



漢坤律師事務所
HAN KUN LAW OFFICES

Newsletter

China Practice

Global Vision



5th Edition of 2015



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Legal Updates

1. Overview on the Notice Regulating Online Reproduction (Authors: Estella CHEN, Qihui LI)

On April 22, National Copyright Administration of the People's Republic of China (“**NCAC**”) promulgated the Notice on Regulating the Order for Online Reproduction (the “**Notice**”), which for the first time clarifies that statutory license does not apply to reproduction of online media and is likely to produce profound impacts on development of online medias as well as the relationship between online media and traditional media. The main content of the Notice are summarized as follows:

The Notice for the First Time Clarifies That Statutory License Does Not Apply to Reproduction of Online Media

Article 1 of the Notice stipulates that, unless otherwise stipulated by laws and regulations, when reproducing work of others, online media shall comply with relevant stipulations of copyright laws and regulations, obtain the license from the copyright owner and pay the royalty, indicate the name of the author and the title as well as the source of the work. Prior to the promulgation of the Notice, relevant copyright laws do not explicitly stipulate whether statutory license shall apply to reproduction of others' work by online media. Article 3 of the Supreme Court's Interpretation on Several Issues regarding Application of Laws in Trial of Online Copyright Disputes promulgated in 2000 (the “**Interpretation**”) stipulates that, statutory license shall apply to reproduction of online media, which means that online media may reproduce other's work by paying royalty and indicating the source thereof without prior written consent of the copyright owner. In the first Amendment to the Interpretation promulgated in 2004, the Supreme Court reconfirmed this opinion. However, the second Amendment to the Interpretation promulgated in 2006 deleted Article 3 of the Interpretation. Since then, there were no explicit regulations regarding whether statutory license may apply to reproduction of online media. In 2012, without enacting any stipulations regarding online reproduction, the Supreme Court rescinded the Interpretation by promulgating Regulation on Several Issues regarding Application of Laws in Trial of Civil Disputes regarding Infringement upon Rights of Dissemination on Information Network (the “**Regulation**”).

Actually, the evolvement of the Interpretation regarding online reproduction of others' work is closely related to the development of the Internet Industry. Before 2004, in order to promote development of the Internet Industry, the Interpretation stipulated that statutory license shall apply to reproduction of online media. However, when it came to the year of 2006, the Internet Industry developed rapidly and online reproduction had seriously infringed upon legal rights of copyright owners. In order to protect rights of copyright owners and traditional media, the Supreme Court deleted the original stipulation in the Interpretation which says statutory license apply to online reproduction.

To some extent, Intellectual Property Laws falls into the scope of mandatory laws, which means unless explicitly stipulated by laws, no rights concerning intellectual property may be created. Particularly, absent explicit stipulations in laws and regulations, statutory license may not be applied. Accordingly, following the year of 2006, online media was actually deprived of rights under statutory license and may not reproduce others' work without consent of copyright owners (excluding reproduction of facts and fair use). Based on foregoing discussions, the Notice does not alter the current structure of Copyright Law because it merely clarifies the implied rule that statutory license does not apply to online reproduction. Because of the fast speed, low price and massive amount of information disseminated on the Internet, if the Notice is strictly implemented, online media will incur substantial costs in negotiation with copyright owners (including traditional media and authors), payment of royalty, response to claims for infringement, and management of copyrights. Although, many people may hold a suspicious attitude towards whether relevant authorities have the capability to effectively implement the Notice under the circumstance that online information is massive and the public consciousness for protection of copyrights is weak, for traditional media and authors, the Notice is indeed a good news, which not only consolidates the legal basis for protection of their rights but also sharpens their competitive edges against online media in negotiations and strengthens their confidences in assertion of their rights. Against the background that online media prevails over traditional media, which gradually degenerates, traditional media finally get the right to say "NO" to online media.

Statutory License Still Applies to Reproduction among Traditional Media, thus Domination of Traditional Media over Original Work Is Strengthened

As stipulated in Article 2 of the Notice, Article 33.2 of Copyright Law, which is "a work that has been published by a newspaper or periodical may be reproduced, abstracted or printed as reference material by another newspaper or periodical, unless the copyright owner declares that reproduction or excerpting is not permitted; however, the copyright owner shall be remunerated according to relevant regulations" shall be applied where a newspaper or periodical reproduces work published by another newspaper or periodical. Based on foregoing regulations, reproduction among traditional media is not subject to consent of copyright owners as long as the copyright owner is remunerated according to relevant regulations after such reproduction.

In common practice of the copyright industry, traditional media generally reaches license agreements of copyright with the authors by directly soliciting contributions from authors or from voluntary submission of contributions by authors. In these license agreements, traditional media and the authors even prescribe that during the license period, rights such as sub-license, collection of royalty and protection of copyrights shall be exercised by traditional media. However, online media has been used to enjoying free reproduction for a long time without forging a solid bond with the authors. Thus, where statutory license of online reproduction is explicitly cancelled, in order to obtain license of content, online media has no option but to establish cooperation relationships and enter into license agreements with traditional media, obtaining license of authors indirectly through

traditional media and paying royalty to traditional media which subsequently will be assigned to the authors by traditional media according to their license agreements. It is based on such a practice that Article 5 of the Notice stipulates “when reproducing a work, an online media shall obtain the consent of the newspaper or periodical and pay royalty” and that Article 8 of the Notice encourages online media and traditional media to “establish a copyright cooperation mechanism in online reproduction by entering into license agreements and etc., jointly search for a reasonable pricing system of license, further perfect the transaction mechanism of license of works”.

Based on foregoing discussions, although the Notice does not alter the structure of Copyright Law, it has a profound impact on development of the media industry in China and the relationship between online media and traditional media. As for the problems that follows the promulgation of the Notice such as costs incurred in negotiations and payment of royalty, whether online media is capable of bearing such costs or cultivating a good cooperation relationship with traditional media, whether with strengthened domination power of works, traditional media could produce outstanding works with both width and depth by integration of resources, whether relevant copyright enforcement authorities could effectively implement the Notice, we will pay continuous attention.

2. State Council Released New Policies to Implement the Local Incentives Clean-up Campaign (Author: Bing Xue, Leigh Yang)

On May 11, 2015, the State Council released Circular on Matters Relating to Preferential Policies for Tax and Other Aspects (Circular Guofa [2015] No. 25, “Circular 25”), providing new guidance on the clean-up of local preferential policies.

Background of the Clean-up Campaign

At the end of 2014, the State Council and the Ministry of Finance respectively released Circular of the State Council on Cleaning up and Standardizing Preferential Policies on Tax and Other Aspects (Circular Guofa [2014] No. 62, “**Circular 62**”) and Circular on Effectively Implementing the Decision and Arrangement of the State Council on Cleaning up and Standardizing Preferential Policies on Tax and Other Aspects (Circular Caiyu[2014] No. 415, “**Circular 415**”), urging various local governments to clean-up and standardize local tax and fiscal incentive policies (the “**Local Incentives**”).

Since the release of Circular 62 and Circular 415, some local governments immediately launched campaigns to abolish all those improper Local Incentives, which caused wide concern and worry among the investors.

New Guidance Under Circular 25

Circular 25 provides clarifications associated with the clean-up of Local Incentives.

a) State Preferential Policies

The preferential policies for tax and other aspects that are formulated by the State in a unified manner shall be implemented on an item-by-item basis.

b) Preferential Policies Issued by Various Local Governments

As to Local Incentives formally documented, Circular 25 provides a grace period to facilitate a smooth transition:

- if there is a specified time limit, such time limit applies;
- if there is no specified time limit but adjustment is genuinely needed, the local governments and relevant departments concerned shall set a transitional period according to the principle of ensuring policy stability by properly managing the pace of change, and continue to implement the said policy during the transition period.

c) New Preferential Policies

As to new Local Incentives to be formulated by local governments, Circular 25 provides various guidance:

- any matters that are related to taxes or to non-tax revenues that are approved by the Central Government shall be reported to the State Council for implementation upon approval;
- others shall be implemented upon approval by the local governments and relevant departments, in which expenditure planning shall not be linked with the taxes paid by enterprises or non-tax revenues.

Under Circular 25, the regular refund-upon-collection approach adopted by various local governments would be considered non-compliance and thus may not be appropriate going forward.

d) Local Incentives Committed by Contracts

Circular 25 provides a grandfathering treatment to Local Incentives that have been committed by investment contracts: Local Incentives contained in the contracts signed by different regions with enterprises shall remain effective, and the aspects already performed thereunder shall not be retroactive.

Han Kun Notes

Circular 25 provides an enterprise-friendly transition approach in the cleaning up of Local Incentives. It is no doubt that the release of Circular 25 is quite positive to standardize Local Incentives and structure a fair investment platform. We suggest the investors should proactively initiate communications with their respective local authorities with regard to the implementation of Local Incentives.

Important Announcement

This Newsletter has been prepared for clients and professional associates of Han Kun Law Offices. Whilst every effort has been made to ensure accuracy, no responsibility can be accepted for errors and omissions, however caused. The information contained in this publication should not be relied on as legal advice and should not be regarded as a substitute for detailed advice in individual cases.

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