



**PRC Law Newsflash
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AMENDMENT TO THE PRC COPYRIGHT LAW INTRODUCED

Introduction

On 26 February 2010, the 13th Meeting of the Standing Committee of the 11th National People's Congress adopted an amendment to the 2001 *PRC Copyright Law (Amendment)*, which will take effect on April 1st.

The amendment comprises just two parts:

- it adjusts the wording of Article 4, to bring it in line with a recent ruling by the WTO Dispute Settlement Body (**DSB**); and
- it reinforces the requirement that copyright pledges must be registered.

Rephrasing of Article 4

Amendment

1. Article 4 of the Copyright Law originally stated that,

Works the publication and/or dissemination of which are prohibited by law shall not be protected by this Law.

The Amendment replaces this wording with the stipulation that

The state shall administer and govern the publishing and dissemination of works pursuant to the law.

The remainder of the article continues to provide that

When exercising their copyrights, copyright holders shall not violate the constitution or the law, nor harm any public morals.

Compliance with WTO Ruling

2. On 10 April 2007, the U.S. requested formal consultations with China about its laws on the protection and enforcement of intellectual property rights. The DSB consequently assembled a panel of experts to review the relevant regulations.

In a report issued on 26 January 2009, the DSB found that certain of China's regulations were inconsistent with its WTO obligations – including that Article 4 of the Copyright Law was incompatible with the 1994 *Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)* and the 1971 *Berne Convention* (as incorporated into the TRIPS). Neither the U.S. nor China appealed the report's findings.

3. During the DSB panel's review, China had argued that Article 4 covered only those works prohibited by the constitution, the law or public morals. However, the panel found that this classification encompassed works that failed the broader, more basic "content review" required by the PRC authorities.

The panel emphasized that the U.S.'s claim did not challenge China's right to conduct a "content review", only the effect of that review on copyright protection. It declined to rule on the most far-reaching claim made by the U.S., namely that China does not have sufficiently strict criminal sanctions against copyright violations (which was the motivating factor behind the request for consultations).

4. Pursuant to the WTO's rules, China has 15 months to implement the DSB's ruling. The revision of Article 4 indicates that China has accepted this ruling and intends to comply with it.

New Article 26

5. The second change introduced by the Amendment is to include a new provision as Article 26, requiring that

any copyrights that are pledged shall be registered by the pledgor and pledgee with the copyright administration under the State Council.

6. Article 26 reiterates and enforces the implementation of Article 227 of the *PRC Property Law*, according to which a copyright pledge only takes effect upon its formal registration.

Conclusion

Article 4

The revision of Article 4 means that foreign works that fail the Chinese government's content review, and are therefore prohibited from being published in China, will nevertheless be entitled to copyright protection in the PRC. This means that holders of rights in those works may seek to enforce them through the Chinese courts. However, as the works in question cannot be legally published or distributed in China, if a rights holder does initiate litigation against infringers, it will have difficulty demonstrating that it has suffered legitimate losses. To obtain any relief, the rights holder will have to cite to the infringers' illegal gains; but these are generally nominal.

The Amendment arguably just rectifies an internal inconsistency in the Copyright Law, rather than constituting a deliberate attempt to conform to WTO and TRIPS requirements. This interpretation is derived from a perceived contradiction between Article 4 and the principle, established elsewhere in the Copyright Law, that copyrights enter into existence immediately upon the creation of a work. The original wording of Article 4 was viewed by many parties outside the PRC as denying basic copyrights to the creators of works that failed a content review, and in so doing, contravening a basic principle of copyright creation that Chinese law itself recognized.

At least in the short term, the Amendment is a hollow victory for foreign media producers and the U.S. Trade Representative, as the DSB elected not to address the core issue of copyright-related sanctions. By amending Article 4 in accordance with the panel's report, China has strengthened its record for WTO compliance without loosening the state's tight grasp on the publication and dissemination of foreign works.

Article 26

Article 26 will grant more protection to copyright pledgees, and help prevent repeat or conflicting pledges in the PRC. As such, it should have a positive effect and assist pledgees to perfect their interests. However, due to the global nature of copyrights, the Amendment does not preclude repeated or conflicting pledges of the same rights being made in the same piece of work across different countries.

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