

## 2. The Updated Legislations on Copyright Protection

GUO Shoukang, Professor, Renmin University of China and UNESCO Chairholder in Copyright and Neighbouring Rights

WAN Yong, Post doctoral student of Law, Renmin University of China

On April 18, 2006, during his visit to the headquarters of US Microsoft Company, President Hu Jintao pointed out that, “Enforcement of the protection of intellectual property right is not only necessary for the furtherance of China’s opening and reform and improvement of investment environment but also indispensable for the consolidation of China’s own innovation capacities”.<sup>1</sup> During the past years, China amended and formulated the laws, administrative regulations and departmental rules in terms of intellectual property right, of which the reasons include, on the one hand, to perform the commitments that China has made as of entering into international treaties and, on the other hand, to encourage innovation and improve self-innovation capacities. This paper is mainly to introduce the updated China’s legislation process in terms of copyright protection in recent years.

### I. Amendment to *Copyright Law* in 2001

On December 11, 2001 China was officially admitted as a member of WTO. In order to perform China’s commitments in the *Protocol on the Accession to WTO*, the 24<sup>th</sup> Meeting of the Standing Committee of the National People’s Congress adopted the *Decision on Amending the Copyright Law of the People’s Republic of China* on October 27, 2001, and effective as of the date of promulgation. The general considerations of this amendment to the *Copyright Law* are that, in accordance with China’s commitments, relevant provisions of the then *Copyright Law* that were not in conformity with the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) shall be amended accordingly and new provisions concerning the copyright protection in an Internet environment shall be added based on the new situation, such as the dramatic development of information technologies.<sup>2</sup> After the amendment, the *Copyright Law* is added to 60 articles from the former 56 articles; the contents amended are totally 53 items; and the scope of amendment involves the subject matter, object, contents of right, restriction, neighbouring rights, legal liabilities and collective administration organizations of the copyright. Certain major amendments are briefed as follows:

#### (1) Definite provisions of the right of rental

As provided by Article 11 of Agreement on TRIPs that, “In respect of at least computer programs and cinematographic works, a Member shall provide authors and their successors in title the right to authorize or to prohibit the commercial rental to the public of originals or copies of their copyright works.” And as provided by paragraph 4 of Article 14 of the TRIPs that, The provisions of Article 11 in respect of computer programs shall apply *mutatis mutandis* to producers of phonograms and any other right holders in phonograms as determined in a Member’s law.

Article 10 of the former *Copyright Law* does not clearly mention the right of rental when providing the personal right and property rights. However, in accordance with the provisions of subsection (5) of Article 5 of the former *Regulations for the Implementation of the Copyright Law*, the right of rental is included in the right of distribution;<sup>3</sup> therefore, the right of rental may be applied to all the works that are protected by copyright. In accordance with subsection (5) and subsection (8) of Article 3 of the former *Copyright Law*, cinematographic works and computer software are works subject to *Copyright Law*; as such, all the computer programs and cinematographic works shall be vested in the right of rental (although there is no definite provision under law) while phonograms are not of the same under the former *Copyright Law*.

After the amendments to the *Copyright Law*, it is explicated provided in subsection (7) of Article 10 that, “the right of rental, that is, the right to authorize others to use temporarily a cinematographic work or a work created by a process analogous to cinematography, or computer software, except where the software itself is not the essential object of the rental.” In addition, it is provided by Article 41 of the *Copyright Law* that, “the producers of a sound recording or video recording shall enjoy the right to authorize others’ reproducing or renting the sound recording or video recording or making it available to the public through information network and to receive remuneration there from...”. Hence, computer software, cinematographic works, and phonograms are all of the right of rental, which is expressly provided in the updated *Copyright Law*.

**(2) Criminal liabilities provided in the  
*Copyright Law***

Although the criminal liabilities in terms of infringement of intellectual property are provided in the *Criminal Law*, and amended in 1997<sup>4</sup>, there are no provisions in connection with the criminal liabilities for infringement under the former *Copyright Law*. It is provided in Article 47 of the amended *Copyright Law*, however, that “anyone who commits any of the following acts of infringements shall..., and where a crime is constituted, criminal liabilities shall be investigated in accordance with law.”

**(3) Addition of the right of communication  
through information network**

It is provided in paragraph (12), subsection 1 of Article 10 of the amended *Copyright Law* that, “the right of communication through information network, that is the right to make a work available to the public by wire or wireless means, so that people may have access to the work from a place and at a time individually chosen by them.” This provision is of reference to relevant contents of the “right of communication to the Public”, in Article 8 of the *WIPO Copyright Treaty*. Article 8 of WCT creates a material right to control the distributions of works on Internet for the sake of right owners.

Generally speaking, the rights of a right owner for controlling the online distribution of her or his work as provided in various countries throughout the world may be classified into the following three types: i) the type of “expansion of extension”, of which the USA is the representative; the USA adopts the expansive interpretations of the extension of the definitions of certain current rights (such as the right of reproduction, the right of publication and the right of public performing) to realize the protection of the right on online communication of the right owner; ii) the type of “reorganization”, of which Australia is representative; this type is to reorganize the various rights of communication of the copyright owner and provide all communication rights other than the right of reproduction and the right of publication as one consolidated communication right; and iii) the type of “new addition”, which specially creates a right so as to control the online communication of works, such as China’s “right of communication through information network”. Since WCT merely requires the parties to confer the right owners the right to protect the online communication of their works but does not have mandatory requirements on the mode to be adopted, China’s provisions of the “right of communication

through information network” are in conformity with WCT’s provisions.

**(4) Addition of the protection for technological  
measures**

It is provided by paragraph (6), subsection 1 of Article 47 of the amended *Copyright Law* that, intentionally circumventing or sabotaging the technological measures adopted by a copyright owner or an owner of the rights related to the copyright to protect the copyright or the rights related to the copyright in the work or the products sound recording or video recording, without permission of the owner shall constitute an infringement, except where otherwise provided for in laws and administrative regulations. This provision is also of reference to the relevant contents of WCT and WPPT.

Article 11 of WCT provides that “Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law.” It is also likewise provided in Article 18 of the WPPT. However, please note that Article 11 of WCT and Article 18 WPPT do not actually confer any substantial new rights to the authors;<sup>5</sup> it merely requires the contracting parties to provide legal remedies against the circumvention of technological measures.

**(5) Addition of protection for electronic rights  
management information**

It is provided in paragraph (7), subsection 1 of Article 47 of the amended *Copyright Law* that, intentionally removing or altering any electronic rights management information attached to a copy of work, a product of sound recording or video recording, etc. without permission of the copyright owner or the owner of the rights related to this copyright shall constitute an infringement, except where otherwise provided for in this Law. This provision is also of reference to the provisions of Article 12 of WCT and Article 19 of WPPT. Likewise, neither Article 12 of WCT nor Article 19 of WPPT confers any substantial new rights to authors.

## II. Amendments to the Regulations for the Implementation of the Copyright Law

Regulations for the implementation of the *Copyright Law of the People's Republic of China* shall become effective as of September 15, 2002 after the review and amendment by the State Council on August 2, 2002. After the amendments, the Regulations are amended from the former 56 articles to 38 articles. The amendments to the Regulation are, on the one hand, to reinforce the maneuverability for the implementation of the amended *Copyright Law* and, on the other hand, to fulfill the commitments of the Chinese government concerning the amendments to the former Regulations during the negotiations for the accession to the WTO.<sup>6</sup> The major amendments are briefly introduced as follows:

### (1) Provisions of "Three-step Inspection Approach"

The "three-step inspection approach" is not expressly provided in the amended *Copyright law* but in Article 21 of the amended *Regulations for the Implementation of the Copyright Law*, which provides that "the exploitation of a published work which may be exploited without permission from the copyright owner in accordance with the relevant provisions of the copyright law shall not impair the normal exploitation of the work concerned, nor unreasonably prejudice the legitimate interests of the copyright owner."

Under international treaties, the "three-step inspection approach" is originally provided in subsection (2) of Article 9 of Berne Convention;<sup>7</sup> however, the "three-step inspection approach" is merely applicable to reproduction right under the said provision. Article 13 of the Agreement on TRIPs<sup>8</sup>, on the contrary, expands the applicable scope of the "three-step inspection approach" to all the economic rights provided in the Berne Convention without restriction to reproduction right only.<sup>9</sup> Article 10 of WCT<sup>10</sup> also adopts the modes of the Agreement on TRIPs and applies the "three-step inspection approach" to all restrictions of and exceptions to rights. In addition, it is also stated in Article 10 of the WCT that, all the restrictions of and exceptions to rights allowed in the Berne Convention may be extended to digital network environment.

Based on the foregoing, it may be concluded that the "three-step inspection approach" provisions of the *Regulations for the implementation of the Copyright Law* are in conformity with the requirements of the Agreement on TRIPs.

### (2) Division of Law Enforcement Authorities

It is provided by Article 37 of the *Regulations for the Implementation of the Copyright Law* that, "where any act of infringement is committed as enumerated in Article 47 of the Copyright Law, which also prejudices the social or public interests, the administrative department for copyright of the local people's government shall be responsible for the investigation into and dealing with such an act. The administrative department for copyright of the State Council may investigate into and deal with any act of infringement that is of nationwide effect." This article divides the punishment authorities between the copyright administrative department of the State Council and the copyright administrative department of the local people's government; in other words, regular administrative cases, either foreign-related or purely domestic, shall be subject to the jurisdiction of local copyright administrative department and the copyright administrative department of the State Council shall investigate and render penalties under cases that are of material impacts throughout the country.

### (3) Provisions of voluntary register system

It is provided by Article 25 of the *Regulations for the Implementation of the Copyright Law* that, "An exclusive licensing contract or a copyright transfer contract concluded with the copyright owner may be filed with the administrative departments for copyright for the record." According to the same, parties may or may not register the contract after the parties sign an exclusive license contract or transfer contract. Non-register does not impact the effect of the copyright as copyright is incepted automatically and not register for any formalities. However, register may provide validations and easier for collection of proof when the copyright is infringed so as to reduce the litigation costs.

## III. Amendments to the Regulations on Administration of Audio-Visual Products

On December 12, 2001, the 50<sup>th</sup> Executive Meeting of the State Council adopted the amendments to the *Regulations on Administration of Audio-Visual Products*, and effective as of February 1, 2002. In the mean time, the *Regulations on Administration of Audio-visual Product* promulgated by the State Council on August 25, 1994 shall be annulled on the same date. The amended *Regulations on Administration of Audio-visual Products* consist of 7 chapters and 51 articles, including the general provisions, publication, reproduction, importation, wholesale, retail and rental, penalty provisions and

## CHAPTER II

supplementary provisions. Comparing to the former one, these Regulations have the following major changes:

### **(1) Better protection for the right for presentation of copyright owner**

For quite a long time, there are some screening rooms that are for commercial purpose. The audio-visual products played in such screening rooms are normally without the authorization of relevant copyright owners, which severely infringe the right for presentation of copyright owners. It is provided in Article 49 of the new Regulations that, "As of the date of implementation of these Regulations, no establishment of a commercial audio-visual products projection unit may be examined and approved, those established according to law shall not update the existing equipment and shall be closed within 5 years, before closure, they shall be supervised and administered by the cultural administrations department."

### **(2) Clearer system for the administration of audio-visual products**

According to the new Regulations, the General Administration of Press and Publication shall be responsible for the supervision and administration over the publication, production and reproduction of audio-visual products throughout the country; the Ministry of Culture shall be responsible for the supervision and administration over the importation, wholesale, retail and rental of audio-visual products throughout the country; and other administrations under the State Council shall be of respect responsibilities and authorities and responsible for the supervision and administration over relevant audio-visual products business activities according to provisions. The publishing administrations above county level shall be responsible for the supervision and administration over the publication, production and reproduction of audio-visual products within their respective jurisdiction and the cultural administrative departments shall be responsible for the supervision and administration over the importation, wholesale, retail and rental of audio-visual products within their respective jurisdiction.

## **IV. Amendments to the *Regulations on Protection of Computer Software***

On December 20, 2001, the State Council promulgated the amended *Regulations on*

*Protection of Computer Software*, and effective as of January 1, 2002. The amendments made at this time are mainly as follows:

### **(1) Harmonization of the protection terms for software and other literary works**

It is provided in the former *Regulations on Protection of Computer Software* that, "the protection term for software copyright is twenty-five years, expiring on December 31 of the 25<sup>th</sup> year after the first publication of the software. Before the expiration of protection, the software copyright owner may apply for a renewal of 25 years at the software registration administration, with a maximum protection term of 50 years." According to this provision, computer software will not be protected until it is published; and if the copyright owner does not renew the same, the protection term of the same is merely 25 years, which is not in line with the requirement of the Agreement on TRIPs. First of all, Article 10 of the Agreement on TRIPs provides that "computer programs... shall be protected as literary works under the Berne Convention (1971)". Further, as provided in Article 7 of the Berne Convention, "the term of protection granted by this Convention shall be the life of the author and fifty years after his death." Provisions under both Berne Convention and Agreement on TRIPs are minimum protection standards; in other words, the protection term conferred by domestic laws of member countries may exceed the standards of the same but shall not be lower than that. As such, the provision under the former *Regulations on Protection of Computer Software* is lower than the protection level granted by the two treaties. In addition, according to the provisions of Agreement on TRIPs, the computer programs shall be protected as literary works. Since the copyright of literary works is incepted as of the date of completion and not conditional upon publication; therefore, the provision that the copyright protection of software being conditional upon publication under the former *Regulations on Protection of Computer Software* is not in conformity with the Agreement on TRIPs, either.

After the amendments, the term for protection of software under the current *Regulations on Protection of Computer Software* is fifty years: "the software copyright shall exist from the date on which its development has been completed. In the case of software the software copyright of a natural person, the term of protection shall be the life time of such person and fifty years after his death, expiring on December 31 of the fiftieth year after his death. In the case of a piece of joint

software, the term of protection shall expire on December 31 of the fiftieth year of the death of the last surviving developer. In the case of software copyright a legal entity or other organization, the term of protection shall be fifty years, expiring on December 31 of the fiftieth year after the first publication of such software, however, if any such software has not been published within fifty years from the date on which its development has been completed, it shall be not longer protected under these Regulations.”

**(2) Amendments to relevant provisions on software registration**

It is provided by the former *Regulations on Protection of Computer Software* that, “registration at the software registration and administrative department is a precondition to the request for an administrative proceeding or action of a software copyright dispute according to these Regulations.” According the same, if the copyright owner does not register the software, no petition for administrative proceeding or legal action is allowed.

The foregoing provision is deleted in the amended *Regulations on Protection of Computer Software*.

**(3) The right of rental and the right of communication through information network conferred to software copyright owners**

Provisions on right of rental and the right of communication through information network are added to the amended *Copyright Law*. It is also respectively conferred by paragraphs (6) and (7) of subsection 1 of Article 8 of the amended *Regulations on Protection of Computer Software* the right of rental and the right of communication through information network to software copyright owners. Software copyright owner is entitled “the right of rental, which is the right to commercially license others to temporarily use the software, unless such software is not the main subject matter of the rental”, and the “right of communication through information network, which is the right to provide software by wire or wireless means so that the public may receive such software at their personally selected time and location”.

**(4) Addition of protections for technological measures and protection of electronic rights management information**

Article 47 of the amended *Copyright Law* provides the protections for technological measures and the protection of electronic rights management

information. By making reference to the foregoing provisions, the new *Regulations on Protection of Computer Software* also defines that “intentionally circumventing or sabotaging of the technological measures adopted by a copyright owner to protect the software copyright” and “any intentionally removing or altering any electronic rights management information of software” shall be dealt with as infringement under paragraphs (3) and (4) of subsection 1 of Article 24.

**V. Measures on the Implementation of Copyright Administrative Penalties**

*Measures on the Implementation Copyright Administrative Penalties* was reviewed and approved by the general affairs meeting of the State Administration of Copyright on July 16, 2003, and effective as of September 1, 2003. The amended Measures further improve the copyright administrative law enforcement from the perspectives of contents and forms and is of great significance to ensuring the copyright administrative law enforcement order, standardizing the administrative law enforcement acts of the copyright administrative departments and pushing the copyright administrative law enforcement work.<sup>11</sup>

**(1) Clear Definition of the law enforcement subject matter for copyright law administrative enforcement**

Article 2 of the former *Regulations on the Implementation of Copyright Administrative Penalties* defines the law enforcement subject matter as the “copyright administrative departments of the State Council and the copyright administrative departments of local people’s governments”, namely the authorities for copyright administrative law enforcement are restricted to copyright administrative departments at each level. However, many provinces and cities are promoting consolidated legal enforcement reforms that are of relatively centralized administrative punishment authorization to date and part of the provinces and cities have built up the consolidated legal enforcement teams for cultural market. Therefore, according to provisions of Article 7 of the *Copyright Law* and Article 37 of the *Regulations on the Implementation of the Copyright Law*, the State Copyright Administration has extended the scope of the copyright administrative law enforcement subject matter appropriately. As a result, the said Regulations define the subject matter for copyright administrative law enforcement as “the State Copyright Administration and the relevant authorities that are

## CHAPTER II

of power of copyright administrative law enforcement at local people's governments".<sup>12</sup>

### **(2) Standardization of the acts punishable by copyright administrative departments**

According to the provisions of the Agreement on TRIPs, intellectual property rights are private rights.<sup>13</sup> Therefore, unless public interests are involved, it is not appropriate for state public authorities to interfere with normal activities of infringement of intellectual property rights. It is also provided by Article 47 of the amended *Copyright Law* and Article 24 of the *Regulations on Protection of Computer Software* that the illegal acts that shall be investigated and punished by copyright administrative departments shall be the acts "that infringe copyright and impair public interests at the same time". For the purpose of consistence with the current relevant copyright laws and regulations, Article 3 of *the Regulations* redefines the "illegal acts" and adds the contents of "impairing the public interests at the same time".

### **(3) Tightening the types of administrative punishments**

According to the provisions of Article 47 of the amended *Copyright Law* and Article 24 of the *Regulations on Protection of Computer Software*, it is added to Article 4 of the Measures for the Implementation of the Copyright Administrative Penalties the contents of "confiscation of materials, tools and equipment and so forth that are mainly used for the producing of infringing reproductions and the provisions on "warning" are deleted therein, through which the types of administrative punishments are adjusted to "order for cease of infringement, confiscation of illegal earnings, confiscation of infringing reproductions, fines and confiscation of materials, tools and equipment and so forth that are mainly used for the producing of infringing reproductions, as well as any other administrative punishments that are provided by laws, regulations and rules".

## **VI. Amendments to Customs Protection Regulations for Intellectual Property Rights**

On November 26, 2003, the new *Customs Protection Regulations for Intellectual Property Rights* was adopted by the State Council, which made great adjustments to the frontier measures for intellectual property rights and established the custom protection system for intellectual property that is consistent with the Agreement on TRIPs.

### **(1) The new Regulations amended the former compulsory register of intellectual property to voluntary register**

As provided by the former Regulations, the register is the precondition to apply for customs protection of intellectual property. Any right owner that does not register the intellectual property shall deal with the emergent register formalities when applying for the General Administration of Customs to take any protective measures, which actually implies that the execution of customs protections is premised on registrations.

As provided by Article 51 of Agreement on TRIPs, members shall adopt procedures to enable a right holder, who has valid grounds for suspecting that the importation of counterfeit trademark or pirated copyright goods may take place, to lodge an application in writing with competent authorities, administrative or judicial, for the suspension by the customs authorities of the release into free circulation of such goods. By studying the said provisions, no preconditions are set up for an application for customhouses to take frontier measures. Hence, the provisions on compulsory register under the former *Custom Protection Regulations for Intellectual Property Rights* are not in conformity with the Agreement on TRIPs.

The new Regulations changed the same to voluntary register. As provided by Article 7, intellectual property right owner may, according to the provisions of the Regulations, apply for the register of his intellectual property right at the General Administration of Customs. One of the advantages of such register is that the customhouse will immediately notify the intellectual property right owner in writing when it deems that the imported goods are of suspicions of IP infringement, which is of advantage for protection of the rights of the intellectual property right owner. In respect of intellectual property right owners that do not register their intellectual property rights, the customhouse is not obligated to notify them when the customhouse discovers any suspicious goods (actually it is hard to discover such goods as their intellectual property rights are not registered at the custom house and custom house is unable to identify the same). As for China which is a country of multiple frontier ports, it is extremely difficult for the right owners to discover whether there is any import or export of suspicious IP infringement goods; based on this, most of the intellectual property right owners will voluntarily register at the General Administration of Customs. Such amendment also reflects the maturity of China's legislative body from the legislative technical perspective, which has switched from the

former obligation-driven to the current benefit-driven.

**(2) Flexible provisions on the assurance provided by the right owner for purpose of seizure of suspicious infringement goods**

It is provided by Article 53 of the Agreement on TRIPs that, the competent authorities shall have the authority to require an applicant to provide a security or equivalent assurance sufficient to protect the defendant and the competent authorities and to prevent abuse. Judging from this provision, the assurance provided by a right owner shall not be restricted to security. The former Regulations merely provide a form of security. Article 14 of the new Regulations amend the form of assurance to “assurance that does not exceed the value of the goods” without any limitations of assurance methods.

**(3) Reduction of security amount**

As provided by the former Regulations, an applicant who petitions the custom to seize the suspicious infringing goods shall provide security that is equivalent to the CIF price of the imported goods for the FOB price of the exported goods; if the consignee or consignor is of the opinion that the imported goods do not infringe the intellectual property of the applicant, it may petition the custom to release relevant goods after it provides the security that is twice the CIF price of the imported goods for the FOB price of the exported goods to the custom. In this regard, double security is required for release of goods, which is of no precedent in any other countries. No similar provisions are under the Agreement on TRIPs, either. It is amended under the new Regulations, therefore, security that is only equivalent to the value of the goods is required for petitions either for seizure or release of the goods by the custom.

**VII. Regulations on Copyright Collective Administration**

The *Regulations on Copyright Collective Administration* was adopted by the 74<sup>th</sup> Executive Meeting of the State Council on December 22, 2004, and effective as of March 1, 2005. This is the first time for China to establish the copyright collective administration system by virtue of administrative regulation. The *Regulations on Copyright Collective Administration* (hereinafter the “Regulations”) clarifies the basic meaning of copyright collective administration and provides the types of the administrative rights enjoyed by copyright collective administrative organizations,

the supervisions over the copyright collective administration organizations and the legal liabilities and so forth.

**(1) Clarification of the basic connotation of copyright collective administration**

Copyright is a civil right and normally exercised by the right owner on her or his own. However, in many occasions, the right owner herself or himself is hard to effectively exercise such right or the cost for self-exercise is too high because the right owners are extensive and cover every aspect of the society and the use methods for literary, artistic and scientific works are also of decentralization, such as the right of performing and the right of broadcasting. For instance, once the musical work is published, the individual author will face a great number of users throughout the country, such as performance organizations, entertainment units and broadcasting organizations; and it is normally unable or difficult to control the use of the work. On the other hand, the users are also unable to secure each single license because of the dispersing of the right owners of the works that are of multiple uses. As such, there is a common practice in the world, namely the right owner authorizes the collective administrative organization to exercise relevant rights on her or his behalf, to release license to users, to bring a lawsuit against infringers and to distribute the collected royalties to the right owner; this is copyright collective management.<sup>14</sup>

These Regulations makes reference to the experiences of foreign countries and provides the basic connotation of copyright collective administrations under Article 2 of the same, which set forth that:

“Copyright collective administration refers to that, under the authorization of right owners, the copyright collective administration organization centralized exercises the relevant rights of the right owner and carries out the following activities under its own name:

1. To sign the license contract of or in connection with copyright with users;
2. To collect royalties from the users;
3. To make transfer payment for the royalties to the right owners; and
4. To participate into the litigations or arbitrations that are in connection with copyright or the rights relevant to copyright.”

**(2) Provisions of the types of the administrative rights enjoyed by the copyright collective administrative organizations**

As provided by Article 4 of the Regulations, “the right for performing, the right of presentation, the right of broadcasting, the right of rental, the right of Communication through information network, the right of reproduction and any other right provided by the *Copyright Law* that are difficult to be exercised by the right owner in person may be subject to the group administration of a copyright collective administration organization.”

**(3) Provision of the collection and transfer payment of royalties**

In order to ensure the collection and transfer payment of royalties, it is clearly provided by the Regulation that the amount of the collected royalties shall mainly be determined through negotiations according to the standard royalty rates set by the collective administration organization, such standard rates shall be published by the copyright administrative department of the State Council; the fees collected by the collective administration organization shall be fully transferred to the right owners after withholding the administrative fees and no misappropriation is allowed.<sup>15</sup>

It is provided by Article 26 of the Regulations that, when two or more than two copyright collective administration organizations collect royalties in terms of the same usage from the same user, one of the copyright collective administration organizations may be determined in advance through negotiations for the purpose of collection of royalties. The royalties collected shall be distributed among the relevant copyright collective administration organizations after negotiations.

**VIII. Measures for the Administrative Protection of Internet Copyright**

In order to strengthen the administrative protection for the right of communication through information network during the Internet information services, the National Copyright Administration and the Ministry of Information Industry promulgated the *Measures for the Administrative Protection of Internet Copyright* (hereinafter the “Measures”) on April 30, 2005. These Measures shall be effective as of May 30, 2005.

**(1) Application Scope of the Measures**

As provided by Article 2 of the Measures, these Measures are applicable to activities that automatically provide uploading, storage, link or search functions in respect of works and audio-visual products through Internet but do not edit, alter or select any stored or transmitting content based on the instructions of the Internet content providers during the Internet information service activities.” “In terms of any direct provisions of Internet contents during the Internet information service activities, copyright law shall be applied”.

**(2) Provision of the Liabilities for the Internet information services provider and Internet accession services provider**

It is provided by Article 5 of the Measures that, “when a copyright owner discovers any infringement of her or his copyright right in the content distributed by the Internet, she or he may notify the Internet information services provider or any institution authorized by the same (hereinafter collectively called the “Internet information services provider”) and the Internet information services provider shall immediately take actions to remove relevant content and keep the notification from the copyright owner for a period of six months.” It is provided by Article 6 that, “the Internet information services provider shall record the relevant information content and the time and the IP address or domain name for the publication of the same after the receipt of the notification from the copyright owner. The Internet accession services provider shall record the accession time, user account, Internet address or domain name and main dialing up telephone number etc. in terms of the Internet content provider.”

If the Internet information service provider fails to take actions to remove relevant content when it knows the Internet content provider infringes any other’s copyright through Internet or, although it does not know the same, after it receives the notification from the copyright owner, which in the meantime prejudice the social public interests, the copyright administration may impose administrative punishments against the same.<sup>16</sup> If no evidence may prove that the Internet information services provider knows the infringement or such Internet information services provider takes actions to remove relevant content after the receipt of the notification from the copyright owner, no administrative legal liabilities shall be imposed.<sup>17</sup>



### **IX. Regulations on Protection for the Right of Communication through Information Network (Draft)**

September 8, 2005 the State Copyright Administration promulgated the *Regulation on Protections for the Right of Communication through Information Network (Draft)* (hereinafter the "Draft") to solicit opinions from the public. The Draft has 21 articles in total, which provides certain specific issues in terms of the communication through information network.

#### **(1) Draft Provides Restrictions on the Right of Communication through Information Network**

Article 4 to Article 7 of the Draft provides the restrictions on the right of communication through information network.

1. Reasonable uses are provided by Article 4 of the Draft:

Use of works in any of the following circumstances are not required for permission from the copyright owner and no compensations are required, but the author's name, the work's name and origin shall be specified as the case may be and no infringement of any other rights enjoyed by the copyright owner according to law shall be allowed:

(1) unless specified by the copyright owner for no republishing, paste the contents published in the bullet board services system to another bullet board services system;

(2) for the purpose of reporting news, to unavoidably reuse or quote the published work of others in the information network;

(3) to distribute to the public through information network any news report articles in terms of political, economic or religious issues that are published in any other media, unless the copyright owners state that no communication by any other means is allowed;

(4) to communicate to the public through information network any other's speech made in the public assembly, unless the copyright owners state that no communication by any other means is allowed;

(5) to provide published works that are kept by a public library for the purpose of reading through the network reading system of the library, provided that such reading system is not of reproduction function and is able to effectively prevent the works under network reading from any further communication through information network;

(6) to reproduce other's websites for the purpose of the provision of search services, provided that no decoding of the technological measures taken by the right owners or exclusive users is allowed and no reproduction functions shall be provided;

(7) to translate the work that is published in Chinese language by any Chinese citizen, legal entity or any other organization into the languages of minor nations and to communicate the same through information network to the public; and

(8) to use the computer software in the course of fixing computer equipment, system or network or demonstrating its functions for non-profitable purposes.

The provision of subsection 1 of this Article shall also be applied to the restrictions to the rights of performers and audio-visual producers.

2. Statutory license for textbooks is provided in Article 5 of the Draft:

"In terms of any provision of network remote educations for the purpose of implementing the nine-year compulsory education or State education planning, the remote educational institution that meets all of the following conditions may, without the permission from the copyright owner, except that the author has declared in advance that the exploitation is not permitted, compile published fragments of works, short written works or musical works, a single work of fine art, or photographic works into the textbooks for network remote educations, provided that the name of the author and the name and origin of the work are specified, compensations are paid as provided and no infringement of any other rights legitimately enjoyed by the copyright owner is committed:

(1) such text books are merely provided to students who register at the remote educational institution; and

(2) such remote educational system is able to effectively prevent the works used in the text books from further communication through information network.

The provision of subsection 1 of this Article shall also be applied to the restrictions to the right of communication through information network of performers and audio-visual producers."

Based on the foregoing provisions, although the Draft provides that the compilation of relevant textbooks for remote educations is of statutory license, it also provides a series of restrictive conditions. First of all, the compilation of textbooks shall be merely for the purpose of implementing nine-year compulsory education and national educational planning. Secondly, those admitted to be compiled into textbooks are fragments of works, short written works or musical works, a single work of fine art, or photographic works that are published already. Works that are not published or the cinematographic works, computer software and saga novels are not within

## CHAPTER II

the scope of statutory license.

3. Statutory license for public libraries to provide the network libraries to readers outside the libraries is provided in Article 6 of the Draft:

“Unless stated by the copyright owner in advance on no-use, a public library that meets all of the following conditions may, without the permission of the copyright owner, provide the published books kept by the library to the registered readers outside the library through the network reading system of the library, provided that the name of the authors and the name and origin of the works are specified, compensations are paid as provided and no infringement of any other rights legitimately enjoyed by the copyright owners is committed:

- (1) the books under network reading have been published legally for more than three years;
- (2) no reproduction function is provided by the reading system; and
- (3) the reading system may accurately record the reading times of the works and effectively prevent the works under network reading from further communication through information network.”

According to the provisions of the Draft, merely a “public library may provide the published books that are kept by the library through network reading system of the library to registered readers outside the libraries”, which therefore excluded all private libraries and commercial data companies. In addition, not all the public libraries are allowed to do the foregoing; only the public libraries that meet the three conditions provided above may be allowed to carry out such activities.

4. Statutory license for excerption is provided in Article 7 of the Draft:

“Literary works, artistic works and photographic works that are published in newspaper, journals or information network may, unless stated by the copyright owner in advance that no excerption or edition is allowed, be excerpted or used as reference or materials in newspaper, journals or information network, provided that the name of the authors and the name and origin of the works are specified, compensations are paid as provided and no infringement of any other rights legitimately enjoyed by the copyright owners is committed.”

Article 32 of the *Copyright Law* merely provides that the articles published in newspaper or journals may be excerpted by other newspaper or journals but does not provide whether the works published on information network are allowed for excerption. The Draft makes clarification in this regard.

According to Article 7 of the Draft, unless stated by the copyright owner in advance that no excerption or edition is allowed, works that are published in newspaper, journals or information network may be excerpted in any other newspaper, journals or information network. Please note that the Draft does not restrict that the works published in newspaper and/or journals may merely be excerpted in newspapers and/or journals and works published in information network may merely be excerpted in information network. In other words, unless stated by the copyright owner in advance that no excerption or edition is allowed, a work published in newspaper and/or journals may be excerpted by any other newspaper, journals or information network.

### **(2) Draft provides protection for technological measures**

It is provided by Article 8 of the Draft that, “without the permission of the right owner or exclusive user, no decoding measure to impair or invalidate the technological measures of the same is allowed, unless otherwise provided by the Regulations.”

It is provided by Article 9 of the Draft that, “no legal liabilities shall be imposed for the decoding of the technological measures without the permission of the right owner or the exclusive user for any of the following purposes:

1. Use allowed by law of the works, performances and audio-visual products communicated on information network;
2. Encryption studies on information network for non-commercial purpose;
3. Technical testing for investigation or correction of information network security defects for non-commercial purpose;
4. Browse filtering technology studies for non-commercial purpose; or
5. Investigation or spying of illegal or criminal activities on information network.

Based on the provisions of above subsection (1), the parties may decode the technological measures of the right owner without her or his permission under circumstances of reasonable use and/or statutory license.

### **(3) Draft provides the protection for electronic rights management information**

It is provided by Article 11 of the Draft that, “no deletion or alteration of the electronic rights management information for the works, performance or audio-visual products is allowed

without the permission of the right owner or exclusive user, unless otherwise provided by the Regulations.

Without the permission of the right owner or exclusive user, none of the following activities shall be committed:

1. To communicate false electronic rights management information to the public through information network; or

2. To communicate the works, performances or audio-visual products of which the electronic rights management information is deleted or altered without the permission of the right owner or exclusive user to the public through information network.”

Such provisions are made reference to the provisions of Article 12 of WCT and Article 19 of the WPPT. However, it need be pointed out that the contents of the foregoing two sections are different from the provisions of Article 12 of WCT and Article 19 of the WPPT. The first difference is that, WCT and WPPT provide the subject condition, namely “knowing” (for instance, paragraph (II) of subsection (1) of Article 12 of the WCT provides that “to distribute, import for distribution, broadcast or communicate to the public, without authority, works or copies of works knowing that electronic rights management information has been removed or altered without approval”), which is not provided in the Draft. The second difference is that, WCT and WPPT mention the reproductions in addition to the works, performances and audio-visual products. But, we are of the opinion that it is reasonable for Draft not mentioning the reproduction. Because WCT and WPPT mention various activities, such as distribution, import for purpose of distribution, broadcasting or communication to the public while the Draft is only applied to the situation of communicating to the public. Broadcasting and communication to the public are intangible use forms (contrary to the tangible items as tangible items cannot be used for broadcasting or communication), which therefore is merely applicable to works. However, tangible use forms (use in the form of tangible items), namely the distribution and import for distribution, are relevant to the “reproductions of works” as the same is premised on the tangible form of the (non-physical) works. Since the Draft is merely applied to the situation of communicating to the public, only works exit and reproduction of works is not an issue.<sup>18</sup>

#### **(4) Draft provides the liabilities issues of the network services providers**

By referencing to the “Safety Harbor Rules” under American laws, Article 14 of the Draft provides that,

“No compensation issues shall be arisen in terms of infringement storage or illegal network contents for any storage services of network contents that are merely provided by automatic technical process and meet any of the following conditions:

1. Not knowing the stored network contents constitute infringement or violation of the law; or

2. Remove the content within 5 days after knowing or should know that the specific stored network contents constitute infringement or violation of the law.

The provisions of subsection 1 of the Article are applicable to the network content research services providers.”

It is provided by Article 15 of the Draft that,

“the right owner may send notice that meets all the following conditions to the storage services provider or search services provider of the contents after the right owner finds that such contents are of infringement or illegal, requesting for the removal of the said contents:

1. Having the written forms, such as handwriting, printing or e-mail;

2. Specifying the name and address of the right owner or exclusive user;

3. Requesting for the removal of the infringement or illegal network contents and specifying the unified resource positioning address of the said contents; and

4. Signed or stamped by the right owner.

With no contrary evidence, the storage services provider or search services provider shall be deemed to know that the stored network contents constitute infringement or violation of the law after the receipt of the notice of the right owner that meet all the conditions set forth in subsection 1 of the Article.

Recently, the hot topics in the society are the issues of music downloading addresses provided by means of links through the search engine of the relevant network search services provider, Article 14 and Article 15 of the Draft provide the same in this regard.

## Footnotes

- <sup>1</sup> <http://tech.163.com/06/0420/09/2F52TKT8000915BD.html> , visit on April 22, 2006.
- <sup>2</sup> Song Muwen, *Amendments to China's Copyright Law, Publishing Science*, Issue I of 2002.
- <sup>3</sup> It is provided by subsection (5) of Article 5 of the *Regulations for the Implementation of the Copyright Law of the People's Republic of China*, promulgated and implemented as of 1991, that “distribution refers to the provision to the public of certain amount of reproductions of the work by virtue of sales or lease for the purpose to satisfy the reasonable demands of the public”.
- <sup>4</sup> Refer to the “Crimes of Infringement of Intellectual Property”, Section 7 of Chapter III of the Criminal Law.
- <sup>5</sup> Jörg Reinbothe & Silke von Lewinski, *The WIPO Treaties 1996* (Butterworths, 2002), p142.
- <sup>6</sup> Overview of the amendments to *the Regulations for the Implementation of the Copyright law of the People's Republic of China*, available on the websites of State Copyright Bureau: <http://www.ncac.gov.cn/servlet/servlet.info.InfoTopicServlet?action=detail&id=22> on April 25, 2006.
- <sup>7</sup> It is provided by subsection (2) of Article 9 of the Berne Convention that, “it shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.”
- <sup>8</sup> Article 13 of the Agreement on TRIPS provides that, “members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.”
- <sup>9</sup> Gervais, *The Agreement on TRIPS*, note 2.71.
- <sup>10</sup> Article 10 of the WCT provides that, “contracting Parties may, in their national legislation, provide for limitations of or exceptions to the rights granted to authors of literary and artistic works under this Treaty in certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.”
- <sup>11</sup> Overview of amendments to Measures for the Implementation of *Copyright Administration*, available at the websites of State Administration of Copyright <http://www.ncac.gov.cn/servlet/servlet.info.InfoTopicServlet?action=detail&id=83>, on April 28, 2006.
- <sup>12</sup> *Ibid.*
- <sup>13</sup> It is provided in the preamble of the Agreement on TRIPs that, “members ...recognizing that intellectual property rights are private rights....”
- <sup>14</sup> *What are the significances of the Regulations on Copyright Collective Administration to Social, Economic, and Cultural Life – Interview with Yan Xiaohong, Deputy General Director of National Copyright Administration*, Yuan Xi, available on websites of Chinalaw <http://www.chinalaw.gov.cn/jsp/contentpub/browser/contentpro.jsp?contentid=co1998293766> on April 28, 2006.
- <sup>15</sup> Please refer to Articles 7, 11, 13, 14, 17, 25 and 29 of the *Regulations on Copyright Collective Administrations*.
- <sup>16</sup> Article 11 of *the Measures for Internet Administrative Punishment*.
- <sup>17</sup> Article 12 of *the Measures for Internet Administrative Punishment*.
- <sup>18</sup> Jörg Reinbothe & Silke von Lewinski, *The WIPO Treaties 1996* (Butterworths, 2002), p155.