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100805
北京市西城区前门西大街 1 号
全国人民代表大会常务委员会法制工作委员会
沈春耀主任

邮寄

**主题：《中华人民共和国著作权法修正案(草案二次审议稿)》
的反馈意见**

尊敬的沈主任您好：

美国知识产权所有人协会(下称“IPO 协会”)感谢有机会对 2020 年 8 月 17 日发布的《中华人民共和国著作权法修正案(草案二次审议稿)》(下称“《草案》”)提交意见。

IPO 协会是一家代表各行业、各技术领域内拥有知识产权或相关权益的公司和个人的国际性行业协会。它拥有一百七十五家公司会员以及超过一万两千多名个人会员。这些个人会员有些从属于公司会员或律所成员，有些是发明人、作者或律师会员。IPO 协会的会员遍及三十多个国家。

IPO 协会提倡有效和实惠的知识产权，为会员提供广泛的服务，包括支持会员在立法和国际事务中的利益、分析当前知识产权问题、提供教育和信息服务、以及向公众传播知识产权的重要性。

以下是我们对《草案》的具体反馈意见。

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第 49 条

根据第四十九条，“未经权利持有人许可，任何组织或个人不得故意避免或破坏技术措施”。在解释本条的广度和范围时，谨提出，避免根据本条采取技术措施不应扩大到未经权利持有人许可而使用的技术措施。例如，通过未经授权使用有效密码来访问存储在计算机系统受版权保护的作品可能是非法的。IPO 认为这种未经授权的使用应属非法，不应将其归入本条的“避免技术措施，”因为所使用的技术措施并未被规避或规避，而是被用于未经授权的使用受版权保护的作品。鉴于上述情况，谨提出在解释技术手段的含意的广度和范围时，在第四十九条的末尾增加以下句子：

未经本条款的权利持有者许可，组织或个人未经授权使用技术措施不应被视为避免使用技术措施。

第 50 条

第 50 条列出了五种情况下可以规避技术措施的情况，包括 (i) 针对学校课堂教学或科学研究；(ii) 不以营利为目的将已出版的作品提供给阅读障碍者；(iii) 国家机关依照行政司法程序执行公务；(iv) 测试计算机及其系统和网络的安全性能，以及 (v) 进行加密或计算机软件逆向工程研究。这些例外（情况）仅适用于“无法通过常规渠道获得版权作品的情况”。谨此提出，即使在上述情况下，也应限制规避行为，使这种规避的效果不会对版权作品的市场或价值产生不利影响。因此，谨此要求对第 50 条进行修正，在第 50 条第 1 款的末尾增加以下句子：

但是，应限制在上述情况下对技术措施的规避，使这种规避的效果不会对版权作品的市场或价值产生不利影响。

至于在确定是否无法通过正常渠道获得受版权保护的作品时所考虑的因素，尚不清楚。因此，我们寻求澄清的是：在确定是否无法通过正常渠道获得受版权保护的作品时将考虑哪些因素。如果在中国有版权的材料可供使用，但用户认为版权费过高，该怎么办？我们建议，这些情况不属于受版权保护的作品“无法通过正常渠道获得”。

第 54 条

第 54 条规定，权利人可以获得赔偿的一种形式是“侵权人的非法收入”。该条还提到，侵权人的非法收入可能难以计算，在这种情况下，权利人可以要求使用费作为赔偿。IPO 尊敬地提出，如果对第 54 条进行修正以增加“负担转移”机制：权利持有人仅需证明通过以下方式获得的总收入，便可以更成功地证明侵权人的非

法收入数额。然后，负担将转移到侵权人身上，以证明从收入中适当扣除的金额以确定“非法收入”。例如，如果权利人表明侵权人从侵权中获得了 100 万元的总收入，那么责任就转移到了侵权人身上，以证明制造和销售成本或其他适当的扣除额。如果侵权人无法证明这种扣除，那么权利人将有权根据第五十四条获得“侵权人的非法收入”全部人民币 100 万元的赔偿。

在其他一些国家，版权法规也提供了类似的转移负担条款，因为认识到侵权者拥有与非法收入有关的财务信息的控制权，可以轻松提供所有相关财务信息，而权利人不必费力地证明侵权行为的金额。我们恭敬地建议，这种负担转移只需要对第 54 条的现有措词进行适度的修改。对第 54 条相关部分的拟议修改如下：

侵犯著作权或者与著作权有关的权利的，应当根据权利人的实际损失或者侵权人的违法所得赔偿权利人。为了确定侵权者的非法收入金额，权利持有者仅需证明侵权人的总收入金额即可。侵权人应承担证明任何费用或从收入总额中适当扣除的金额以确定非法收入数额的责任。如果权利人的实际损失或侵权人的非法收入难以计算，则可以参照赔偿使用费。

IPO 协会再次感谢贵院给予此次机会提出反馈意见。我们也非常愿意与贵院进一步交流或能有机会为贵院提供更多的信息。

随信附上本信的翻译版本。

此致



Daniel J. Staudt
美国知识产权所有人协会主席

附件：IPO 协会对《版权法》（草案二次审议稿）的反馈意见（英文版）



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Siemens

Vice President
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Shell Oil Company

Treasurer
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Dell Technologies

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Pfizer Inc.

Brett Allen
Hewlett Packard Enterprise

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Stuart Watt
Amgen, Inc.

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30 September 2020

National People's Congress of the People's Republic of China
No. 1, Qianmen Street W
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Beijing 100805
People's Republic of China

Via Courier

***Re: Amendment to the Copyright Law of the People's Republic of China
(Second Deliberation Draft)***

Dear National People's Congress:

The Intellectual Property Owners Association (IPO) appreciates the opportunity to respond to the request for comments on the draft *Amendment to the Copyright Law of the People's Republic of China (Second Deliberation Draft)* ("Draft Amendment") published on 17 August 2020.

IPO is an international trade association representing companies and individuals in all industries and fields of technology who own, or are interested in, intellectual property rights. IPO's membership includes 175 companies and close to 12,000 individuals who are involved in the association either through their companies or as inventor, author, law firm, or attorney members. IPO membership spans over 30 countries.

IPO advocates for effective and affordable IP ownership rights and offers a wide array of services, including supporting member interests relating to legislative and international issues; analyzing current IP issues; providing information and educational services; and disseminating information to the public on the importance of IP rights.

IPO appreciates the stated objectives of the Draft Amendment to protect the copyright of authors of literary, artistic and scientific works, and to encourage the creation and dissemination of works beneficial to society.

We hope that our comments below will be helpful during the process of finalizing the Draft Amendment.

Article 49

Under Article 49, “no organization or individual may deliberately avoid or destroy technical measures” without permission from the rights holder. In construing the breadth and scope of this Article, it is respectfully submitted that avoidance of technical measures under this Article should not extend to the use of technical measures which may be without permission from the rights holder. For example, accessing a copyrighted work stored in a computer system through the unauthorized use of a valid password may be illegal, and IPO supports the principle that such unauthorized use should be illegal, but it should not be construed as the avoidance of technical measures under this Article. The technical measures have not been evaded or otherwise circumvented, but rather have been used to gain unauthorized access to a copyrighted work. In view of the foregoing, it is respectfully submitted that the following sentence be added to the end of Article 49 in construing the breadth and scope of what it means to avoid technical measures:

Unauthorized use of technical measures by an organization or individual shall not be considered as the avoidance of technical measures without permission from the rights holder under this Article.

Article 50

Article 50 lists five circumstances under which technical measures may be circumvented, including (i) for school classroom teaching or scientific research, (ii) not-for-profit where the published works are provided to the dyslexic, (iii) state organs performing official duties in accordance with administrative and judicial procedures, (iv) testing the security performance of computers and their systems and networks and (v) conducting encryption or computer software reverse engineering research. These exceptions (*i.e.*, circumstances) apply only where access to the copyrighted works “cannot be obtained through normal channels.”

It is respectfully submitted that circumvention, even under the above listed circumstances, should be limited so that the effect of such circumvention does not adversely impact the market for, or value of, the copyrighted work. It is therefore respectfully requested that Article 50 be amended by adding the following sentence to the end of Article 50, first paragraph:

Circumvention of technical measures under the foregoing circumstances, however, shall be limited so that the effect of such circumvention does not adversely impact the market for, or value of, the copyrighted work

It is also unclear what factors will be taken into account when determining whether a copyrighted work cannot be obtained through normal channels. We seek clarification regarding the factors that will be considered when determining whether a copyrighted work cannot be obtained through normal channels. For example, what if the copyrighted material is available in China but at a royalty rate considered too high by a user? IPO suggests that this does not make it a situation where the copyrighted works “cannot be obtained through normal channels.”

Article 54

Article 54 currently provides that one form of compensation that the rights holder may obtain is the “illegal income of the infringer.” The Article also references that the illegal income of the infringer may be difficult to calculate, in which case the rights holder may claim a use fee as compensation.

It is respectfully submitted that rights holders may be more successful in proving the amount of the illegal income of the infringer if Article 54 is amended to add a “burden shifting” mechanism under which the rights holder need only prove the amount of gross revenue obtained by the infringer from the infringement. The burden would then shift to the infringer to prove the amount of appropriate deductions from the revenue to determine “illegal income.” For example, if the rights holder shows that the infringer made 1 million yuan in gross revenue from the infringement, then the burden shifts to the infringer to prove the amount of manufacturing and sales costs or other appropriate deduction. If the infringer cannot prove such deductions, then the rights holder would be entitled to the full 1 million yuan as compensation under the “illegal income of the infringer” portion of Article 54.

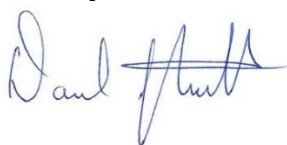
Copyright statutes in at least some other countries provide a similar burden-shifting provision in recognition of the fact that the infringer has control of the financial information relating to the illegal income, and the rights holder should not have to struggle to prove the amount when the infringer has easy access to the relevant financial information. We respectfully suggest that such a burden shifting would require only a modest amendment of the present language of Article 54. A proposed amendment to the relevant section in Article 54 is shown below:

*For infringement of copyright or copyright-related rights, the right holder should be compensated based on the actual loss of the right holder or the illegal income of the infringer. **To determine the amount of illegal income of the infringer, the rights holder is required to prove only the amount of the infringer’s gross revenue. The infringer shall have the burden of proving the amount of any expenses or appropriate deductions from gross revenue to determine the amount of illegal income.** If right holder’s actual loss or the infringer’s illegal income is difficult to calculate, then the use fee for compensation for compensation may be referred to.*

We thank the National People’s Congress for this opportunity to comment, and we welcome further dialogue and opportunity to provide additional comments.

We have enclosed this letter as translated herewith.

Sincerely,



Daniel J. Staudt
President

Attachment