

1.5 billion to one: online copyright enforcement against the odds

As China improves its protection for both online copyright and intellectual property as a whole, new weapons are being added to the rights holder's armoury

It is Saturday afternoon and Journey's iconic song "Don't Stop Believin'" is playing on a US college student's computer. Next up on the playlist is something by Dave Matthews, followed by U2, Michael Jackson, The Rolling Stones and The Beatles: a well-thought-out playlist of tunes that have remained popular throughout the years. These few songs are just a sample of the 3,000-plus songs downloaded illegally by the student with apparent impunity.

More than 7,000 miles away in China, the same type of illegal activity occurs on a daily basis, albeit on a much larger scale. In 2009 China boasted over 384 million internet users, an increase of roughly 86 million over the previous year. China's online community is now greater than the populations of the United States, England and Australia combined.

With such vast numbers, the amount of internet-related crime – specifically online copyright infringement – has accelerated out of control. Arguably the most common and basic form of copyright infringement, illegal downloads of music from the Internet has created major unrest in China, where an estimated 80% to 90% of the music downloaded is pirated. This alone represents a dramatic loss of revenue on both a global and national scale: the Music Copyright Society of China recently reported a revenue loss of over 90%.

The music industry is just one area where online copyright infringement runs rampant. Essentially, in China, everything is downloaded illegally from the Internet. Films, computer programs, software, books and even current television shows are easily obtained from various websites that allow the user simply to download the content without any authorisation from the copyright owner and without paying royalties. New films and television shows are generally available on the

Internet in China mere days after their initial release in the United States. The problem has become so endemic that critics blame the absence of a healthy cinema culture in China directly on illegal downloads.

Types of infringement

The Chinese online copyright infringement problem can be categorised into two distinct groups:

- digital libraries of copyrighted material; and
- the dissemination of music, films and television shows using peer-to-peer (P2P) networks.

Digital libraries

In China, hundreds of websites allow the unauthorised download of copyrighted publications. Typically, publications are scanned, categorised by subject and subsequently made available for users to download. The publications available for download range from books and magazines to educational journals and textbooks and are updated on an hourly basis. These websites generate revenue through advertisement.

Dissemination of music, films and television shows

Numerous websites allow the user simply to download a song, film or television show without proper authorisation from the rights holder. The process is simple and users often acquire hundreds, if not thousands, of illegal videos. The problem is so severe that mere hours after a television show is broadcast for the first time, it is available for download on virtually every file-sharing and P2P network. Such networks offer users a free forum where they can upload, download and distribute large amounts of data. Users are often anonymous, identified only by their account and possibly an internet protocol address, and are free to

distribute any file they wish. The majority of the files available for download are copyright protected, yet the rights holders have not given permission for the works to be disseminated. Some popular videos and songs have been downloaded tens of millions of times.

Copyright protection

In 2001 China extensively revised its IP laws in anticipation of joining the World Trade Organisation. These revisions brought China into compliance with the Agreement on Trade-Related Aspects of Intellectual Property Rights, and reaffirmed its commitment to protecting and enforcing IP rights.

The Copyright Law was drafted in 1990 and revised in 2001, with the current implementing regulation taking effect in 2002. The 2001 revision of the Copyright Law brought China into compliance with the Berne Convention by granting full copyright protection for works of art, literature, social and natural sciences, engineering and technology, including oral, written, dramatic, musical and cinematographic works. The term of copyright protection is the life of the author plus 50 years.

With regard to legal and natural persons in China, copyright protection applies from the time of creation; for foreigners, copyright protection commences on the date on which the work is first published in China. Further, foreigners enjoy protection in accordance with any agreement or multilateral treaty to which their own country and China are signatories. In accordance with the full national treatment principle of the Berne Convention, if a foreign work is first published in a third country that has a copyright agreement with China, that work enjoys trademark protection in China.

The Copyright Law protects, recognises and regulates copyright infringement on

the Internet. Article 10 provides a copyright owner with the “right of information network dissemination, ie the right to present a work to the public in the cable or wireless form for members of the public to get the work at the time and site selected on their own”. It is solely up to the rights holder to determine the forum and place of dissemination for public use. The current Chinese practice of freely sharing files and allowing the download of copyrighted work clearly violates this regulation.

Further, according to Article 41: “Sound or visual recording producers shall enjoy the right to license others to reproduce, distribute, lend and disseminate to the public through information networks and the right to get compensation in relation to sound or visual recording products they produced. In addition, the licensee who reproduces, distributes or disseminates to the public through information networks shall acquire the license of both the copyright owner and the performer and pay compensation thereto.”

It is for the rights holder to license its work or authorise others to distribute it. Further, it can seek compensation from any individual who reproduces or distributes the copyrighted work.

Article 48 provides for monetary damages for infringement of any copyrighted work: “If a copyright or copyright-related right is infringed, compensation shall be paid according to the actual loss of the right owner by the person who made the infringement; if the computation of the actual loss is difficult, compensation may be paid according to the illegal gains of the person who made the infringement. The compensation shall also include the reasonable expenses of the right owner for preventing the act of infringement.”

Enforcement options

Although the Copyright Law favours the rights holder and its proprietary interest in the copyrighted work, it provides little information or guidance on how to find the actual infringer or the course of action to take beyond filing a lawsuit.

Taking the BitTorrent and other file-sharing sites as an example, it is exceedingly difficult for a rights holder to pursue a claim for copyright infringement against a simple user of the site. There are likely hundreds of thousands, if not millions, of users, and there may be numerous acts of infringement. Pinpointing just one user and filing a lawsuit against him or her is likely to be cost prohibitive and certainly will not prevent thousands of other users from downloading the copyrighted material.



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Aaron D Hurvitz joined Kangxin Partners, PC in 2009 as of foreign counsel and is responsible for advising Kangxin’s foreign clients on IP law in China. Mr Hurvitz frequently gives lectures around the world, focusing on anti-counterfeiting and IP enforcement, and provides advice on doing business, licensing technology and commercialising intellectual property in China.

With the number of internet users and infringers increasing exponentially each year, the National Copyright Administration of China, in cooperation with the Ministry of Information Industry, has published the Administrative Protection of Internet Copyright Regulations. These regulations, created in accordance with the Copyright Law, provide greater rights and enforcement options for copyright owners.

Article 5 states that: “Informed by copyright owners through internet information service providers themselves or by their commissioned agents of infringing content transmitted on the Internet, internet access service providers shall take measures to remove the relevant content immediately and keep the copyright owner’s notice for six months.” This regulation is one of the first measures to have enforcement teeth. The rights holder need not pursue each individual claim of copyright infringement, but rather can simply inform the website host or internet service provider (ISP), which must immediately remove the infringing content.

Moreover, as stated in the regulation, the notice given by the rights holder is effective for six months from the date of the original notice, shifting the burden of responsibility to the ISP or website host.

Further, according to Article 11, if the ISP is on notice that its website is hosting infringing material, the copyright administration can order the removal of the infringing copyright material and, under Article 47 of the Copyright Law, seize the illegal earnings derived from the copyright infringement. Alternatively, it may impose a fine of less than three times the amount of the illegal earnings or, where the illegal earnings are difficult to determine, a fine of Rmb100,000 (approximately \$14,750).

Internet monitoring and cease and desist letters

Rights holders should take a two-tiered approach to combating internet copyright infringement in China. For small private works, the rights holder can follow and track the dissemination of its work in China. When infringement is discovered, it can contact the individual website or ISP and request that it remove the copyrighted work.

However, where there is widespread copyright infringement, it is nearly impossible to keep track of the thousands of websites which may disseminate the copyrighted work. In such case it is prudent to employ an internet monitoring team, providing it with a number of potentially infringed works as a reference. The cost is relatively low and the acquired market intelligence is invaluable.

Once key infringing websites have been identified, a cease and desist letter should be issued to the ISP, which in turn will remove the problematic sites.

Sending a letter brings a double benefit: the service provider is likely to remove the websites distributing the infringing material and the ISP is placed on notice of the infringing content. Under Article 12, notice is a prerequisite before the copyright administration can impose administrative penalties on the ISP for failing to take appropriate steps to remove the infringing material.

Conclusion

It used to be a foregone conclusion that enforcing copyright on the Internet in China was a near-impossible task. Great efforts were made to chase individual infringers, yet once they were caught there was little action for the rights holder to take. However, times have changed, and as China continues to improve its protection for both online copyright and intellectual property as a whole, there is much to be excited about. Considering the options currently available, and the aggressive stance that the government has taken towards IP rights protection, rights holders are sure to agree when Journey sing “Don’t Stop Believin’”. 