

What You Should Know About China's Software Law

Basic principles

The People's Republic of China ("PRC") is a member of the Berne Convention for the Protection of Literary and Artistic Works ("Berne Convention") and the Agreement on Trade Related Aspects of Intellectual Property Rights ("TRIPS"). Thus the PRC, pursuant to Article 10 of TRIPS protects computer software as literary work under the Berne Convention (1971).

In order to be eligible for protection, computer software must have been developed independently by its developer and have to be recorded on some tangible medium. The scope of computer software protection includes computer programs and related files.

Software protection does not extend to ideas, procedures, and methods of operation or mathematical concepts. Any foreigner or foreign enterprise that first releases software within the territory of the PRC can enjoy copyright under the PRC Copyright Law and the PRC Regulations on Computer Software Protection. Software which a foreigner or foreign enterprise releases outside the territory of the PRC can receive this protection in accordance with a bilateral agreement or international treaty.

A software copyright holder is entitled to decide whether the software will be made available to the public, to state his /her name on the software and to revise the software. He/she also enjoys the right to reproduce, distribute and lease the software, as well as to disseminate the software via information networks and to convert the software from one natural language into another natural language.

A software copyright commences on the date on which the development of the software is completed. The term of protection for the software copyright of an individual in the PRC is the individual's whole lifespan plus 50 years after his / her death, ending on December 31 of the 50th year after his/her death. The term of protection for the software copyright of a company is 50 years, ending on December 31 of the 50th year after the software was initially released.

A software copyright holder may voluntarily apply for copyright registration of the software with the Copyright Protection Center of China ("CPCC"), which is designated by the National Copyright Administration ("NCA"). A registration certificate issued by the CPCC serves as prima facie evidence of the existence of software copyright. Registration protects a software copyright holder against software piracy.

Registration

In order to apply for registration of a software copyright with the CPCC, the applicant must submit an application to CPCC together with required supporting documents.

The CPCC will complete the examination of the application within 60 days from the acceptance date. If the application meets the requirements of the CPCC, a Certificate of Software Copyright Registration will be issued by the CPCC.

Licensing

Licensing of software copyrights is permitted in the PRC. The parties concerned shall apply for registration of the licensing contract with the CPCC. Without submission of the Registration Certificate of Software Copyright License, no royalties can be transferred abroad.

Assignment

Software copyrights may either be assigned in part or as a whole. The parties concerned may apply for registration of assignment with the CPCC. This registration is not mandatory. In the case of registration, a Certificate of Registration of Software Copyright Assignment will be issued by the CPCC within 60 days from the acceptance date.

Enforcement

In accordance with the requirements of TRIPS, both administrative relief and judicial relief are available to copyright holders if they want to take action against software piracy in the PRC. A software copyright holder may file a complaint with the local copyright administration against infringement of software in the PRC if the infringement has also impaired the public interest. Court action is also possible. ⁷ The local copyright administration and the court have the power to seize infringing software and to order the infringer to cease the infringement. The local copyright administration may also impose fines but only courts are entitled to award damages.

The amount of damages for software copyright infringement will be calculated according to the actual losses of the copyright holder. If the actual losses are difficult to calculate, the damages paid will be based on the illegal revenues earned by the infringer. If neither of them can be determined, under the revised PRC Copyright Law courts may award damages of up to RMB 500,000.



For further information and assistance, please contact

Colin Liu

Partner, Head of Intellectual Property

E colin.liu@cmslegal.cn

CMS, China

2801 Plaza 66, Tower 2

1266 Nanjing Road West

Shanghai 200040, China

T+86-21-6289 6363

F+86-21-6289 0731

CMS, China has been active in China on behalf of its clients for almost 30 years and has had an office there since the mid-90s. Our offices in Mainland China are staffed by lawyers from China, Germany, Switzerland and the United Kingdom, who provide an extensive range of legal advice and services to clients doing business with China. CMS, China is a member of CMS Legal Services EEIG, a European Economic Interest Grouping that coordinates an organisation of independent member firms. CMS Legal Services EEIG provides no client services. Such services are solely provided by the member firms in their respective jurisdictions. In certain circumstances, CMS is used as a brand or business name of some or all of the member firms. CMS Legal Services EEIG and its member firms are legally distinct and separate entities. They do not have, and nothing contained herein shall be construed to place these entities in, the relationship of parents, subsidiaries, agents, partners or joint ventures. No member firm has any authority (actual, apparent, implied or otherwise) to bind CMS Legal Services EEIG or any other member firm in any manner whatsoever.

CMS member firms are: CMS Adonnino Ascoli & Cavasola Scamoni (Italy); CMS Albiñana & Suárez de Lezo, S.L.P. (Spain); CMS Bureau Francis Lefebvre (France); CMS Cameron McKenna LLP (UK); CMS DeBacker (Belgium); CMS Derks Star Busmann (The Netherlands); CMS von Erlach Henrici Ltd. (Switzerland); CMS Hasche Sigle (Germany); CMS Reich-Rohrwig Hainz Rechtsanwälte GmbH (Austria) and CMS Rui Pena, Arnaut & Associados RL (Portugal). CMS offices and associated offices: Amsterdam, Berlin, Brussels, Lisbon, London, Madrid, Paris, Rome, Vienna, Zurich, Aberdeen, Algiers, Antwerp, Beijing, Belgrade, Bratislava, Bristol, Bucharest, Budapest, Casablanca, Cologne, Dresden, Duesseldorf, Edinburgh, Frankfurt, Hamburg, Kyiv, Leipzig, Ljubljana, Luxembourg, Lyon, Marbella, Milan, Moscow, Munich, Prague, Rio de Janeiro, Sarajevo, Seville, Shanghai, Sofia, Strasbourg, Stuttgart, Utrecht, Tirana, Warsaw and Zagreb.

"CMS, China" should be understood to mean the representative offices in Mainland China of CMS Bureau Francis Lefebvre, CMS Cameron McKenna LLP and CMS Hasche Sigle, working together.

CMS, China

CMS Hasche Sigle Shanghai Representative Office

2801 Tower 2, Plaza 66 | 1266 Nanjing Road West | Shanghai 200040, China
T +86 21 6289 6363 | F +86 21 6289 9696

CMS, China

CMS Cameron McKenna LLP Beijing Representative Office (UK)

Room 1901, Building A, Sanlitun SOHO Centre | Chaoyang District | Beijing 100027, China
T +86 10 85270259 | F +86 10 85900831

www.cmslegal.cn