



THE US-CHINA BUSINESS COUNCIL

美中贸易全国委员会

The US-China Business Council Recommendations for Revisions to the PRC Copyright Law

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The US-China Business Council (USCBC) is pleased that the National Copyright Administration of China (NCAC) is in the process of revising the PRC Copyright Law, and has reached out to stakeholders to gather input and recommendations. We anticipate that these revisions will help to ensure that China's revised Copyright Law reflect the latest developments and technologies that impact copyrights, and hope that these revisions will continue to strike a balance between the rights and needs of authors, creators, and copyright holders as well as copyright users.

USCBC represents nearly 240 US companies with sizable operations in China, many of which are actively involved in copyright-related industries and have a significant interest in the development and implementation of China's evolving copyright policies. USCBC appreciates the steady progress China has made in recent years on copyright protection, including efforts to combat copyright piracy through its recent Special Campaign to Combat Intellectual Property Rights (IPR) Infringement and other channels. Such efforts to promote a robust IPR environment are an integral part of China's plans for overall economic development, and fit well with China's goal of becoming a global leader in creating intellectual property.

We appreciate the willingness of NCAC to consider our recommendations for the next round of revisions to the Copyright Law. Such efforts to engage stakeholders reflect a positive effort to provide greater transparency in policy formulation and implementation and will produce better regulatory outcomes that are more widely supported by various stakeholders in China. We believe that our recommendations will help to further improve the PRC Copyright Law and ensure that the interests and obligations of all parties are adequately balanced.

Recognizing that there are many provisions on which to comment, and that other organizations may address these provisions, USCBC respectfully submits the following comments on selected provisions.

Scope of Copyright Protection

Article 21 grants copyright protection for individual authors for 50 years from the death of the author, and for legal persons or other organizations for 50 years from the first publication date. Yet some types of copyrighted products – including feature films – involve large amounts of capital and manpower and depend on long-term royalties for support. In recognition of this fact, many countries seeking to promote their film and audiovisual industries have extended copyright protection for audiovisual works to 70 years or more. These countries include not only developed countries like the United States, Australia, Germany and Japan, but developing countries like Mexico, Brazil, and Russia. To better promote a flourishing film industry with participation from legal entities both large and small – in line with China's stated goals of promoting its cultural industries – we recommend that China amend Article 28 to change each mention of the time period for copyright protection from 50 years to 70 years.

Finally, Article 3 describes the types of works that are eligible for copyright protection. However, the article does not include live telecasts of sporting events, and in practice such telecasts have not received copyright protection in China. Such telecasts, however, are not simply the reporting of news, as they frequently include a

significant number of creative elements (including camerawork, editing, music, graphics, and commentary) that merit copyright protection. The 2008 Beijing Olympics illustrates the need to extend copyright protection to live telecasts, and provides a good example in which PRC government officials recognized this need and took concrete steps to address the problem. Other sporting events deserve the same type of concrete protection for the same reasons. In other countries, such copyright protection is extended so long as the live telecast is simultaneously recorded (thus providing a tangible, fixed, recorded work that serves as the basis for copyright protection). We thus recommend that China extend similar protections by adding “live telecasts of sporting events that are simultaneously recorded” to the list of works in Article 3.

Proving Copyright Ownership and Ensuring Appropriate Use

We note that language in Section 2 provides general guidance as to how legal entities can show and exercise ownership of their copyrights, but does not indicate specific documents or evidence that rights-holders can show to prove ownership in disputes. Such information is provided in a patchwork of other regulatory documents, including Article 7 of the Supreme People’s Court’s October 2002 *Interpretation of Certain Applied Legal Issues Related to Trials of Civil Copyright Disputes* and Article 19 of NCAC’s May 2009 *Implementing Measures for Copyright Administrative Punishment*. Since this guidance is not included in the Copyright Law itself, copyright enforcement authorities in various areas have often applied the law’s general principles differently. Such uneven implementation causes confusion for companies and regulators alike.

Greater clarity as to how rights holders can and should prove ownership will assist not only rights-holders to ensure that they seek and preserve proper documentation for their copyrights, but will also make administrative and judicial proceedings in which ownership rights that are in question run more smoothly and efficiently, saving valuable time and resources. Thus, we recommend that a new provision be added to Section 2, stating: “Acceptable evidence to demonstrate copyright ownership shall include, but not be limited to early drafts, source materials, legitimate published materials, registration certificates for copyrights or works, evidence provided by certification organizations, licensing contracts, or infringing goods or their invoices obtained by the parties or their entrusted persons obtained via ordering or purchasing in the market.”

Separately, we appreciate that Article 45 describes proper procedures to be followed when a television station broadcasts a film or audiovisual product, requiring such entities to obtain permission from the film producer and to pay remuneration. The Internet is increasingly a platform for entities – both established television stations and other organizations and users – to broadcast content, including film works. Accordingly, we recommend that new language be added to Article 45 to read: “Any entity that broadcasts a cinematographic work, a work created by virtue of an analogous method of film production, or a videographic work produced by another person, either via television or Internet channels, shall obtain permission from, and pay remuneration to, the producer of the cinematographic or videographic work; the entity that thus broadcasts a videographic work produced by another person shall obtain permission of, and pay remuneration to, the copyright owner.”

Definitions of Copyright Infringement

We appreciate the extensive listing throughout this law of what constitutes as copyright infringement, as this list covers many of the most common types of infringements that companies – both foreign and domestic – experience. Articles 47 and 48 provide a detailed list of prohibited activities, while Articles 22 and 23 provide a list of copyright uses that do not constitute copyright infringement (often called “fair use” provisions). We appreciate that drafters have provided these lists to give clear guidance to regulators, rights-holders, and potential pirates of what they can (and cannot) do with copyrighted materials, and encourage enforcement officials to use these lists to that the needs and rights of all parties are respected.

We respectfully suggest a few changes to the types of counterfeit infringement listed in Articles 47 and 48. These changes are designed to provide clearer information to both companies and regulators about how to consider, investigate, and apply penalties to cases of suspected copyright infringement, and also to ensure that regulators can more effectively tackle counterfeiting networks by addressing both the symptoms and the root causes of China’s copyright infringement concerns. We respectfully suggest that:

- New language be added in Article 23 to clearly define how an author should “declare in advance the use [of authored works] thereof is not permitted,” as it is not clear what specific actions an author should take to invoke this protection beyond simply copyrighting their work.
- Article 47(5) be clarified to define “plagiarizing” to clarify how this may differ from other types of infringement listed in Article 47, such as “publishing without permission” (Article 47(1)), “exploiting... without permission” (Article 47(6)), and “exploiting...without paying remuneration (Article 47(7)).
- Article 48(1) be amended to add “uploading” to information networks and “transmitting” via those networks works created by other people as types of infringing behaviour.
- Article 48(6) be amended to include not only cases in which an infringer directly circumvents measures the rights-holder has taken to protect his copyright, but also cases in which an infringer intentionally facilitates copyright infringement, to state: “Intentionally circumventing or destroying, or directly providing the means to circumvent or destroy, the technical measures taken by a rights-holder for protecting the copyright or copyright-related rights in his work, sound recording, or video recording, without the permission of the copyright owner or the owner of the copyright-related rights, unless otherwise provided in law or in administrative regulations.”
- New language be added to Article 48 to state that “use of a video or audio recording device to create a recording of a recorded work or a live performance (e.g. a film, play, concert, or other performance) within a theatre or performance space without the permission of the copyright holder or the performer, unless otherwise provided in the Law.”
- New language be added as Article 48 to include: “Manufacturing, importing, selling, providing, or otherwise trafficking in any technology, product, service, device, component, or part thereof, that:
 - (a) Is primarily designed or produced for the purpose of circumventing a technical measure taken by a rights-holder for protecting the copyright or copyright-related rights in his work, sound recording or video recording without the permission of the copyright owner or the owner of the copyright-related rights;
 - (b) Has only limited commercially significant purpose or use other than to circumvent such a technical measure; or
 - (c) Is marketed by the individual or entity trafficking in such technology, product, service, device, component, or part thereof, or another individual or entity acting in concert with the first individual or entity, for use in circumventing such a technical measure.”

Remedies and Penalties for Copyright Infringement

For those who commit acts of copyright infringement, we are glad to see that Articles 47 and 48 of the current Copyright Law describe civil and criminal penalties that can include halting the infringing activities, paying compensation for damages, confiscating unlawful income, confiscating and destroying infringing reproductions or equipment used to make infringing reproductions, and imposing fines. Such specific remedies help to ensure that local enforcement officials are aware of the range of remedies available to them in addressing copyright infringement. However, Articles 47 and 48 do not make clear whether officials are permitted to apply multiple penalties, which could allow them to apply stricter penalties based on the facts of the case. We suggest that new language be added to Articles 47 and 48 stating that local enforcement officials are encouraged to use any combination of administrative, civil, and criminal penalties to address these issues more effectively.

Additionally, to make explicit that copyright owners themselves have the right to bring a civil lawsuit or work in cooperation with local prosecutors to request a criminal investigation, we recommend that language be added to both articles to state: “A copyright owner or the owner of a copyright-related right can institute a civil cause of action or request other remedies (including administrative action or criminal charges) in the case of any of the following infringing acts.”

Article 49 states that in cases of infringement, the infringer shall compensate for the “actual losses suffered by the rights-holder” where that figure is possible to calculate, with unlawful income of the infringer and judicial determination (up to RMB 500,000) as the second and third choices. However, “actual losses” may not reflect

the full economic implications for the rights-holder when considering the loss of potential future income and damage to their reputation. Such remedies also may not adequately deter copyright piracy, which undercuts the efficacy of such remedies. Permitting authorities to examine and use multiple means of calculating damages based on the likely deterrent effect would more effectively meet the goals of these provisions to penalize copyright infringement. Therefore, we recommend that Article 49, paragraph 1 be revised to state: “Where a copyright or copyright-related right is infringed, the infringer shall compensate the rights-holder, with compensation calculated based on proceeds obtained by the infringing party due to infringement during the relevant period, losses suffered by the rights-holder due to infringement during the relevant period, and other relevant factors, including (but not limited to) popularity of the infringed work, investment and resources required to produce said work, revenue in third-country markets, and lost downstream revenue in order to fully estimate the economic impact of infringement.” We also recommend that NCAC eliminate the maximum statutory damages cap of RMB 500,000 listed in Article 49, paragraph 2, as this change will allow courts to award higher damages for counterfeiting piracy cases as the needs of the case dictate and thus more effectively deter current and potential infringers.

Copyright Licensing

Article 24 of the Copyright Law describes the rules for an author or rights-holder to license copyrights to another party for their use, and are explicit about the types of basic clauses that should be included in a licensing agreement. This gives rights-holders and rights-users alike a framework for negotiating and concluding licensing contracts that can help to prevent disputes. The language indicates that licensing contracts “shall” include the necessary phrases, but does not indicate whether there are any consequences or penalties if contracts do not include them. To clarify for rights-holders and rights-users, as well as for enforcement officials that may be involved in any disputes, that arise from licensing contracts, we respectfully suggest that Article 24 be revised to clarify to state that “A licensing contract should include the following basic clauses.”

Other Related Regulations

In addition to the recommended revisions above, we respectfully recommend that NCAC consider reviewing and revising other copyright-related regulations, including the *PRC Copyright Law Implementing Regulations*, the *Computer Software Protection Measures*, and the *Regulations for Protecting Communication Rights through Information Networks*, to ensure that these regulations are consistent with the revised Copyright Law as well as to address and update other related copyright issues, such as use and abuse of copyrights on Internet platforms, liability for Internet service providers whose services involve use of copyrights, criminal liability for copyright infringing actions, and an appropriate scope of “fair use.”

Conclusion

USCBC would like to thank NCAC for this opportunity to submit recommendations for the revision process of the Copyright Law. We hope that these comments will prove constructive to the positive development of China’s regulatory framework for copyrights. USCBC welcomes any feedback that NCAC may have and would be pleased to further discuss the content and various provisions at NCAC’s request.

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