China updates approach to copyright protection

Vivien Chan and Ann Xu of Vivien Chan & Co analyse the draft amendments to China’s Copyright Law, including the liability of ISPs and rules around damages and assess recent court judgments

The PRC Copyright Law is a progressive enactment which provides a full range of protection to copyright and related rights in line with the Berne Convention. The various amendments to the Copyright Law reflect China’s determination to respond to the development of information technology and rampant piracy in the country. This article begins with highlighting the proposed amendments to the Copyright Law and follows with a discussion of recent copyright developments in China.

Proposed amendments to the Copyright Law

On June 6 2014, the Office of Legislative Affairs of the State Council released a finalised series of draft amendments to the Copyright Law (the draft) in the hope of improving the coherence of the Chinese copyright system and building an internationally aligned intellectual property regime.

The current Copyright Law is silent on certain types of works, such as applied art works, which is one type of copyrighted work under the Berne Convention. The State Council passed the
Regulations for the Implementation of International Copyright Treaties in 1992, which included provisions for the protection of foreign works of applied art but made no reference to applied art works created by Chinese citizens. Therefore, the courts tended to treat works of applied art as works of fine art under the Copyright Law. The draft addresses the issue of including works of applied art as a separate type of copyrighted work. Such protection extends to toys, furniture, ornaments and other two or three-dimensional artworks possessing both aesthetic and functional values.

The current Copyright Law does not specifically deal with the liability of internet service providers (ISPs) in relation to copyright infringement. The draft provides that ISPs would not be obliged to review copyright information where they simply provide storage, search, connection and other purely technical internet services to users. This proposed provision has its roots in China’s current position. The Regulations on the Protection of Right of Dissemination via Information Network (2015) also provide a similar rule, which seeks to strike a balance between the interests of the copyright owners and online transmitters. Further, Article 76 of the draft sets out the duty of care and the liability for failure to remove the infringing content on the part of the ISPs in copyright infringement disputes. Under the proposed provision, ISPs are obliged to delete the infringing content upon receiving complaints from copyright owners. In cases where the ISPs fail to take necessary measures to stop the infringement, they shall bear joint and several liability with the alleged infringer. This is a welcomed development to incorporate the complaint mechanism into the law so that copyright owners can have a more certain expectation that their complaints will be properly handled, and necessary measures will be taken against the infringers promptly.

The draft also touches upon the enforcement of the rights of copyright owners, which has been a perennial issue in China. Article 76 of the draft states that infringers shall bear civil responsibility to cease the infringing activities, make a formal apology and compensate the copyright owners based on the new damages calculation system. Under the new system, damages shall be calculated either as the actual loss suffered by the copyright owner, the infringer's illegal profit or as a reasonable multiple of royalties in the normal trade of copyright. Where it is impossible to determine a specific amount according to this criteria, the damages awarded to the copyright owner shall be a sum not greater than RMB 1 million (approx. US$150,000). Such an amendment has been applauded by copyright owners. Under the current Copyright Law, if copyright owners apply the last calculation method, they can obtain a sum no greater than RMB 500,000 (approx. US$75,000). The draft shows a definite intent to combat copyright infringement in China. The draft also expands the scope of administrative punishments and grants the copyright authorities significant discretionary powers to impose warnings, confiscate illegal gains and seize suspected goods, thereby enhancing the deterrent effect of the Copyright Law.

Recent development (I) – copyright protection for computer games

Online gaming is one of the largest and fast-growing businesses in China. However, the risk of infringement of successful online games has been a continuing headache for leading online game developers. The current Copyright Law focuses on the regulation of traditional forms of creative content such as music, books, films, paintings and photographs, but contains no clear provisions concerning the protection of computer games. It is unclear whether such games should be protected by separating them into artistic work, literary work, musical work or computer software or whether they should be treated as a standalone form of work and protected as a whole.

Despite the uncertainty in the current Copyright Law, the Chinese Courts are now more willing to interpret the law broadly and grant
protection to game developers. This can be illustrated by the recent copyright infringement case of the popular online game MU Online, in which the Pudong New Area People’s Court of Shanghai held that the combination of game characters, weapons, maps and equipment could be regarded as part of the storyline of the game and are therefore protectable literary works under the Copyright Law. Having considered numerous factors, including the commercial value of the game, the degree of infringement and the licence fee, the court ordered the infringer to pay RMB 5 million (approx. USD 750,000) as damages, which is significantly greater than the statutory ceiling of RMB 500,000 (approx. USD 75,000) under the Copyright Law.

This case demonstrates that the Chinese courts are becoming more willing to protect non-conventional forms of creative content. Further, it appears that the courts treat the determination of copyright infringement in the field of online gaming in the same way as in the conventional creative industries. In most cases, the Chinese courts are inclined to rule in the plaintiff’s favour if the expressive elements of the games are copyrightable and there are substantial similarities between the games.

Recent development (II) – crackdown on unauthorised video streaming

The rapid development of digital network technology promotes the dissemination of works on the internet and facilitates access to copyrighted works. The country’s online streaming sites have been growing fast, providing movies, drama series and other audiovisual contents similar to US sites, like Hulu and Netflix. These streaming platforms have often been criticised as popular locations for copyright infringement. The prevalence of illegal uploading of media content on these platforms has contributed to the continuous expansive trend of copyright protection in China.

A recent judgment by the Chinese court has also reaffirmed the country’s determination to crack down on copyright infringement. The Motion Picture Association of America (MPAA) scored a piracy victory in China when the Shenzhen Nanshan District People’s Court found the online video streaming service provider Xunlei Networking Technologies Co. (Xunlei) guilty of copyright infringement and ordered it to pay RMB 1.4 million (approx. USD 210,000) in damages. The decision stems from the copyright infringement claim filed by the MPAA on behalf of six major US film studios, including Universal, Warner Bros and Disney. As one of China’s top 10 internet companies, Xunlei has hundreds of millions of subscribers. It was found to have made 28 movie titles available to the public via its video streaming platforms without proper authorisation from the film studios. The judgment has reinforced the confidence of foreign copyright owners and demonstrated China’s attempts to create a legitimate marketplace for copyrighted works.

Once a hotbed of piracy, copyright complaints in the country were mostly lodged by overseas right holders or local government parties in the past. As the major internet giants in China, such as Tencent and Baidu, begin to acquire international broadcasting rights and create media content of their own, the domestic internet companies are now playing a more proactive role in stamping out piracy in the country. For instance, Tencent has prevailed in a recent copyright infringement litigation regarding the online streaming of The Voice of China. The defendant, Baofeng Technology (Baofeng), which is a streaming site operator and VR hardware manufacturer, has been repeatedly found liable for the unauthorised distribution of the films, drama series and the World Cup. In this case, Baofeng was held liable for streaming the first six episodes of The Voice of China without permission from Tencent, which had acquired exclusive streaming rights of the show.

Aside from the above favourable court decisions, further steps have been taken by the Chinese government to crack down on copyright infringement on online streaming platforms. In
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Late 2018, the National Copyright Administration of the People’s Republic of China (formerly known as the Copyright Protection Centre of China) (the NCAC) summoned 15 major online streaming platforms and media companies such as Douyin, Bilibili and Tencent-backed video app, Kuaishou, asking them to enhance their internal copyright supervision systems. Streaming platform operators are required to indicate the origin of the contents and to compile a blacklist for the suspended accounts. The NCAC has also urged platform operators to conduct self-inspection and take down suspected infringing works on their platforms. Up until now, more than 570,000 videos have been removed from online streaming platforms. The NCAC also required online streaming platform operators to establish a 24/7 user complaint system to respond promptly to reports of illegal uploads of unauthorised content, which supplements the pre-existing copyright takedown mechanism set out in the Regulations on the Protection of Right of Dissemination via Information Network (2015).

Under the pre-existing takedown mechanism, copyright owners must give written notice to ISPs requesting the removal of the media content. Upon receiving the notice, the ISP should forward the notice to the alleged infringer and take immediate measures to remove the infringing content. If the alleged infringer submits an explanatory statement requesting reinstatement of the link, the ISP should then promptly restore the content on its platform and forward the statement to the copyright owner, who would be required to issue a fresh complaint or initiate court proceedings to take the matter further. If the ISP fails to comply with these procedures, it will be held liable for the loss sustained by the copyright owner as a result of the prolonged infringement. However, in the event of wrongful removal of media content, copyright owners will be held liable for the loss suffered by the alleged infringer. Despite such a takedown system, copyright owners often experienced difficulty in lodging the complaints given the absence of a user-friendly complaint system. Following the call by the NCAC, platform owners have now established their own complaint systems facilitating the complaint lodging process leading to a significant decrease in infringing content on major online platforms.

Although the proposed amendments to the Copyright Law are yet to be implemented, they are a sign of the Chinese government’s determination to curb copyright infringement, in particular on online platforms. Copyright owners should acquaint themselves with the complaint and take-down mechanisms of popular online platforms in China and avail themselves of such mechanisms to take down infringing content, which will usually be a more cost-effective option than lodging infringement proceedings before the court.
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