared") is to be legislated by the State Council separately in Implementing Regulations.



3. Changes concerning the first ownership of audiovisual works

The provision in the current Copyright Law stipulating that the first ownership of audiovisual works belongs to the producer has been replaced in the Draft. According to the Draft, the first ownership should in principle be governed by an agreement between the relevant parties. Absent such agreement, the producer will own the copyright in the audiovisual work. However, according to the Draft, the scriptwriter, director, author of musical works specifically created for the work, "etc.", will also be labelled as authors of audiovisual works.

It is as of yet unclear how the "etc." in the Draft ought to be understood: does it mean that anyone who contributed (substantially) to the work can also claim to be a joint author of the work? What's certain is that the owner of the copyright (the producer) will have to "share" the profit made with the work with the abovementioned authors, and that he will have to take account of their moral rights (e.g. right of identification). Since the Draft contains no additional details as to how this "sharing" should be perceived, a detailed regime will have to be set out in Implementing Regulations.

4. Changes concerning the first ownership of works created in the course of employment

Under the Draft, the first ownership of works created in the course of employment should in principle be governed by contract. Absent any contract, the copyright vests in the employee except that the employer owns the copyright in project blue prints, product design drawings, maps, computer programs and relevant documents and works completed by employees at press agencies, news agencies, broadcast stations and TV stations for performing the obligation of reporting designated by the employer.

Where the copyright vests in the employee, and absent any contract, the employer will be entitled to a free statutory license, permitting him to use the work within the scope of its business. This statutory license will be exclusive for two years.

On the other hand, where the copyright vests in the employer, the employee shall be rewarded in accordance with the quantity and quality of the works (to be determined in Implementing Regulations), and the employee will be entitled to publish his or her works by compilation.

From a practical perspective, the foregoing means that it will remain essential for employers in China insert copyright assignment clauses into the employment contracts with their employees.

5. Fair use: open door?

The Draft fine-tunes the existing exhaustive list of situations that may constitute "fair use" of a work. For example, under the Draft imitating, painting, photographing or videotaping an artistic work, placed or exhibited at an outdoor public place, and reproducing, distributing or making available to the public such imitation, photograph or videotape, constitutes fair use of said work, except if such reproduction, exhibition or public dissemination of the work is conducted in the same form or medium as the original work.

The Draft moreover turns the exhaustive fair-use list into an open-ended list, by adding a general exception, open to the complete discretion of the Courts: "13. *Other situations*".

Moreover, in the Draft, all exceptions become limited to the proviso that the use of the exceptions does not "conflict with a normal exploitation of the work, and does not unreasonably prejudice the legitimate interests of the copyright holder". This proviso was added to bring the exceptions in line with Article 13 of the TRIPS agreement.

Finally, the statutory license covering the free reproduction of sound recordings contained in the current Copyright law (article 40) is deleted in the Draft. This means that under the Draft, third parties can no longer use a pre-existing musical work to freely make sound recordings without the permission of the copyright owner, regardless of whether a statement is made that forbids such reproduction.



6. Limitation to published literary works

The Draft provides that a literary work that has been published in newspapers or periodicals can be reprinted or extracted by other newspapers or periodicals without the permission of the copyright owner, provided that: (1) the latter newspaper or periodical makes a pre-recordal of such reprint or extraction with the competent Authority (the Copyrights Collective Administration Organization); (2) the author's name, the work's title and the source of the work are quoted in the reprint or extraction; and (3) the user of the published literary work pays fees to the copyright owner within one month after the reprint or extraction in accordance with the payment standard published by that same Authority.

Nevertheless, said reprint or extraction won't be permitted under the Draft if the newspaper or periodical has the exclusive right of publication of the work, and makes a noticeable statement on the newspaper or periodical that reprint or extraction of the work is not permitted.

7. Registration of copyright

Under the Draft, copyright holders can still obtain an optional registration of their copyright. Unlike in the initial first Draft, such registration is not anymore a prerequisite to obtain statutory damages. According to the Draft, exclusive licensees can also register their right. If exclusive licensees omit to register their right, their right will not be enforceable against *bona fide* third parties.

8. Lawful use of computer programs

The Draft draws on pre-existing EU and US legislation to adopt certain exceptions specific to computer programs. According to the Draft, duly licensed users may use computer programs for back-ups, for modifications of computer programs to a specific environment and for obtaining interoperability with other operating systems.

9. Copyright infringement in the digital sphere

One of the main goals of the Draft is the facilitation of the e-exploitation of works protected by copyright (e.g. through online legal music streaming services).

To that end, the exclusive right of reproduction is expressly extended to digital reproduction, and the exclusive right of distribution is extended to 'other means of distribution', thus including distribution via the internet. The Draft also expressly provides that producers of sound recordings have the exclusive right to allow others to reproduce the recordings through 'wired or wireless means'.

These extensions of the monopoly of the copyright owner are counterbalanced by some additional exceptions to copyright infringement in the digital sphere. Firstly, the Draft adopts limited "safe harbours" for Internet Service Providers ("ISP's"), which are reminiscent of the ISP safe harbours set out in EU Directive 2000/31/EC.

Moreover, the Draft also provides for an exemption from compensation payments for *bona fide* users of infringing software products. Such users will have to obtain a license or destroy their infringing software products, but cannot be ordered to pay compensation for infringement.

The Draft finally also provides for a possibility of exploitation of "orphaned works" in digital form. Users can exploit such works - after placing royalty payments in escrow- if the copyright owner cannot be identified or contacted.

10. Technological protection measures

The ban on the circumvention or deletion of Technological Protection Measures ("TPM's") is taken from the administrative regulations and adopted as an autonomous statutory ground of copyright infringement. The prohibition in the Draft is twofold, encompassing both circumvention or destruction of TPM's ("*direct infringement*") and the importation or provision of devices or components mainly used to evade or disable TPM's ("*secondary infringement*").

The Draft also lists five exceptions, pursuant to which the circumvention of TPM's is permissible, unless the person invoking the exceptions provides technologies, devices or components for the circumvention of TPM's or infringes other rights of the copyright owner under the copyright law. Such exceptions include circumvention for:

1. school teaching or science and technology research,
2. providing works to blind persons,
3. performance of public functions by authorities,
4. safety testing of computers, computer systems or networks, or
5. research concerning encryption or reverse engineering of computer programs.

11. Damages and remedies

The Draft clarifies and increases the civil statutory damages for copyright infringement. These damages are very important, since they constitute the standard damages ordered in the majority of the Chinese

copyright infringement cases, given the high burden of proof in establishing the sum of a right owner's actual losses.

Under the Draft, the right owners can choose between the actual losses incurred (evidence required), the infringer's illegal gains (evidence required), the "*reasonable multiples*" of customary transaction fees for the type of infringed rights, or a lump sum compensation of under 1 million RMB.

The Draft also provides for punitive damages of up to three times the amount of the compensation payment if the infringing party commits wilful copyright infringement more than two times. The People's Courts will moreover include all reasonable legal expenses of the copyright owner in the amount of compensation ordered, and may assist the copyright owner in establishing the level of compensation by ordering the defendant to submit its accounting records relating to the infringing goods.

The Draft also sharpens the sting of the administrative measures which the copyright administration authorities may impose on infringers. To that effect, the current law's fine of three times the illegal business revenue is increased to five times such revenue, and the current lump sum fine of 100,000 RMB is increased to 250,000 RMB.

Conclusion

The adapted provisions of the current Draft, overly vague though they may seem at times, can generally be seen as a positive evolution for Chinese Copyright Law. The Draft in fact reinforces the position of the copyright holders and administrative authorities in handling copyright infringements, and brings the Law more in line with the day-to-day reality of online commercialisation of works protected by copyright.

The SCLAO has now received all comments from the relevant stakeholders. Going forward, the Draft may be adapted yet another time (depending on the comments the SCLAO received), or it may be directly sent over to the Standing Committee of the National People's Congress for approval.

We at Hogan Lovells will continue to monitor these developments closely, and are happy to assist you with any queries you may have in this regard.

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