

Copyright Protection in China: What you need to Know

China IPR SME Helpdesk



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Today, intellectual property rights have a strong footing in China, despite the persistence of media accounts suggesting otherwise. There are dedicated IP courts in major cities and litigation by foreign companies is frequently successful.

China is now making significant headway in the cultural and high-tech industries, where copyright is the key. One example is the book industry, with sales increasing by over 30% from 2013 to 2014. Another new industry is the mobile app industry, now worth over \$8.7 billion (2015), with small domestic start-ups relying on copyright to safeguard them in a market where less cautious foreign app developers have been overtaken by copycats.

What is a copyright?

Copyright is a form of intellectual property (IP) that protects a creator's exclusive right to control who reproduces or alters the product of their original creative effort. Copyright protects the producers of any original work, and is relevant to almost all businesses, not just those in the creative industry. Adequate copyright protection can form an important part of an IPR protection strategy. Businesses regularly create articles, photographs, drawings, designs, models, websites, computer software, which all enjoy copyright protection. Copyright is an automatic right that arises the moment a work is created.

Once the work is created, in most cases, the creator will automatically enjoy copyright protection in all 164 member countries of the Berne Convention for the Protection of Literary and Artistic Works, including all China. Voluntary registration for copyright is available in China. Though European SMEs' work is automatically protected by copyright the moment it is created, voluntary registration will provide proof of ownership, which can save the SME time and money in case of a dispute later on. For copyrights that are particularly important to the livelihood of the business it is strongly advised to register copyright.

What kinds of works are protected by copyright?

Copyright protects original creative expressions of ideas that exist in a fixed medium such as on a piece of paper, on an artist's canvas, on an optical disc, or on magnetically recordable media. Copyright protects only the expression of an idea, not the idea itself.

Traditional types of creative works such as books, music, recordings, plays, films, paintings, sculptures, photographs, etc, enjoy copyright protection in China. Other works such as works of choreography, acrobatics, calligraphy, *quyi* (a traditional Chinese performance art form), model works, and databases and compilations as to the selection and arrangement of content also enjoy copyright protection in China. The basic principle of a copyright is that the work be original and reproducible.

Unlike in Europe, where computer software is protected by patents, software is expressly protected under copyright in China. Industrial and graphic designs, applied art, architectural buildings are also protected by copyright.

How is copyright ownership determined?

A copyright of a work belongs to its creator, or the employer of the author. Protected creative acts include those intellectual activities that directly result in the creation of the work. Acts of support such as rendering services or material or financial resources are not considered creative acts. For example, if an SME provides only managerial support to the creation of a work, it will not be considered an author of the work. If it is expected that the copyright will be licensed, transferred, or used as an in-kind contribution to registered capital for the establishment of a legal entity in China, then copyright ownership must be clearly determined. Without evidence to the contrary, the person or entity whose name appears on the work is considered the as the author of the work.

Commissioned works

Without an agreement which states otherwise, the copyright of a commissioned work belongs to the commissioned party. This means that if a third party is commissioned to create a work, then the copyright belongs to that third party, unless stated otherwise in a relevant contract.

In all other cases, the employee owns the copyright to the service work. However, the contracting business enjoys preferential rights such as preventing their employee for a period of two years from licensing the work to a third party without consent, or if given consent, obtaining an agreed share of the licensing fee. Employment contracts should clearly address who owns the copyright to works created by employees and provide, where desired, that copyrights to works created by employees be assigned to the employer in exchange for compensation.

How to register copyright?

Registration of copyright in China is administered by the Copyright Protection Center of China (CPCC). An applicant must complete the copyright registration application form and mail the application materials to CPCC. The application should also include supplemental documents such as the identification documents of the applicant, any documents of copyright ownership, samples of the work, and a brief description of the work. After receiving the application, the CPCC will review the application materials, determine the cost (this is a one-off payment which can range from RMB 100 – 2,000), and notify the company. Once the applicant pays the fee, they will receive a notice of receipt of payment and notice of application acceptance. The examination of the application takes approximately 30 working days to complete from the date of acceptance. After the successful completion of the examination, the applicant will receive a Copyright Registration Certificate.

Copyright Enforcement

The two most common ways to enforce copyrights are through administrative and judicial routes. First, the SME needs to confirm any suspected infringement and gather and preserve evidence. For example, if suspected infringing goods are encountered at a trade show, the SME should attempt to gather business cards, take photographs and ask questions about the source of the goods. Where suspected infringement is discovered on the internet, the company needs to determine the identity of the seller or user of the copyrighted work and the ISP network on which the infringing content is stored. For serious cases, European SMEs may want to consider hiring a lawyer or a private investigator.

While administrative enforcement through the National Copyright Administration of China (NCAC) is often a faster and less expensive alternative to judicial proceedings, NCAC is not empowered to issue damages. It can however, order infringers to stop their activities, confiscate illegal income, confiscate and destroy pirated goods and the equipment and materials used to manufacture them, and issue fines.

Meanwhile, the People's Courts hears judicial enforcement cases. Companies may request the court for preliminary or permanent injunctions, to preserve evidence of infringement and property of the defendant and to order the defendant to destroy any infringing goods or instruments of infringement, pay damages, and make a public apology.

If damages can be proved with reasonable certainty, there is no limit on the amount of damages a court can award. If actual losses or illegal income of the infringer cannot be determined, the court may order the defendant to pay compensation up to a maximum of approximately EUR 60,000. In most cases, damage awards for copyright infringement have been relatively low.

In minor cases or as a first-step to enforcing copyright in serious cases, the company may send a cease and desist letter to the suspected infringer requesting the infringer to stop its activities. Such a letter should identify the copyrighted work, ownership of the copyright and the alleged infringing activity. The letter may also include a demand to immediately cease all infringing acts under threat of litigation or further legal action, but legal advice should be obtained in advance to determine whether it is appropriate.

Border protection of copyrighted works and products by the General Administration of Customs (GAC) can be a cost-effective way to prevent counterfeit goods from entering or leaving China. The SME may directly apply to Customs to seize goods suspected of infringing a copyright or record copyright with the GAC to take advantage of Customs' routine screening of shipments.

Take-away messages

- Copyright defines a broad range of creations in China; particular care should be taken to protect works – such as software - which are usually protected by other intellectual property types in Europe.

- It is recommended that European SMEs voluntarily register their copyright as part of a multi-layered IPR protection strategy. For example, a company logo can enjoy **double protection** as both a trade mark and a copyright. In addition, in case of infringement a copyright registration proves that the company is the rightful owner of the copyrighted work in dispute and increases company's chances of successful copyright enforcement.
- Carefully structure and check the contracts and license agreements to ensure that ownership of copyright is determined in the manner most beneficial to the company.

Please include the attached by-line after the article:

*The **China IPR SME Helpdesk** supports small and medium sized enterprises (SMEs) from European Union (EU) member states to protect and enforce their Intellectual Property Rights (IPR) in or relating to China, Hong Kong, Macao and Taiwan, through the provision of **free information and services**. The Helpdesk provides jargon-free, first-line, confidential advice on intellectual property and related issues, along with training events, materials and online resources. Individual SMEs and SME intermediaries can submit their IPR queries via email (question@china-iprhelpdesk.eu) and gain access to a panel of experts, in order to receive **free and confidential first-line advice** within **3 working days**.*

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