

New developments of copyright protection in China

Copyright law in the People's Republic of China was first promulgated in 1990 and implemented on June 1, 1991 ("**1991 Copyright Law**"). The 1991 Copyright Law provided China with the foundations upon which copyright could be protected. In May 1991, China's State Council approved a secondary level law, namely the promulgation of the Implementation Regulations of Copyright Law ("**1991 Copyright Regulations**"), and together with the 1991 Copyright Law, they are collectively referred to as the 1991 Copyright Laws ("**1991 Copyright Laws**"). Amendments to the 1991 Copyright Laws were made and were later approved by the 24th session of the Standing Committee of the 9th National People's Congress of China on October 27, 2001 ("**2001 Copyright Law**"). In view of this new 2001 Copyright Law, China's State Council abolished the 1991 Copyright Regulations and issued new Implementation Regulations of Copyright Law in August 2002 ("**2002 Copyright Regulations**"). Now together with the 2001 Copyright Law, they are collectively referred to as the 2002 Copyright Laws ("**2002 Copyright Laws**").

The new 2002 Copyright Laws not only reflect the requirements of the WTO, but they also reflect the principles and rules provided for in the TRIPS Agreement of the WTO. More importantly, the 2002 Copyright Laws have made amendments to various existing provisions, including the scope of objects that are given copyright protection, the classification of copyrights, the limitation of rights, the permitted use of rights, the transfer of rights, the legal obligations and others. These amendments and their implications will be discussed in more detail in remaining part of this article.

1. Improved Classification of Copyrights

In general, copyrights in China are sorted into 2 categories: personality rights and property rights. In order for a copyright owner to adequately protect its rights, especially its property rights, it must know what rights it is entitled to and which categories those rights fall within. Unfortunately, the 1991 Copyright Laws only identified personality rights as including the rights of publication, authorship, alteration and integrity¹, and stipulated that property rights are limited to the right to use and the right to receive remuneration. Further, the 1991 Copyright Laws strictly limited any dealings in property rights to two types (i) by use of the works, and (ii) by licensing others to use of the works. As a result of the limitations within the 1991 Copyright Laws, the full extent of the rights of copyright owners were unclear. This also led to difficulties for administrative bodies and judicial bodies in dealing with cases involving copyright disputes.

To address these anomalies, the 2001 Copyright Law provided a more defined classification for all of the 17 types of rights that are enjoyed by copyright owners under Article 10². The

¹ See Copyright Law of the People's Republic of China, 1991, Article 10.

² See Copyright Law of the People's Republic of China, 2001, Article 9. The contents include: the right of publication, authorship, alteration, integrity, reproduction, distribution, rental, exhibition, performance,

first 4 of the 17 rights are now classified as personality rights and the next 12 rights are property rights. As for the 17th right, it expressly provides that, “any other rights a copyright owner is entitled to enjoy” should also be included as a copyright. This is in effect a catch-all right to ensure that rights which have not yet been contemplated (e.g. arising from the future development of the Internet) or which have not been expressly classified above for whatever reason, can then be placed within this category. This right has in effect widened the discretionary powers of judicial bodies in handling copyright matters. The 2001 Copyright Law also removed the restrictions on the methods in dealing with property rights; so copyright owners are now left to deal with their rights in whatever manner they deem fit.

Other amendments in the 2001 Copyright Law to the categories of copyrights include³:

- (1) A publisher now has the right to permit or prohibit any other person to use the typographical arrangement of books or periodicals it has published;
- (2) The rights of performers have been extended and are now addressed within six clauses as compared to four in the past. The two new clauses read as follows: (1) to authorize others to reproduce or distribute sound recordings and video recordings incorporating the performance, and to receive remuneration therefor; and (2) to authorize others to communicate the performance to the public on information networks, and to receive remuneration therefor;
- (3) Under the 1991 Copyright Law, the use of others' sound/video recordings or performances required the prior consent of the copyright owners if the works concerned had never been published; otherwise, prior consent was not mandatory. Now, under the 2001 Copyright Law, no distinction is made between published works and non-published works. It is therefore mandatory to obtain prior consent from copyright owners before using any such works; and
- (4) Under the 1991 Copyright Law, if a radio or television station made a non-commercial broadcast of a published sound recording or video recording created by another person, it would not have been necessary to obtain the permission of either the copyright owner, the performer, or the producer of the sound recordings or video recordings, nor would it have been necessary to pay them remuneration. However, under the 2001 Copyright Law, more stringent requirements have now been introduced. Although there is still no need to obtain permission for the relevant broadcast, there is now an obligation to pay remuneration whether or not the broadcast is of a commercial or non-commercial nature.

2. Changes In Limitation of Copyright Law

The changes in the limitation of China's copyright law involve the following⁴:

showing, broadcast, communication of information on networks, making cinematographic work, adaptation, translation, compilation, and any other rights a copyright owner is entitled to enjoy.

³ See Copyright Law of the People's Republic of China, 2001, Article 9, Article 35, Article 37, Article 39, Article 40.

- (1) Prior to the implementation of the 2001 Copyright Law, the reuse or citation of a published work in newspapers and periodicals, or at radio stations and television stations, was permitted if the user was able to provide an “**inevitable reason**” for such usage. However, with the new law, users can now only reuse or cite published works in such ways if it is for the purpose of reporting news and events. This has narrowed the possibility of any abusive usage of published works.
- (2) Under the 1991 Copyright Law, newspapers, periodicals, radio stations and television stations were permitted to publish or broadcast only editorials and commentaries of other media. The 2001 Copyright Law has relaxed this restriction. Now, features and articles on current issues relating to politics, economics or religion can also be published or broadcast (except where the author has declared that the reprinting and rebroadcast of such materials is not permitted).
- (3) Previously, the 1991 Copyright Law was silent with regards the usage of published works by government bodies. However, in the 2001 Copyright Law, such usage is now regulated, thereby, only permitting government bodies to use published works within a certain “reasonable limit” in the performance of their official functions.
- (4) The 1991 Copyright Law provided that the consent of the original copyright owner was not required for the publication and distribution of translations of published works (works of any persons) if the said translation was made from the Han language into any minority nationality language. This provision has been amended and narrowed in the 2001 Copyright Law, now providing that the consent of the original copyright owner would be required for the publication and distribution of such translations unless the published works are **of a Chinese citizen, legal entity or any other organization**. In summary, the new law has now identified a category of translation works which requires consent of copyright owners, and in turn, provided better protection for works of foreigners and stateless persons.
- (5) The 1991 Copyright Law stated that if the performance of a published work was free, no prior consent from the author was required and no compensation was required to be made to the author. Under the 2001 Copyright Law, the term ‘free’ has now been restricted in that a free performance must satisfy two conditions: 1) the performance is free to the audience; and 2) no compensation is paid to the performers.

3. Enforcement Measures and Others

(1) Monitoring rights

The collective administrative system in China has now been clearly defined in Article 8 of the 2001 Copyright Law. According to this Article, copyright owners may authorize collective administrative organizations to exercise their rights to collect royalties or to represent them in disputes regarding rates.

⁴ See Copyright Law of the People's Republic of China, 2001, Article 22.

(2) Improvement of legal duty and enforcement measures

- a. The 2001 Copyright Law now specifically provides for measures which allow for preservation of property and evidence before legal proceedings are instituted.
 - b. The 2001 Copyright Law has also raised the evidential burden under China's civil procedure concerning intellectual property litigation on publishers or producers who have allegedly reproduced works without acquiring the relevant rights.
 - c. The 2001 Copyright Law now prescribes tougher penalties for copyright infringement: in the cases where the copyright owner's actual injury or the infringer's unlawful income cannot be determined, the People's Court shall have the right to assess damages not exceeding RMB 500,000 depending on the circumstances of the infringing act.
- (3) Under the 2001 Copyright Law, if a person fails to fulfill their contractual obligations, or executes them in a manner that is not in conformity with the agreed conditions of the contract, they will bear civil liability in accordance with the relevant provisions of the *Contract Law of the People's Republic of China* and other relevant laws and regulations. Previously, given that the *Contract Law* had yet to be promulgated, the 1991 Copyright Law had only made reference to the *General Principles of the Civil Law of the People's Republic of China*.

4. More Changes

Under the 2001 Copyright Law, a new provision has been added to regulate "copyright transfer contracts", providing that such contracts must contain the following information and terms: name of the work, type of rights, geographical scope, amount of compensation and liability in case of infringement⁵.

Also, the 2001 Copyright Law has made changes to various terms used within China's copyright law. For instance, "non legal entities" has now been broadened to "other organizations", which includes not only non legal entities but also other entities such as non-enterprise entities, and "the type of right to be authorized for use" now reads "authorized ways of using the works".

Further, sound/video works such as television and video productions are now defined as "works created in such a way that resembles the production of motion picture". By such changes, terms/concepts that are used in China's copyright law have now become more clearly defined and easier to comprehend for practitioners and concerned persons/bodies.

5. Revision of the Copyright Object

The 2002 Copyright Laws extend the scope of objects that are afforded copyright protection⁶:

⁵See Copyright Law of the People's Republic of China, 2001, Article 25.

⁶ See Copyright Law of the People's Republic of China, 2001, Article 2, Article 3, and Article 5.

- (1) For the first time, copyright protection in China has been extended to the works of stateless persons (persons who are neither Chinese citizens nor foreigners according to the laws of China) that have not previously been published in China. To date, the copyright laws in China had only protected works of foreigners who were eligible to enjoy copyright, either by way of bi-lateral agreements concluded between their country of residence and China, or by virtue of an international treaty to which both countries were a party.
- (2) Copyright protection has also for the first time been extended to acrobatic performances, architectural designs, model works and literary and artistic works published via the Internet.
- (3) Previously, “numerical tables”, whether they were of general use or of non-general use, were not protected under the 1991 Copyright Laws. Now, under the 2001 Copyright Law, specific copyright protection has been given to “numerical tables of non-general-use”.

Henry Huang, Partner
Lesley Lai
Shanghai United Law Firm
Shanghai, China
September 2003

Shanghai United Law Firm has an associate relationship with Haldanes Solicitors and Notaries of Hong Kong.