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**STATE COUNCIL ISSUES NEW MEASURES ON COPYRIGHT FEES
FOR AUDIO RECORDING BROADCASTS**

Introduction

On 10 November 2009, the State Council issued the *Provisional Measures on the Payment of Remuneration for Broadcasts of Audio Recordings by Radio and Television Stations (Measures)*.

The Measures have been enacted pursuant to Article 43 of the *Copyright Law of the Peoples Republic of China (Article 43)*. This article states that all holders of copyrights in audio recordings must receive royalties for the public broadcast of their works, but notes that rules specifically addressing this issue would be released at a later date by the State Council. The Measures also form part of the regulatory framework for the collective management of royalties by Associations (defined below), which is set forth in the *Copyright Collective Management Regulations*.

The Measures apply to:

- the copyright owners of audio recordings;
- the radio and television stations that broadcast those works, and
- the collective management associations engaged by copyright holders to collate their royalties from the broadcast of audio recordings, and otherwise act on their behalves in managing their in this respect (**Associations**).

The Measures are significant because prior to their promulgation, the payment of royalties by the broadcasters of audio recordings was a relatively weak obligation. Article 43 provided for such payments in principle, but set forth no details. By introducing a clear requirement for royalties to be paid, and calculation methods for royalties, the Measures are a positive step toward protecting the rights of copyright holders.

Summary of the Measures

1. Royalty Arrangements

The language of the Measures is somewhat ambiguous, but essentially specifies the following options with regard to royalty arrangements:

- Radio and television stations that have obtained prior permission from copyright owners to broadcast their works may enter into agreements regarding royalties with the Associations or with the copyright owners directly.
- Where prior permission to broadcast has not been obtained, the stations must pay royalties to copyright owners in accordance with the calculation methods set forth in the Measures.
- Radio and television stations that are seeking to broadcast a performance of a "publicized musical work" (*e.g.*, a score containing music and/or lyrics) may negotiate a royalty arrangement with the Associations.

2. Royalty Calculation Methods

The Measures stipulate following methods for calculating royalties:

- A fixed fee mutually can be agreed-upon between radio and television stations and the Associations.
- If a fixed fee payment cannot be negotiated, royalties must be calculated either:
 - at a standard rate from 0.01% to 0.9% (depending on the ratio of advertising time to total broadcast time on the broadcast channel) of 85% of the broadcaster's total annual advertising revenue; or
 - based on the length of time the particular audio recording is broadcast, at a rate of RMB0.30 per minute for radio stations and RMB1.50 to 2.00 per minute for television stations.

Notably, radio and television stations broadcasting from central China are only required to pay 50% of the above non-fixed royalties. Radio and television stations broadcasting from Western China will only be required to pay 10% (which will increase to 50% over the next 5 years).

3. Timing of Royalty Payments

Royalties must be paid on an annual basis. When making payments to

Associations, the radio and television stations must provide a list of the name of each audio recording or publicized musical work for which royalties are due, the name of the corresponding copyright owner(s), the time the recording or work was or is to be broadcast, and other necessary details.

Analysis

While the Measures have been introduced to protect copyright owners and enhance their access to royalties, there are two main obstacles to their success: the disincentive they present to broadcasters, and the disillusion many copyright holders feel with regard to the Associations.

Reinforcing the legal requirement to pay royalties creates a disincentive on the part of radio and television stations to broadcast audio recordings; particularly when they are newly released and therefore untested. Stations could previously broadcast new recordings and pay royalties in kind (*e.g.*, in exchange for on-air publicity) or not at all. Under the Measures, however, they are obligated to pay royalties irrespective of whether they have reached an agreement with the copyright holders.

To address this issue, during the process of drafting the Measures some specialists proposed a "grace period", whereby new audio recordings could be broadcast royalty-free for the first few months after their release. This was intended to balance the desire of radio and television stations to ensure that the content they broadcast is commercially viable against the legal principle that copyright holders should receive royalties for their work. However, this suggestion was ultimately not adopted.

The Measures reinforce not only the legal obligations of broadcasters, but also the Associations, which are often accused of failing to properly collect or pass on royalties or collect them in the first place. The two largest Associations (the China Audio-Video Copyright Association and the Music Copyright Society of China) have recently been the subject of particular criticism after their widely publicized failure to remunerate rights holders. As a result, some copyright owners prefer to negotiate and enter into royalty agreements directly with radio and television stations, bypassing the Associations altogether.

The success of the Measures in improving access to royalties will thus depend on, but also encourage, the Associations' improvement of their services and thereby their reputation in the industry.

Conclusion

In 2006, TransAsia was asked to advise the State Administration of Radio, Film and Television (**SARFT**) on how other parts of the world, particularly Western countries, implement royalty payment systems for radio and television stations, and to compile

comprehensive information for the SARFT's reference in formulating the Measures. We have therefore been following the development of this area of law for some time with great interest.

The enactment of the Measures demonstrates a concerted effort by the State Council to enhance the protection of copyrights in audio recordings, in keeping with the principles laid down by the Copyright Law (and in particular, Article 43). By providing a clear legal requirement to pay royalties, and guidelines on how they should be calculated, the Measures are a positive development for copyright holders. However, their overall success will depend on how well they are enforced, as well as how two key practical issues develop, namely, whether the Measures act as a disincentive for broadcasters, and whether the Associations perform their obligations and become a reliable component of the copyright protection system.

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