

## UPDATES ON COPYRIGHT PROTECTION OF DIGITAL MEDIA IN CHINA

Copyright generally automatically arises upon the completion of the work, unlike other intellectual property rights which require registration. In China, which adopts a first-to-file trademark system, many international corporations may find their trademarks already registered by squatters or third parties by the time they wish enter into the China market. Relying on copyright protection is an important alternative when infringement occurs. This newsletter begins with highlighting the available administrative actions to enforce copyright in China, and follows with examining how work disseminated on the Internet is protected.

### HOW DOES COPYRIGHT RECORDAL ASSIST ENFORCEMENT ACTIONS?

Although copyright arises upon the completion of the work and does not need to be registered, in China, such work can be recorded, and copyright recordal is useful in facilitating enforcement actions when infringement occurs. Specifically, work protected under the Copyright Law can be recorded with the Copyright Protection Centre of China under the National Copyright Administration of the PRC. Recordal implies a prior ownership claim of a work and is prima facie evidence of ownership when infringement occurs.

### ADMINISTRATIVE ACTIONS

When owners of creative work suspect that infringement has occurred, in addition to going to the court, the aggrieved party may wish to seek administrative action through the National Copyright Administration (the "Administration") or the relevant local copyright administrations. The relevant governing rule for administrative action is the Measures for the Implementation of Copyright Administrative Punishment 2009 (the "Measures").

While the Administration has no power to award damages to the copyright owner, it can give warnings, impose fines and confiscate infringing products and illegal gains. Furthermore, the Administration is empowered to investigate and collect evidence to be used in civil or criminal proceedings. The advantage of filing administrative actions is that (a) local administrations usually have better local knowledge about any infringing operation in the vicinity and (b) administrations actions are faster than civil proceedings.

To file a complaint, the copyright owner has to state the major facts and reasons for the complaint with supporting evidence of copyright ownership and infringement, including copyright recordal certificates, translated foreign copyright ownership certificate, copy of infringing works and so on. The Administration will decide whether to accept the case within 15 days of filing of complaint (Art 13, the Measures). After accepting the case, administrative officers would conduct investigation and may gather evidence by consulting and copying the documents, files, account books or other written documents related to the suspected illegal act, sampling the suspected infringing products for evidence, as well as legally registering and preserving in advance the suspected infringing products. Upon examination of the investigation report and the statement or argument of the party concerned, the Administration may impose an administrative punishment, or transfer the case to the courts for handling.

### OTHER ADMINISTRATIVE ACTIONS - CUSTOMS RECORDAL

Chinese law also provides for the protection of copyright by local Customs. This is conditional upon copyright owner registering its copyright recordal certificate with Customs. Upon noticing of goods suspected of infringing copyright which pass through the border (for both import and export), Customs will send a notice to the copyright owner. The copyright owner may then request the detention and investigation of the suspected goods upon payment of bond fees.

## COPYRIGHT OF DIGITAL MEDIA IN CHINA – TO WHAT EXTENT IS AN INTERNET SERVICE PROVIDER (“ISP”) LIABLE?

Generally speaking, the right of an owner of digital media to disseminate information is protected under the Copyright Law and the Regulations on Protection of the Right to Network Dissemination of Information (the “Regulations”), which was last amended in 2013. In this digital age where technology on information sharing is readily available and easy to master, infringement of original work often occurs in cyberspace. Illegal sharing in China is particularly prevalent - numerous hosting websites and search engines enable users with access to storage, sharing, and means to locate copies of creative work of others. The copyright holders of creative work have found a way to curb infringement by establishing liability on internet service providers (ISPs) who allow unauthorized links of copyright protected material to be made available to its users.

The case of Ningbo Chenggong Multimedia Communications Limited (“Chenggong”) v Beijing Alibaba Information Technology Limited (“Alibaba”) suggest that the responsibility of an ISP goes beyond taking down infringing content upon receiving complaint and sets out an example of when knowledge is considered to be apparent on the part of the ISP. The plaintiff, Chenggong, is the sole online distributor of TV program “Fendou”. The defendant, Alibaba, operates the popular website cn.yahoo.com. Chenggong claims that Alibaba provided online viewing of the TV program without its authorization. Alibaba, on the other hand, suggested that it merely provided a link to the disputed content, which is uploaded by its users and hosted by a third party. Furthermore, the link was taken down upon receiving a complaint from the plaintiff.

The defendant tried to rely on on Article 22(3) of the Regulations, which states that a network service provider that provides information storage space or provides audio-visual recordings to the public through its information network shall not be liable for compensation if it does not know and has no justified reason to know that the work provided by the service provider have infringed upon other’s rights. In this case, subjective knowledge was found on the part of Alibaba before receiving a complaint from Chenggong, based on:

1. The disputed content was featured in the front page of the TV drama section of cn.yahoo.com
2. Alibaba provided storage service at the time when the TV drama was first broadcasted in Beijing.

While most cases would not resort to the court as in the above case, owners of creative work should be aware of the complaint and take-down procedures of the most popular internet service providers. Since popular internet service providers serve as a point of access to infringing content for many internet users, targeting internet service providers may be more cost-effective than targeting each individual infringer. Yet it is important to strike a balance between the interests of stakeholders by imposing reasonable liability upon the ISP. As for the ISP, relying passively on complaints by intellectual property right owners and subsequently taking down infringing content may not be sufficient. Putting in place a system to detect infringing content and links seems necessary in view of the increasing responsibility imposed by the court.

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