**Hot Issues in Draft Copyright Law Amendments**

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China’s legislature successively released the Amendments to the Copyright Law (Draft for First Review) on April 30, 2020 and those for the second review (Draft for Second Review) on August 17, 2020. This author will be examining the hot issues in the deliberations or review of the two Draft Amendments.

I. Definition of Works

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| Current Law | Draft for First Review | Draft for Second Review |
| Article 3 For the purpose of this Law, the term “works” includes works of literature, art, natural science, social science, engineering technology and the like which are created in the following forms:  (1) Written works;  ...  (9) Other works as provided for in the laws and administrative regulations. | Article 3 For the purpose of this Law, the term “works” refers to the intellectual achievements in the fields of literature, art and science ***that are original and reproducible in a tangible form***, including:   1. Written works;   ...  (9) Other works as provided for in the laws and administrative regulations. | Article 3 For the purpose of this Law, the term “works” refers to the intellectual achievements in the fields of literature, art, and science ***that are original and expressible in a given form***, including:  (1) Written works;  ...  (9) ***Other intellectual achievements of the characteristics as required of works***. |

The definition of the works in the Draft for First Review is exactly consistent with the current Implementation Regulations of the Copyright Law. In the Draft for Second Review, the definition of the works was revised as "the term ‘works’ refers to the intellectual achievements in the fields of literature, art, and science that are original and expressible in a tangible form“. With the rapid development of network technology, the form of expression of works has already exceeded the traditional "reproduction in a tangible form". The Draft for Second Review revised it into "expressible in a given form", which not only eliminates the ambiguity of the phrase "reproducible in a tangible form", but also caters to the development of the times.

In the Draft for Second Review, revision has also been made of the embracive paragraph "other works as provided for in the laws and administrative regulations" into "other intellectual achievements of the characteristics as required of works", which means that it is possible to allow the courts to determine new types of works according to specific circumstances in trial of a case. While this will leave room for emerging types of works in the future, and avoid making law provisions lagging behind the times, lack of uniform standards will lead to uncertainty in the types of works and unlimitedly expanded scope of works.

II. Abuse of Rights

To Article 4 of the Draft for First Review was added the clause that copyright proprietors and copyright -related right holders, exercising their copyright or copyright-related rights "shall not abuse the right to affect normal dissemination of works", and to Article 50 the clause on "administrative liabilities for abuse of copyright". However, the two clauses were deleted from the Draft for Second Review.

After the Draft for First Review was released, the newly added clause prohibiting abuse of rights has drawn widespread attention. Most experts and scholars argued that the design of the "prohibition of abuse of rights" clause is unjustifiable, and suggested deleting them for two reasons: 1) cases of copyright abuse by copyright proprietors are rare in China, and the current copyright law has put in place the fair use, statutory license, and compulsory license systems that have restricted the possibility for copyright proprietors to abuse of their rights; and 2) due to the difficulty in determining incident of abuse and for lack of uniform standards, in practice, the provision prohibiting the abuse of rights is likely to be abused, and will hinder the normal exercise of the rights by copyright proprietors.

III. Types and Ownership of Audiovisual Works

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| Current Law | Draft for First Review | Draft for Second Review |
| Article 3 For the purpose of this Law, the term “works” ... (6) Cinematographic works and works created by a method similar to those used to produce films; … | Article 3 For the purpose of this Law, the term “works”... (6) ***Audiovisual works***; … | Article 3 For the purpose of this Law, the term “works” ... (6) ***Cinematographic works, TV drama works, and other audiovisual works***; … |
| Article 15 The copyright in cinematographic works and works created by a method similar to those used to produce films shall be enjoyed by producers, but play writers, directors, photographers, lyricists, composers and the like shall have the right of authorship and the right to receive remuneration under contract signed with producers. | Article 15 The copyright in the ***audiovisual works*** shall be enjoyed by the audiovisual work ***producers who organize the production and assume responsibility***, but the play writers, directors, photographers, lyricists, composers and the like shall have the right of authorship and the right to receive remuneration under contract signed with audiovisual work producers. | Article 17 The copyright in the ***cinematographic works and TV drama works in the audiovisual works*** shall be enjoyed by the ***producers who organize the production and assume the responsibility***, but the play writer, director, photographer, lyricist, composer and the like shall have the right of authorship and the right to receive remuneration under contract signed with producers.  ***If audiovisual works other than those specified in the preceding paragraph constitute joint works or service works, the ownership of the copyright shall be determined under the relevant provisions of this Law; if they do not constitute joint works or service works, the ownership of copyright shall be agreed upon between the producer and author, and if there is no agreement or the agreement is not clear , it is enjoyed by the producer, but the author shall have the right of authorship and the right to receive remuneration. Producers who use the audiovisual works specified in this paragraph beyond the scope of contract or industry practice shall obtain permission from the author.*** |

In the Draft for First Review, the wording "cinematographic works and works created by a method similar to those used to produce films" were revised into "audiovisual works," and their copyrights were enjoyed by the producers of audiovisual works who organize production and assumed responsibility. This revision makes many short video and online video producers believe that their works will receive the same protection as cinematographic works.

In the Draft for Second Review, the wording "audiovisual works" was revised into "cinematographic works, TV drama works, and other audiovisual works," and the ownership of rights was distinguished:

1. The copyright of the cinematographic works and TV drama works are enjoyed by producers who organize production and assume responsibility; and

2. For other audiovisual works, it is necessary to find out whether they are joint works or service works before ownership of the rights is determined.

The audiovisual works are divided into cinematographic works, TV drama works and other audiovisual works, and producers of audiovisual works are required to first identify the type of their works when determining the ownership of copyright. However, types of video nowadays are quite varied, and hard to classify. For example, are micro-movies are cinematographic works? Are TV documentaries and variety shows other audiovisual works? Or can they be classified as TV drama works? For this reason, the concepts of these three audiovisual works need to be clearly defined by the supporting administrative regulations, otherwise it will render application of the law difficult.

IV. Joint Works

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| Current Law | Implementing Rules of the Current Copyright Law | Drafts for First and Second Review |
| Article 13 Where a work is created jointly by two or more co-authors, the copyright in the work shall be enjoyed by these co-authors. Co-authorship may not be claimed by anyone who has not participated in the creation of the work.  If a work of join authorship can be separated into independent parts and exploited separately, each co-author shall be entitled to independent copyright in the parts that he has created, provided that the exercise of such copyright shall not prejudice the copyright in the join work as a whole. | Rule 9 Where a join work ***cannot be used separately***, its copyright shall be jointly enjoyed by all the co-authors, and exercised by consensus; where consensus cannot be reached, and there is no justified reason, no party shall prevent any other party from exercising other rights other than ***assignment***, but the income shall be reasonably distributed to all co-authors. | Article 13/14 For a work jointly created by two or more co-authors, the copyright shall be jointly enjoyed by the co-authors, and exercised by consensus; where consensus cannot be reached, and there is no justified reason, no party shall prevent any other party from |

The current copyright law only stipulates how to exercise copyright in joint works that can be used separately. Rule 9 of the Implementing Rules of Current Copyright Law specifies how to exercise the copyright in indivisible joint works. The draft amendments follow the provisions of the Implementing Rules, with variations made. First, the prerequisite of "indivisible use" has been deleted, that is, for joint works, it is no longer necessary to distinguish whether they are divisible or not, and the rights therein shall be exercised under this Article. Second, beside assignment, exclusive license and pledge have been added to the list of restricted acts since, in copyright transactions, exclusive license and pledge will also significantly impact the rights of the right holders. It is necessary to reach an agreement, and any party shall not exercise the rights alone.

V. Special Service Works

Both the Drafts for First and Second Review deem service works created by staff of newspapers, periodicals, news agencies, radio stations, and television stations as special service works, that is, the copyrights, except the right of authorship, in the works created by staff of the above-mentioned employers as the work they do to complete the their work assignment are owned by their employers, without requiring that the works are created mainly by using the material and technical conditions of legal or non-legal entities.

VI. Damages System

In current judicial practice, most intellectual property rights holders, copyright holders included, find it difficult to provide sufficient evidence to prove their actual losses or the infringers’ illicit income in the court proceedings. As a result, court cases of the kind finally end with the statutory damages awarded, which are only 500,000 yuan at the maximum under the current copyright law. The low-cost infringement and high-cost enforcement have forced many right holders to give up enforcement, and endure damage caused because of infringement.

To the now amended Copyright Law has been added a method for "determining the amount of damages with reference made to the royalties where the right holders’ actual damage or infringers’ illicit income is difficult to calculate"; and the provision that for willful infringement of copyright or copyright-related right with serious circumstances, damages more than one time and less than five times the amount of the statutory damages are possibly determined with the preceding method. This clarifies the principle of punitive damages; and increases the maximum statutory compensation from 500,000 yuan to 5 million yuan, thus, greatly enhancing the copyright protection, and help address the problem of low-cost infringement and high-right enforcement.

In addition, to harmonize with the trademark law now in force and in response to the "difficulty in producing evidence", the amended Copyright Law has added the provision that "where a right holder has fulfilled the necessary burden of proof and the infringement-related account books and materials are mainly in the hands of the infringer, the court, to determine the amount of damages, may order the infringer to provide the account books and materials related to the infringement; where the infringer does not provide or provide false account books, materials, etc., the court may determine the amount of damages with reference made to the claims made and the evidence provided by the right holders". This provision, making it less difficult and costly for right holders to adduce evidence, will better protect the legitimate rights and interests of right holders.

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Ms. Zhang received her degree of bachelor of laws and degree of Bachelor of Arts in English from Minzu University of China in 2010. She joined Panawell as legal assistant in March 2011. Ms. Zhang specializes in counseling, computer and copyright registration, and domain name registration.