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## BETTER AND QUICKER COPYRIGHT ENFORCEMENT

*China*

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WAN HUI DA

# *Better and quicker copyright enforcement*

**Chao Xu and Charles Feng of Wan Hui Da** discuss how the Draft Amendments to the Copyright Law will deal with the increasing number of cases in China

**T**he Draft Amendments to the PRC Copyright Law (the Draft) have been finalised by the National Copyright Administration of China (NCAC) and has been submitted to the State Council Legislative Affairs Office (SCLAO) for further review in December 2012, and will then be submitted to the Standing Committee of the People's Congress of China, the top legislative body of China, for final review and promulgation. Therefore, the draft has attracted huge attention from the industry, professionals and the public.

The Draft of the PRC Copyright Law makes significant changes to the Copyright Law both in style and content. The Draft has eight chapters and 90 articles, while the current Copyright Law has six chapters and 61 articles.

## **Subject Matter**

### **Major revisions of subject matter**

The Draft upgrades the definitions of specific subject matters from the Implementing Rules to the Copyright Law (as well as other specific defini-



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tions described below). It replaces the name of “cinematographic works and works expressed by a process analogous to cinematographic works” to “audiovisual works”. The Draft also removes “video product” from the list of subject matters and has added “works of applied art”, with a validity period of 25 years. It also changes the name of “computer software” to “computer program”. By contrast, computer files are protected as written works.

### Works of applied art

According to the current Implementing Rules of the Copyright Law of the PRC, “works of fine art are divided into two categories, ‘works of (pure) fine art’ and ‘works of applied arts’”. Chinese courts and the NCAC have in the past adopted the view that as long as a work of fine art is physically separable from the functional elements of an industrial article, it will be protected as pure fine art. By contrast, where a work has both functional and aesthetic elements that are not separable from each other, the work should be classified as applied art. In the last two draft amendments of the Copyright Law, the works of applied art were classified as a subject matter independent from the works of fine art, with the requirement of both functionality and artistic merit, in comparison to other forms of works of art.

Article 5.9 of the Draft confirms this new and independent ‘works of applied art’ category, and adds a more detailed description: “toys, furniture, accessories and other two-dimensional or three-dimensional artistic works that possess both practical function and artistic merit”. The three categories (toys, furniture, and accessories)

are only mentioned as examples for understanding and determining the scope of this new category. This detailed definition for the works of applied art, and the fact that it is upgraded as an independent category of work, will probably justify further implementing rules to provide even more complete and detailed protection.



*Chao Xu*

**Chao Xu is a counsel at Wan Hui Da, and a recognised copyright expert in China.**

**From 1986 to 1994, he went to the Max-Planck-Institut fuer auslaendisches und internationales Geistiges-und Wettbewerbsrecht in Muenchen twice to study copyright. He has served in the National Copyright Administration as director of the legal affairs department, and deputy director-general and commissioner of the copyright department. During his service in the Administration, Chao participated in or took charge of numerous legislations, enforcement actions and foreign negotiations concerning copyright protection.**

**Chao was involved in the drafting and amendment of the Copyright Law, the Regulations on Implementing the Copyright Law, the Regulations on Computer Software Protection, the Provisions on the Implementation of the International Copyright Treaties, the Collective Management of Copyright Regulations, the Regulations on the Protection of the Right to Network Dissemination of Information, the Interim Procedures on the Payment of TV and Radio Programmes Playing Phonograms. In 2007, Chao played an important role in the IP negotiation with the United States.**

**Over the years, Chao has published numerous works on copyright, and made key-note speeches at various events.**

### Audiovisual works

Under current law, the name of subject matter is “cinematographic work and works expressed by a process analogous to cinematographic works”. In the Draft, it is replaced by one single term: “the audiovisual works”. The Draft defines audiovisual works as “works which are recorded on some medium consisting of a series of images, with or without accompanying sounds, and which can be projected with the aid of technical devices including cinematographic works, television series or works created by virtue of analogous methods of film production”.

Furthermore, the new Draft offers a more detailed definition by providing examples: “cinematographic work, television series and other works expressed by a process analogous to cinematographic works”. This terminology is in line with China’s execution on the Beijing Treaty on Audiovisual Performances and laws of other countries, such as the United States. Moreover, the exemplification of specific forms as “cinematographic works, television series or works created by virtue of analogous methods of film production” will extend the scope of such subject matter to other forms that have recently emerged or will emerge in China, such as Micro film.

### Exclusive rights

#### Major revisions of exclusive rights

The Draft reduces the number of categories of exclusive rights with virtually no change to the protectable scope of exclusive rights as a whole. Specifically, 17 categories of exclusive rights are reduced to 13, with the removal of the right of alteration, the right of showing, and the right of mak-

ing cinematographic work, the functions of which are replaced by the right of integrity, the right of performance, the right of adaptation and the right of reproduction.

The Draft also adds the right of pursuit as a new kind of exclusive right. Due to the specialty of this right, it is specified in the provision to be

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different from other exclusive rights. The Draft clarifies that the right of broadcast shall be applied to non-interactive transmission of works, which aims to solve the issues of real-time broadcast or direct broadcast via internet, while the right of information network transmission is applied to the interactive transmission of works.

With regard to neighbour- ing rights, the rental right of performers and their right of acquisition of remuneration are newly introduced. Furthermore, the right of acquisition of remuneration to the producer of sound recording was added.

### Right of pursuit

The Draft provides a new category of right to artistic, photographic, written or musical work, the right of pursuit, which was specified as “subsequent to the transfer of original copy or handwriting of the works, the author or its heir will enjoy the right to receive interest from the profits made by resale of the works through auction”.

Along with the prosperous development of the arts market in China, with huge profits made by intermediary buyers and businesses, more emphasis on the interests of artists have been demanded by local artistic associations. The amendment aims for a better balance of interests between artists and businesses.

### Exploitation of audiovisual work and distribution of profits

Under current Copyright Law, except the right of authorship and remuneration, there is no provision for the exclusive rights of component works (such as a novel, music or drama) that is used or adapted into an audiovisual work.

The Draft confirms the exclusive rights enjoyed by component works by providing that the producer of audiovisual works shall acquire the permission of component works prior to its use for production.

The Draft further specifies that the exclusive rights of the audiovisual work and the distribution



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**He has successfully represented a number of multinational companies in their most intricate and important cases in the IP field, helping them to obtain the recognition of well-known mark status, registration of 3D marks, handling litigation cases of IP infringements concerning copyright, patent, trade mark, trade dress or trade secret, as well as resolving unfair competition, IP licensing, technology transfer agreements and handling other dispute matters.**

**As an experienced litigator in China, Charles has represented foreign clients at various levels of courts as well as enforcement agencies. In addition to his work in courtrooms, he has been involved in IP transactional work, including the drafting, negotiation and enforcement of IP assignment or licensing agreements.**

**His professional experience includes working with the non-profit Japan External Trade Organization (JETRO), and reputable international and Chinese law firms, Baker & McKenzie and King & Wood Mallesons. He has also been a speaker at INTA, QBPC and JETRO/IPG seminars.**

of related profits can be decided according to an agreement between the producer of the audiovisual work and the authors of those component works. Even if there is no clear agreement, the authors of the component works shall enjoy a “reasonable remuneration” deriving from the exploitation of the audiovisual work. The third Draft also provides that the author of those component works enjoys the exclusive right to his own work embodied in the audiovisual work unless it is stipulated otherwise in the agreement.

The Draft provides that authors of component works enjoy the authorship right as well as the right to receive the corresponding profit according to the contract, or a statutorily “reasonable amount”. Such provision will greatly strengthen the protection to right owners of component works.

### Employers’ exclusive right to the use of works for hire

Under current law, the employer enjoys the copyright of works for hire except its right of authorship, where (i) the employer provides material technical conditions and takes responsibility for the competition of works of engineering design figure, product design figure, computer software, and others, or; (ii) the copyright originally belonged to the employer in accordance with law, administrative regulations or contracts. As for the exclusive right for other kinds of works for hire, their copyright will belong to the author employee unless it is contractually decided otherwise, which allows the author per se to use such work regardless of authorisation from the employer.

The Draft provides that the employer enjoys the right to use,

free of charge, the works for hire made by the employee, within the scope of employment, as well as to exclude others (including the authors) from using the works during a two year period. In return, the law requires the employer to provide rewards to its employee-author and to retain the employee-author’s right to use the works in other

## The provision for compensation is widely regarded as insufficient to compensate the loss of right owners

publications. In addition to works of engineering design figure, product design figure, and computer software, the Draft adds news reports to the works whose copyright (except the right of authorship) automatically belongs to the employer.

The revision provides that the ownership of works for hire shall, primarily, be decided under contract. The revision also authorises employers to exclude any party including the employee itself from using the works for hire on engineering design figure, product design figure, computer software, and news reports.

### Ownership of exclusive rights

The Draft reflects the principle of contract autonomy in the following aspects. It changes the ownership of audiovisual works from belonging to the producer to according to the contract, with an addition of an interest mechanism concerning authors of audiovisual works. The Draft establishes the contract priority principle, and specifies the respective rights of relevant parties. It adds the provision on copyright protection for works of a sole medium, in order to solve the issue concerning affec-tion to enforcement of copyright due to loss of sole original copy.

### Term of protection for exclusive rights

According to the requirement of related associations and provisions of international treaties, the term of protection for photographic works is the lifetime of the author plus 50 years after his death.

### Limitation to Exclusive Rights

With reference to international treaties, the major principle on limitation to exclusive rights is added, while the scope of limitation to exclusive rights is adjusted.

## Remedies

### Major Revisions Concerning Remedies

The Draft summarises and systemises infringing acts and situations. It adds provisions on the lia-

bility of internet service providers. The Draft authorises right owners to choose the computing method of loss on the basis of actual loss, illegal gains of the infringer, reasonable times of royalties, or a reasonable amount below Rmb1 million (\$160,000). The Draft also heightens statutory damages and provides for punitive damages to intentional infringers. Furthermore, the Draft increases the amount of fines from three times the illegal gains to five times. It also strengthens enforcement measures, such as conduct seizures for local administrative organs. It also adds provisions concerning copyright administrative mediation.

### Statutory compensation and punitive compensation

Under current law, the copyright owner may seek compensation on the basis of either its loss due to infringement or illegal gains acquired by infringers, otherwise the statutory compensation shall be decided by court at a maximum of Rmb500,000.

The Draft provides that the right owner may choose to seek compensation according to (i) actual loss; (ii) illegal gains of the infringer, (iii) reasonable times of royalties or otherwise, or (iv) statutory compensation under Rmb1 million. Furthermore, the Draft provides that where the intentional infringements have occurred more than twice, the court is authorised to decide the amount of compensation as up to two or three times the statutory amount (the statutory damages can then be decided as up to Rmb3million).

Due economic developments in China, the provision for compensation is widely regarded as insufficient to compensate the loss of right owners. The new legal provisions aim to increase the amount of compensation to meet the actual demand of law enforcement, and to sufficiently deter infringers.

### Administrative mediation for copyright disputes

The Draft adds the provision concerning administrative mediation procedures. Specifically, copyright administrations may establish a Copyright Dispute Mediation Committee (CDMC), which is responsible for the mediation of copyright and related rights disputes. Moreover, this mediation agreement will be judicially confirmed according to the Civil Procedural Law of the PRC.

Copyright-related disputes have significantly increased in past years, and the current judicial procedures are widely regarded as time-consuming and costly. With these new provisions, Chinese administrative organs will provide remedies for more time-effective resolutions for right owners.



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