

CHINA LAW GUIDELINE IN PROTECTION OF INTELLECTUAL PROPERTY RIGHTS

中国保护知识产权法律指南

COMPILED BY
LEGAL AFFAIRS DEPARTMENT OF CCPIT/CCOIC
(CHINA COUNCIL FOR THE PROMOTION OF
INTERNATIONAL TRADE /CHINA CHAMBER OF
INTERNATIONAL COMMERCE)

中国国际贸易促进委员会法律事务部 编著



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China Market Press

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An Introduction to the Legal Affairs Department of CCPIT/CCOIC

The Legal Affairs Department of CCPIT/CCOIC is one of the important functional departments of CCPIT/CCOIC. In pursuance of the consistent purpose of promoting the development of China's foreign economic relations and trade, propelling the economic and technological cooperation between China and foreign countries and serving enterprises at home and abroad, the Legal Affairs Department has been providing domestic and foreign enterprises with legal services including Certification and Authentication, ATA Carnet, mediation, legal counseling, average adjustment, etc.

Certification and Authentication

The service of certification and authentication relates to certification affairs involving international trade in goods, service and technology, investment, international contracting, intellectual property, international commercial litigation, etc. concerning international economic and trade activities. Based in Beijing, the Office for Certification & Authentication has 49 branches in the CCPIT's provincial and municipal sub-councils, constituting a high-quality, high-efficiency, nationwide certification and authentication service network. Its main service offerings are: to issue the Certificate of Origin for export goods, to issue International Commercial Certificates and authenticate foreign-related commercial documents, to apply for consular authentication on agency basis, to perform CCC (China Compulsory Product Certification) certification services on agency basis and offer counseling services for SA 8000 (Social Accountability 8000) certification and environmental labeling certification.

For more details please log on the website <http://www.co.ccpit.org/>

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ATA Carnet

Approved by the State Council and authorized by the General Administration of Customs, the CCPIT/CCOIC is responsible for issuing and guaranteeing the ATA Carnet in China, canceling the import/export carnet after verification and handling import/export carnet-related indemnity claims as well as keeping electronic filing. ATA Office is the functional unit in this respect. So far, the CCPIT has empowered 12 local issuing bodies to issue the ATA Carnet and extend the ATA Carnet system in their localities, over 200 local branches to act as issuing agents, and set up an ATA working center at the Capital Airport.

For more details please log on the website <http://www.atachina.org>

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Mediation

The Legal Affairs Department of CCPIT/CCOIC has a Mediation Center that is a permanent conciliation institution that assists, in an independent and impartial manner, the parties involved to resolve commercial and maritime disputes through mediation. The Mediation Center accepts cases in accordance with the mediation agreement between the parties. Mediation under the Mediation Center is governed by uniform Mediation Rules applying to the entire mediation network. The Center has a Panel of Mediators from which parties may select during mediation. These mediators are invited and appointed by the Mediation Center, and should be upright and impartial person with professional knowledge and rich practical experience in the commercial, maritime and legal fields. Since the Mediation Center was established in 1987, with the headquarter located in Beijing, it has

established more than 40 sub-centers, forming a nationwide mediation network, which is most famous commercial mediation institute in China. The Mediation Center attaches importance to international communication and cooperation. It has entered into cooperation agreements with counterparts from Germany, the United States, the United Kingdom, Sweden, the Republic of Korea, Canada, Hong Kong, Macao, Japan, Italy, etc., actively engaging in co-mediation operations, and has jointly established co-mediation centers with the South Korean Chamber of Industry and Commerce, the Canada-China Business Council, the Macao World Trade Center, International Institute for Conflict Prevention and Resolution, the Italy-China Chamber of Commerce and the Milan Arbitration Center, aiming to provide dispute resolution services to Chinese and foreign parties under the joint mediation programs.

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Legal Counsel

Legal Counsels provide services specialized in legal counseling, legal service and legal research. Their main work include: to act as a legal counsel upon the authorization by Chinese or foreign clients, to participate in business negotiations, issue written legal opinions, draft contracts and provide other related services upon the authorization by a party involved in non-litigious matters, to act as a legal representative or arbitration agent for a Chinese or foreign party to a civil or commercial lawsuit, to act as an agent in defending or bringing a lawsuit against anti-dumping, countervailing, safeguard measures and other trade remedy measures, to hold international legal seminars at home and abroad, promoting China's exchanges and cooperation with the international community in this regard, to participate in the drafting and formulation of important state laws and regulations; to advise on China's accession to relevant international conventions, etc.

Legal Counsels have accumulated rich experiences in Intellectual Property Rights (IPR) protection. The Legal Affairs Department has a committee of experts consisting of the most authoritative experts specialized in IPR study in China and

has a good and close relation not only with the domestic IPR law firms, but also with relevant government institutes and legislative bodies concerning the IPR protection. Legal Counsels provide the following services helping clients to protect their IPR: (1) consulting service about IPR for domestic and foreign enterprises in foreign investment, trading and exhibitions, (2) Provide integrated IPR protection plans for domestic and foreign enterprises, (3) Assist clients to solve the IPR disputes through mediation, translate the content of amicable settlement into the enforceable arbitration award, and help clients or play as the agent to complain or sue against IPR infringement to China administrations or justice institutions, (4) Assist clients to apply the IPR protection to the Customs of China, (5) at the request of clients, provide other services to protect their IPR (such as recommending law firms, offering general consulting opinions etc.)

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Average Adjustment

The Department for Average Adjustment of CCPIT/CCOIC is the unique professional institution for average adjustment in the mainland of China at present and is also the corporate member of the Association Internationale de Dispatcheurs Europeens. Since its establishment, the Department for Average Adjustment has handled over 1, 000 cases of general and particular average adjustment. In 2004, the Department of Average Adjustment established its Shanghai Office in Shanghai. The Department of Average Adjustment provides all kinds of average adjustment services for the clients.

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Contents

Volume 1 Copyright Law	(1)
Chapter 1 Copyright and Copyright Law	(1)
Chapter 2 Protection and Administration of Copyright	(4)
Chapter 3 Protection of Computer Software	(27)
Chapter 4 International Copyright Law Conflict	(44)
Volume 2 Patent Law of PRC	(50)
Chapter 1 Patent Right and Patent Law of PRC	(50)
Chapter 2 Procurement, Invalidity and Termination of Patent Right	(61)
Chapter 3 Implementation and Protection of Patent Right	(94)
Chapter 4 Other Patent Regulations	(105)
Chapter 5 Special Regulations about International Application	(111)
Chapter 6 Protection of IC Layout Design	(123)
Chapter 7 Protection of New Plant Species	(136)
Volume 3 Trademark Law	(144)
Chapter 1 Trademark Introductions	(144)
Chapter 2 Application and Renewal of Registered Trademark	(151)
Chapter 3 Use, Cancellation, withdrawal and Change of Registered Trademarks	(170)
Chapter 4 Contents and Limitations of Exclusive Trademark Rights, Form and Recognition Standards of Trademark Infringements	(182)
Chapter 5 Special Protection of Famous Trademarks	(195)
Chapter 6 Protection of Trademark Rights	(201)
List of Chinese Laws and Regulations of IPR Protection	(217)

Volume 1 Copyright Law

Chapter 1 Copyright and Copyright Law

1. Definition of Copyright.

Copyright is defined as the personal rights and property rights legally enjoyed by authors and creators of literary, artistic and scientific works. This Law stipulates that the copyright includes two categories, namely personal right (spiritual right) and property right (economic right). The personal rights of the copyright include rights of publication, authorship, alteration and integrity protection. The property rights of the copyright include rights of reproduction, performance, broadcast, exhibition, distribution, projection of film and TV programs, adaptation, translation, annotation, compilation, lease and arrangement.

2. Relationship between Copyright and Publication Right.

Article 94 of General Rules of Civil Law of PRC (“Civil Law” hereafter) enacted in 1986 and enforced in 1987 provides that “Citizens and legal entities enjoy copyright (publication right), and legally enjoy the rights of authorship, publication, printing and remuneration.” Article 51 of Copyright Law of PRC (“Copyright Law” hereafter) enacted in 1990 provides that “the copyright and publication right hereunder share the same definitions.” Article 56 of Copyright Law (as amended in October 2001) provides that “the copyright hereunder is defined as the publication right.”

3. Subject and Object of Copyright.

The subject of the copyright shall enjoy the rights and bear the obligations of the copyright. The copyright owner is defined into 3 categories. The first category includes the natural person, legal entity or other organizations that create the works, i. e. the authors. The second category includes the natural person, legal entities or other organizations, besides the author, who enjoy the copyright. The third category includes the natural person, legal entity or other organizations that is entitled to the copyright by trust contract or service contract. In some cases, a country can also be deemed as the subject of copyright. The object of the copyright refers to the literary, artistic and scientific works protected by Copyright Law, i. e. works.

4. Categories of works stipulated by Copyright Law.

The works stipulated by Copyright Law fall into 9 categories, i. e. the literary, artistic, natural science, social science, engineering and technological works in the forms below: written works; oral works; musical, dramatic, folk arts, choreographic and acrobatic works; works of fine art and architecture; photographic works; cinematographic works and other works created in methods similar to cinematography; engineering design drawings, product design drawings, maps, diagrams, other drawings and model works; computer software; other works stipulated by laws and regulations.

5. Works not protected by Copyright Law.

Works not protected by Copyright Law include those legally prohibited from publication and dissemination, resolution, decision and order of government agencies, other legislative, administrative and juridical documents, and the official translations thereof; news release, calendar, numerical tables, forms of general use and formulas; the works expiring the protection term under the Copyright Law.

6. Conditions of Copyright Ownership.

The copyright laws protect the works, which is the carrier of the thought of the author. A works generally consists of two parts. One part is the content, which represents the thinking, emotion, idea and the cognition of the objective reality. Another part is the form of the works. The Copyright Law protects the form instead of the content of the works, but the two cannot be absolutely separated. Copyright Law protects the form of literary, artistic and scientific works, provided that the following conditions are met: (1) Originality, the works shall be independently created by the author's intellectual labor, instead of copy or piracy of other works; (2) Unique expression, the works shall express the unique thinking, emotion, idea or comments of the author, and enable the readers, listeners or audiences to understand it as a tool of information transmission. (3) Reproduction; the works shall be expressed or fixed by a given material form that can be directly or indirectly sensed. The form of the works shall support reproduction by which one or more copies of a work can be produced by printing, photocopying, copying, lithographing, making a sound recording or video recording, duplicating a recording, or duplicating a photographic work or by other means. (4) Legitimacy; only legally procured works are subject to the protection of Copyright Law, no works prohibited from publication and promotion shall be protected by Copyright Law.

7. Is the copyright required to register?

Unlike patents, any works, once finished, automatically enjoy copyright without any registration and filing procedures, whether published or not, provided that it is printed with copyright mark pursuant to Universal Copyright Convention. At present, it is not compulsory to register the works. The registration only confirms the form of the works, and constitutes only the copyright evidence and initial litigation evidence.

8. Chinese Laws and Regulations of Copyright (Publication right).

The currently prevailing laws and regulations of copyright in China: Copyright Law of PRC, Rules for Implementation of Copyright Law of PRC, Regulations of Computer Software Protection and Regulations for Implementation of International Copyright Treaty. In 1993, China executed two international copyright organizations, i. e. Berne Convention (enacted in 1886, 134 member nations in 1999) and Universal Copyright Convention (enacted in 1952). World Intellectual Property Organization (“WIPO”), the international copyright organization founded in 1970, now has 172 member nations. In 1996, WIPO promulgated two Internet-related treaties, WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty, both of which China has not entered into.

Chapter 2 Protection and Administration of Copyright

1. Governing Bodies of Copyright.

Governing bodies of copyright mainly include: (1) Judicial administration by copyright law. The judicial body (people’s court) conducts judicial judgment on copyright disputes, copyright contract dispute and copyright infringement acts; (2) Administrative management of copyright. Article 7 of Copyright Law stipulates the principles of administrative authorities of copyright “the administrative copyright department of the State Council steers the nationwide copyright administration, the administrative copyright departments of provinces, autonomous regions and centrally administered municipalities shall steer copyright administration of local administrative region respectively.” The State Intellectual Property Office of PRC, the administrative copyright department of the State Council, is authorized to steer the nationwide copyright administration, the administrative copyright departments of provinces, autonomous regions and centrally administered municipalities shall steer copyright administration of local administrative regions respectively. (3) Collective management of copyright. The

collective management organization on behalf of the copyright owners is the copyright management system that shall collectively manage the copyrights beyond the exercise reach of the copyright owners, and authorize the users to exploit the works of the members.

2. Nature of Collective Management Organization of Copyright.

According to Copyright Law, the collective management organization or copyright is non-profit civil league organization legally incorporated, and serves as the representative of the copyright owners instead of the administrative government agency. The collective management organization, as entrusted by owners, collectively manage the work exploitation rights of independent copyright owners, enable the authors to focus on production, boost the wider and quicker dissemination of the works, and promote the social civilization and advance. Regulations of Collective Copyright Management enacted by State Council on March 1, 2005, specifically provides for the establishment procedures, rights, obligations of collective management organizations, collection and allocation of copyright license fees, supervision and management of collective management organizations.

3. Legal Liabilities of Copyright Infringements.

Pursuant to applicable laws and regulations of China, the party liable for copyright infringement shall bear the legal liability for such remedies as ceasing the infringing act, eliminating negative effects, making a public apology or paying compensation or damages. In some cases, the copyright administrative authorities may make administrative penalties besides the civil liability such as warning, order of production suspension and distribution, confiscation of unlawful income from the act and reproduction devices, and imposition of a fine. The criminal infringements are subject to criminal punishment.

4. Settlement of Copyright Infringement Disputes.

The copyright infringement disputes shall be settled via mediation. Any copyright infringement dispute that fails mediation or either party turns against the mediation agreement may be submitted to the court. The parties rejecting mediation may also directly lodge the suit to competent court.

5. Settlement of Copyright Contract Disputes.

Copyright contract disputes shall be settled via mediation, or be submitted to arbitration organization designated by the arbitration clauses in the contract or written arbitration agreement reached after the dispute occurs. In case of no arbitration clauses in the contract or written arbitration agreement reached after the dispute occurs, the concerned party may directly lodge the suit to competent court.

6. What if any party of a copyright dispute disagrees with the administrative penalty?

In case any party of a copyright dispute disagrees with the administrative penalty, the party may bring an action to the court within three months after receiving the administrative penalty award. In case the punished party fails to bring the action or honor the award within above period, the administrative copyright authority is entitled to make the petition to the court for enforcement.

7. Functions of collective copyright management organizations.

The collective copyright management organizations act on behalf of the authors to license the work exploitation, regularly collect and allocate royalty, with major functions below: (1) Manage the works of the author and license the exploitation of the works as entrusted by the authors; (2) Negotiate with the exploiters of the works and execute the license contracts; (3) Collect royalty, and regularly allocate the

royalty to authors; (4) Investigate and study the compliance with Copyright Law and protection of publication rights, voice the feedback to government agencies, and advise on the improvement of copyright system; (5) Contact and coordinate with domestic and foreign collective copyright management organizations, build up international collective copyright management network, ensure lawful exploitation of the works of domestic authors in foreign country in consideration of the royalty; (6) As entrusted by the copyright owners, claim against any copyright infringement, independently lodge civil lawsuit, or help the copyright owners to lodge the civil lawsuit; (7) Educate the authors and copyright owners with Copyright Law, and enhance their copyright protection awareness.

According to the above functions of collective copyright management organizations, the copyright owners and other copyright-related right owners may authorize collective copyright management organizations for exercising copyright or other related rights. As authorized, the collective copyright management organizations may claim rights in its own name on behalf of the copyright owners and other copyright-related right owners, and participate in the litigation and arbitration for the concerned copyright and other copyright-related rights, Pursuant to the juridical explanations taking effect since October 15, 2002, the court shall accept the litigation brought forward by legally incorporated collective copyright management organization in its own name with written authorization of the copyright owner.

8. Present Status of Collective Copyright Management Organizations of China.

At present, Music Copyright Society of China ("MCSC") is the most important collective copyright management organization in China. Founded on December 17, 1992, MCSC is a social legal entity approved by the Ministry of Civil Affairs of PRC headquartered in Beijing. Any copyright owners of music works may register as the members of MCSC. The members shall entrust the concerned rights to MCSC, MCSC shall, in its own name, authorize the users to explore the music works

under its control, and manage the rights of public performance, broadcast, recording and reproduction distribution of the music works of the MCSC members, while the members shall exercise other rights in the copyright. Except for above three kinds of rights, other copyright-related rights under the management of MCSC are mounting with time.

MCSC collective management of music copyright mainly covers: (1) Registration and archive management of music copyright owners and music works; (2) Collect royalty from users, and issue licenses; (3) Allocate royalty to music work authors based on the exploitation of the music; (4) Initiate legal proceedings against any infringement of music work copyright; (5) As designated by State Intellectual Property Office of PRC, collect the royalty of legally licensed music works.

MCSC compiles the member information into “Directory of International Music Composers, Lyricists and Music Publishers” (CAE Directory) affixed with given CAE codes, and incorporates the music works of the members into “World Works List” (WWL) affixed with international serial numbers, which further includes the copyright owners and music works of China into international music recognition system. Thus once the music works of MCSC are used in other countries and regions, MCSC will be informed and protect the music works through the international collective copyright management network. Besides, there are two other copyright associations in China approved by State Intellectual Property Office, namely China Literary Works Copyright Association approved in May 2000, and China Audio and Video Copyright Association approved in November 2001, but the two associations are still under preparation.

9. How does China administer the audio and video products?

There is a hierarchical department-based administrative system of audio/video products in China, in which the administrative department of news and publication affiliated to the State Council steers the nationwide publication, reproduction and import of audio/video products; the State Council culture administrative department and broadcast, film and television administrative department jointly