

Embassy of the United States Beijing, China

INTELLECTUAL PROPERTY RIGHTS

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Copyright

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Legislation

The [Copyright Law of the People's Republic of China](#) (Copyright Law) adopted on September 7, 1990 and implemented on June 1, 1991, was the first law authorizing the administration and protection copyrights. The State Council approved Regulations for the Implementation of the Copyright Law (Implementing Regulations) on May 24, 1991. On October 27, 2001, the Copyright Law was amended by the Standing Committee with new Implementing Regulations implemented on September 15, 2002.

On July 24, 2003, the National Copyright Administration signed into law amended measures for the Implementation of Administrative Penalties in Copyright Cases (Administrative Penalties), consisting of five chapters and 44 articles. These Administrative Penalties became effective September 1, 2003.

Specific legislation for the protection of computer software took effect in October 1991 and was amended in December 2001. Regulations on the protection of computer software were issued in January 2002 and revised measures on the registration of computer software were issued in February 2002. Legislation relevant to copyright protection in China include the Regulations on Customs Protection of Intellectual Property (1995), which introduced border enforcement

of intellectual property rights, and the Regulations for Protection of Lay-out Designs of Integrated Circuits promulgated in 2001.

Recent copyright regulations address the issue of internet copyright protection. The National Copyright Administration and the Ministry of Information Industry jointly promulgated the "Administrative Measures on Internet Copyright Protection," which came into effect on May 30, 2005. The Measures state that an Internet Service Provider will be liable for administrative penalties if it knowingly transmits copyright-infringing material over its network (e.g., by hosting a website that contains infringing material). The ISP can also be penalized for failure to remove such infringing materials after receiving a take-down notice from the copyright owner that meets all of the conditions set forth in the Measures. ISPs will not be held administratively liable for unknowingly transmitting copyright-infringing materials. The Measures set forth administrative fines based on the income generated through the transmission of infringing materials. If an Internet content provider believes that an ISP wrongfully removed materials, the content provider can send a counter-notice certifying that the material is non-infringing.

For more detailed information on China's amended Copyright Law, please see the *Ask the Experts* section below.

Coverage - What Does Copyright Protect?

Under Article 3 of the Copyright Law, copyright protection is provided to the following:

- Written works
- Oral works
- Musical, dramatic, and choreographic works
- Artistic and architectural works
- Photographic works
- Cinematographic and audio-visual works
- Graphic works such as those related to engineering and product designs, maps and models
- Computer software
- Other works specified by laws and regulations

Copyright holders in China maintain the following exclusive rights:

- Right of publication
- Right of authorship
- Right of alteration
- Right of protection against distortion
- Right of reproduction
- Right of leasing
- Right of public performance of a mechanical work

- Right of exhibition
- Right of performance
- Right of broadcast
- Right of distribution over an information network
- Right of adaptation
- Right of translation
- Right of compilation and annotation

The Copyright Law provides that the works of Chinese citizens and foreign entities that are first published within China enjoy copyright protection under Chinese law for a term of 50 years, or the life of the author plus 50 years in the case of an individual author. The term for moral or personal rights, such as the right of accreditation, is perpetual. In addition, a publisher enjoys a 10-year term of protection for original designs of a publication.

Article 2 of the Copyright Law also provides that works of foreign entities that are first published outside of China are protected under international copyright conventions or bilateral agreements to which China is a party. China is a member and has ratified the following agreements:

- Berne Convention for the Protection of Literary and Artistic Works (since 1992)
- Convention for the Protection of Producers of Phonograms Against the Unauthorized Duplication of Their Phonograms (since 1993)
- Paris Convention for the Protection of Industrial Property (since 1985)
- World Intellectual Property Organization Convention (WIPO) (since 1980)

What doesn't the Copyright Law protect? Article 5 of the Copyright Law states that the following works will not be afforded copyright protection:

- Laws and regulations, resolutions, decisions and orders of State organizations, other documents of a legislative, administrative or judicial nature, and their official translations
- News on current affairs
- Calendars, numerical tables and forms of general use, databases and formulas

In addition, the Copyright Law does not apply to works of folk literature and art. The State Council shall separately enact protection for these works.

In October 2002, the Supreme People's Court issued an interpretation on adjudicating civil copyright disputes.

Registration

Unlike patent and trademark protection, parties need not register to obtain copyright protection for their works. Protection is granted to works of individuals from countries belonging to the international copyright conventions or bilateral agreements of which China is a member. China's National Copyright

Administration (NCA), however, adopted the Measures for Voluntary Works Registration on December 31, 1994. As a result, parties seeking copyright protection may wish to voluntarily register their works to establish evidence of ownership should enforcement actions become necessary. A party can voluntarily register with the local copyright administration, which will examine the application and if the application is qualified, issue a certificate of copyright to the applicant.

The registration of a copyright license with the local copyright administration is an administrative formality, but may be required as part of the procedure to remit license/royalty payments abroad.

Articles discussing the registering of a copyright may be found on the China Copyright Information Web at www.ccopyright.com.cn, established by the Chinese Center for Copyright Protection in 1999. This site contains information on the use of copyrights and contains articles on recent governmental legislation and foreign copyright protection.

Market Entry Planning

As China continues to grow and implement its World Trade Organization (WTO) commitments, more and more small and medium-size American companies have sought - and found - opportunities to sell their goods in China. With U.S. exports to China up approximately 20 percent since 2001, more U.S. firms than ever before have questions about how to succeed in the China market, and at the top of their list is how to protect their company's intellectual property. Since joining the WTO, China has strengthened its legal framework and amended its laws and regulations regarding IPR. However, despite stronger statutory protection, China continues to be a haven for counterfeiters and pirates. According to the [International Intellectual Property Alliance](#), piracy losses for business software, video games, motion pictures, recordings and books in 2002 exceeded US\$1.85 billion, with piracy rates generally running 90-96 percent across all copyright industries.

Thus, it is extremely likely that if a product sells in China, it will thereafter be counterfeited and sold cheaply, competing with the legitimate product. The challenge becomes how to be part of the successful group of companies doing business in China and to avoid the pitfalls.

A well-developed, comprehensive IPR strategy should be a major part of the business plan of any company looking to do business in or with China. A company must identify its IPR, control it and protect it. At a minimum, such a strategy should include the following:

- **Prevention** - The best weapon is prevention. Be clear of your rights before the product ever crosses the border into China. Every legal means available should be used to mitigate the risks from the start, including:
 - Incorporating copyright protections into contracts and marketing strategies
 - Entering into written and enforceable contracts that require agents, suppliers, distributors and employees to protect your copyright
 - Refusing to register your software copyright unless and until you have clearly determined that registration is necessary

- Refusing to assign or license your copyright unless and until you fully understand the consequences
- Making certain that your rights in the copyright remain upon termination of the assignment, license, transaction or investment
- **Protection** – If you discover that your copyright has been violated, do something immediately to protect and enforce your rights. Investigations, raids, seizures as well as civil litigation, administrative proceedings and criminal prosecutions are some of the tools available. Before deciding which tool(s) to use, however, you should ask the following preliminary questions:
 - Is the copyright registered or otherwise protectable in China?
 - Is the harm being caused in China or overseas?
 - What is the source of the harm? Competitors? Employees, agents or contractors?
- **Professional Advice** – Engage the assistance of legal professionals with both China and IPR expertise early in the process, particularly if your product is software, and involve them in the development of your overall China business strategy. Membership in anti-counterfeit organizations can also help.

For more detailed guidance on market entry strategies, please see the *Ask the Experts* section below.

Enforcement Approaches - How to Address Infringement?

Pirating of copyrighted material is a widespread problem in China, and its effects can be devastating. The following briefly describes the tools available in China to enforce copyrights.

THREE TYPES OF ACTION AGAINST INFRINGERS

1. Administrative Adjudication The Implementing Measures for Copyright Administrative Adjudication (Implementing Measures) adopted by NCA became effective on September 1, 2003. NCA, the State Administration of Industry and Commerce (SAIC) and their local offices may impose administrative penalties under these measures (typically by NCA in cases of national significance, and by SAIC in lesser, regional matters). Notably, NCA and SAIC can only mete out administrative penalties and do not have authority to award civil or criminal damages. They may, however, serve as mediator in the determination of damages and, in some instances, the mere initiation of an administrative action may provide the necessary impetus for the parties to reach a mutually satisfactory settlement.

The statute of limitations on causes of action for copyright infringement is two years from the act of committing the infringement, unless the act is a continuous act of infringement, which would continue the statute of limitations.

Initiating an Administrative Action: The relevant copyright authority may commence an administrative action on its own initiative or upon receiving an application from the copyright owner, another interested party or any party with relevant information. The complaining party may be required to submit a written application that includes the following information:

- The party's name, address and occupation (if the applicant is an individual)
- The name and position of its legal representative or person in charge (if the applicant is an entity)
- Documents establishing copyright ownership
- The infringed work or product samples
- A claim for penalties and compensation
- The facts and grounds upon which such claims are based
- Sources of evidence, including names and addresses of witnesses
- A power of attorney, if an agent on behalf of the injured party submits the application

Within 15 days of receiving the application, the copyright authority will decide whether to accept the application and notify the applicant. If the copyright authority rejects the application, it must disclose the reasons for its decision.

Investigation of the Case and Collection of Evidence: Upon accepting an application to commence an administrative proceeding, the copyright authority shall designate at least two enforcement officers to handle the case. If either of the officers has an interest in the matter, that individual shall recuse him or herself; otherwise, either party may request that the officer be excused from the case.

During the investigation of the case, enforcement officers may undertake any of the following steps to collect evidence:

- Inspect and copy documents, files, account books and other written materials relating to the alleged infringement
- Compile written statements from witnesses
- Take samples of the allegedly infringing product
- Seize and maintain the allegedly infringing product
- Seek assistance from other copyright authorities and professional experts

The Administrative Proceeding: Upon conclusion of the investigation, the enforcement officers assigned to the case will submit a Copyright Administrative Penalty Opinion (Opinion) to their department in charge. The Opinion must set forth the following:

- The facts constituting the violation
- All evidentiary materials
- The recommended penalty
- The reasons and bases for the recommended penalty

The copyright authority will then notify the defendant of the following:

- The fact that a copyright administrative decision will be made
- The reasons and basis for a decision as put forth by the complaining party

- The defendant's right to issue a statement and put on a defense
- Other rights the defendant may be entitled to under law

If the defendant chooses to present a statement and defense, it should be submitted within three days after notice is received, and should be accompanied by a statement of facts and reasons and all evidentiary material. The copyright authority will review the statement and defense, and verify the facts, reasons and evidence submitted by the defendant. The copyright authority will then examine the entire case file and issue its decision in a timely manner.

Available Penalties: Any penalty finally imposed must not be more severe than the penalty recommended in the Opinion, and can include any of the following:

- Administrative fines (in instances where fines are RMB20,000 or more for an individual defendant or RMB100,000 or more for an enterprise, the defendant has the right to request a formal hearing)
- Warnings
- Injunctions prohibiting the production and distribution of infringing products
- Revocation of business or operational licenses
- Confiscation of unlawful income arising from the infringement
- Confiscation of the infringing products and the materials, tools and equipment used in their production
- Reference to relevant authorities for criminal investigation
- Other administrative penalties as stipulated by relevant laws and regulations

If the infringing act has resulted in the previous imposition of a fine by another authority, the copyright authority may not impose a fine for the same act. Depending upon the specific circumstances of the case, however, it may impose any of the other types of administrative penalties listed above. In any case, the imposition of administrative penalties will not absolve a defendant of civil or criminal liability for the same act.

Enforcement: A party has the right to appeal the imposition of an administrative penalty. The filing of an appeal, however, will not stay the enforcement of the penalty. If, within three months of the issuance of the decision the decision has not been executed and no appeal has been filed, the copyright authority may apply to the relevant People's Court to enforce the decision.

2. Civil Litigation Civil actions are available for all types of copyright infringement and, unlike administrative or criminal proceedings, may be initiated directly by an individual or legal person without the intercession of a government authority or court. Either the copyright owner or its exclusive copyright licensee has standing to bring a civil action in the Chinese courts and may demand that the infringing activities cease and that the infringer pay damages.

Initiating a Civil Action: To commence a civil suit, a written complaint must be submitted to a People's Court specifying the following:

- The complainant's name and address
- The name and position of its legal representative (if applicable)
- The nature of the claim and the facts upon which the claim is based
- Evidence and sources of the evidence
- The names and addresses of witnesses

Within seven days after the written complaint is submitted, the People's Court will examine the complaint and determine whether it fulfills the basic requirements, and if so, the case will be accepted for hearing and the relevant parties will be notified.

The defendant must submit a response within 15 days after receiving the complaint by official service of process. The court will send a copy of the response to the plaintiff within five days of its receipt. If the defendant fails to submit a defense the court will proceed to determination without the defendant.

Injunctive Relief: The Copyright Law makes various forms of injunctive relief available to a plaintiff to help mitigate the harm that can result simply due to the time lag between the filing of a suit and the issuance of a court decision.

The court can order a preliminary injunction or other property preservation measures if the plaintiff can demonstrate that an infringement has or is about to occur, and that failure to stop the infringement would cause irreparable damage to the plaintiff's lawful interests. If the plaintiff believes that evidence may be destroyed or made difficult to obtain at a later date, the plaintiff may also request the court to adopt measures to preserve evidence. If the court imposes property or evidence preservation measures, the plaintiff will be required to post a bond equal to the value of the items seized.

The court must rule on an application for injunctive relief within 48 hours, and the order will be executed immediately. With respect to relief ordered prior to the commencement of an action, if the plaintiff fails to file suit within 15 days from when relief is granted, the court shall order the withdrawal of the injunctive measures.

Evidentiary Requirements and Burden of Proof: There is no Chinese counterpart to the U.S. concept of discovery. In China, each party is responsible for presenting evidence to support its claims. In the event that a party is unable to obtain evidence due to "objective circumstances," or if the People's Court considers certain evidence to be relevant to a case, the court can, on its own initiative, collect the evidence itself. All evidence must be presented in court and subject to cross-examination. The right to determine the authenticity and validity of evidence rests solely with the court.

In cases involving publication, distribution or rentals, the vendor (who is typically the alleged infringer) must prove that the product being published, distributed or rented has been legally licensed. This allocation of the burden of proof makes it very difficult for vendors to avoid liability by pleading ignorance of their supply chain, while easing a plaintiff's difficulties in obtaining hard evidence to support a case.

Available Remedies: Possible civil remedies include the following:

- Cessation of infringing activities
- Elimination of the effects of the infringement
- Issuance of a public apology
- Confiscation of unlawful gain, infringing products and assets used in furtherance of the infringement
- Compensation for damages suffered
- Any combination of the above

In calculating damages, the injured party should be compensated for actual losses. To assist in calculating damages, the Supreme People's Court issued an Interpretation of the Supreme People's Court of Several Issues Relating to the Application of Law to the Trial of Civil Copyrights Disputes, effective October 15, 2002. If actual losses are difficult to calculate, the compensation can be determined based on the infringer's illegal gains. Compensation should include reasonable expenses incurred by the injured party to curb the infringement. If neither actual losses nor illegal gains can be determined, the court may award compensation up to RMB500,000.

3. Criminal Prosecution The Criminal Code of the People's Republic of China (Criminal Code) provides guidance on all areas of criminal prosecution. The supplemental 1994 Resolution of the Standing Committee of the National People's Congress Concerning the Punishment of Crimes of Copyright Infringement was the first official guidance as to the types of copyright infringement that would be deemed sufficiently egregious to warrant criminal prosecution. Article 452 of the Criminal Code abolished this resolution effective October 1, 1997, and Article 217 of the Criminal Code of the PRC now governs the area of criminal punishment. Pursuant to Article 217, the following acts done for the purpose of reaping profits will be given criminal punishment:

- Reproducing and distributing, without the permission of the copyright owner, his other written works, musical works, cinematic works, television works, video works, computer software and other works
- Publishing a book for which another person has the exclusive publishing rights
- Reproducing and distributing, without the permission of the phonographic or video graphic producer, his or her phonographic or video graphic work
- Producing and selling a work of art bearing the forged signature of another

If the act results in a relatively large amount of illegal gain, or other serious circumstances exist, the criminal punishment given may include:

- A fixed-term prison sentence of three to seven years
- The imposition of a fine
- Criminal detention
- Confiscation of all materials, tools, infringing copies, and other property

which is mainly used to produce such infringing copies

- Compensation

China Customs

Another agency that rights holders may approach to combat copyright infringement is the General Administration of Customs. The Implementing Measures of Customs for the Protection of Intellectual Property Rights (Customs Measures) and the subsequent Regulations of the People's Republic of China on the Customs Protection of Intellectual Property Rights, issued by the State Council, contain general rules and guidelines for Customs' role in IPR enforcement. Through registration with The General Administration of Customs ("GAC") in Beijing, the Customs Measures may provide protection for all categories of IPR, including copyrights, and prohibit the import or export of goods in violation of those rights.

Proactive Registration with Customs: Registering proactively with the GAC before an infringement occurs allows a copyright holder to expedite the approval of an application for Customs protection if an infringement actually does occur. An application for proactive registration should contain the following information:

- The name, nationality or registered locality, address, legal representative and primary business location of the copyright owner
- Information on the copyright to be protected, including documentation establishing copyright ownership
- A list of persons authorized or licensed to use the copyright
- Information on the products to which the copyright is related, including the manufacturer, primary importers or exporters, primary points of customs entry or exit, key product characteristics and price
- The name, place of manufacture, key product characteristics, standard prices, primary importers or exporters, and primary points of customs entry or exit, and if known, information concerning any infringing products
- Other information as required by Customs

The application should be accompanied by the following documentation:

- A photocopy certified by the registration authority of the registration certificate of the copyright holder
- Documentary proof of copyright ownership
- Other documents required by Customs

The GAC must respond to an application within 30 working days of receipt. The application and subsequent approval forms will be placed on file immediately. The application and approval is valid for ten years, renewable within six months of the end of the term. Any changes should be reported to Customs within 30 working days after the changes are archived.

Request for Customs Protection When an Infringement Occurs: An application for customs protection from an actual infringement should include the following:

- The copyright being infringed
- The Customs number assigned to the request upon approval
- The name, address, legal representative or primary place of business of the suspected infringer
- The name, specifications and other information concerning the infringing products
- Possible ports of entry or exit, the time, mode of transport and recipient (imports) or sender (exports) of the infringing products
- Evidence establishing the infringement
- Measures requested to be taken by Customs
- Other information required by Customs

If a proactive request is not already on file for a copyright for which customs protection is being sought, the request must be submitted along with the application for Customs protection. In addition, if Customs discovers goods that

appear to infringe upon a copyright already on file, Customs may on its own initiative seize the goods. Customs will then provide immediate written notice to the copyright holder, who must file an application for Customs protection within three days after receipt of such notice.

If the copyright holder requests that the infringing products be seized, the copyright holder must post a security deposit with Customs equal to no less than the equivalent value of the goods, which shall be used to indemnify the losses caused to the consignee or consigner if the detainment is found to be inappropriate and to pay for warehousing, custody and disposal fees. The specific measures of payment will be determined by the GAC.

If Customs agrees to seize the products, Customs will send a Customs Holding Receipt to the recipient or sender of the products, as the case may be, and provide written notice to the copyright holder.

The recipient or sender of the goods may submit a written explanation as to why the products do not infringe upon the copyright. Customs will provide written notice of the objections to the copyright holder. If the recipient or sender of the goods believes that the products do not infringe upon the copyright, it may, after posting a security deposit with Customs equivalent to the value of the goods, request Customs to release the goods. If the intellectual property right holder fails to bring a lawsuit to the people's court within a reasonable time, Customs will refund the guaranty bond.

If the recipient or sender of the goods raises no objection, Customs shall have the authority to dispose of the products immediately as "infringing products."

Unless the copyright holder has referred the matter to a local copyright authority or a People's Court within 15 days of receiving notice of the seizure, Customs will commence an investigation.

Customs may release the products held under any of the following circumstances:

- The products are found not to be infringing after investigation by Customs or by a local copyright authority
- The case filed with a People's Court is dismissed or the court does not impose an order for preservation of evidence
- The copyright holder does not respond to notice received from Customs within the stipulated period or abandons its request for Customs protection

When products are released under any of the above, Customs will refund the security deposit after deducting costs for storing, safekeeping and handling the goods and any compensation payable to the importer or exporter.

If Customs, a local copyright authority or a People's Court determines that the seized products are infringing, the products will be confiscated and disposed of by Customs. Customs may also impose penalties equivalent to the CIF price (cost, insurance, freight) (in the case of imports) or FOB price (free on board) (in the case of exports) of the goods.

A party may request reconsideration of a decision by Customs within 30 days of receiving written notice of the imposition of a penalty, or within 30 days of public notice of the imposition of the penalty if written notice cannot be provided. Customs must determine a request for reconsideration within 90 days of the date that application for reconsideration is filed. A dissatisfied party may appeal a decision on reconsideration to the relevant People's Court within 30 days.

[Section 337](#) is applicable when pirated goods are entering the U.S. market.

[U.S. Customs Protection](#)

[Filing a Complaint with the TCC](#)

Other Sources of Protection

In an effort to combat piracy, smuggling and pornography, the Ministry of Culture has issued notices and guidelines mandating the use of anti-counterfeit

measures, such as affixing numbered holographic security stickers on domestic, imported and exported audio/visual products. In addition, the Ministry of Culture also requires that a sign stating "Surveillance and Reporting of Illicit Audio-Visual Products" be prominently displayed on the premises of any enterprise engaged in the wholesale, retail, rental or commercial broadcasting of audio-visual products.

Ask the Experts

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