



Differences in Copyright Enforcement between the U.S. and China

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Introduction

China and the U.S. have signed the Berne Convention and the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS Agreement). These two agreements set minimum standards for copyright regulation. Under these agreements, creators are granted "automatic" rights to any work they produce. Consequently, the creators receive copyright protection without the need of registering their works. Moreover, the agreements state that all works except photographic and cinematographic shall be copyrighted for at least 50 years after the author's death, but parties are free to provide longer terms.

While the copyright laws of China and the U.S. conform to the abovementioned provisions, the enforcement of the copyright laws in these countries differ in two aspects, namely, the use of administrative protection (Section 2) and the strictness of the enforcement of the copyright laws (Section 3).

The use of administrative protection

In the U.S., a legal relief for a copyright infringement can be obtained only through judicial proceedings. In contrast, the laws of China allow the Chinese government to punish serious infringements of copyright that do not rise to the level of a crime. In this regard, it should be noted that the Chinese government has the right to impose fines, confiscate infringing products and illicit income, and destruct the infringing products.

Actually, according to China's 2007 White Paper on IPRs, the majority of copyright cases are resolved in an administrative way. To be specific, 10,344 out of 10,559 cases concerning intellectual property rights were concluded by administrative authorities at all levels across the country; 8,524 of the concluded cases were concluded with administrative punishment decisions, 1,585 were concluded with mediation arrangements, and 235 were transferred to judicial authorities. It is worth mentioning that cyberspace is currently the main domain where copyright violations occur in China. Below, an example of administrative enforcement of copyrights in the field of cyberspace is provided.

In April 2006, Autodesk, a leading U.S. design and media software company, submitted a complaint to Jiangsu Province Copyright Bureau (JSPCB) against Viscount Industries (Kunshan) Ltd. (Viscount Industries). Autodesk wrote in the complaint that several of Viscount Industries' computers used Autodesk's software without authorization. Subsequently, the JSPCB inspected Viscount Industries and discovered that four computers owned by Viscount Industries' Department for Research and Development had downloaded and installed pirated Autodesk software. In December 2007, the JSPCB fined Viscount Industries RMB 800,000. The fine was based on the value of the infringing software. Moreover, JSPCB ordered Viscount Industries to remove the Autodesk software from the four computers immediately. At the time of the imposition, the fine was the biggest fine regarding copyright infringement. The case marked a unique milestone in the fight against software piracy.

The strictness of the enforcement of the copyright laws

Despite cases such as Autodesk vs. Viscount Industries, China enforces its copyright laws less strictly than the U.S. A clear indicator of the weak enforcement of copyright laws in China is a report published by the International Intellectual Property Alliance. The report found that 90 percent of the DVDs distributed in China are unauthorized copies. In this regard, it should be also noted that the U.S. trade representative, responsible for developing and coordinating U.S. international trade, commodity, and direct investment policy, and overseeing negotiations with other countries, stated in relation to China's inclusion in the Priority Watch List in 2009:

"While the Chinese Government continues to provide increased attention to the IPR environment, the shared goal of significantly reducing IPR infringement throughout China has not yet been achieved. China's IPR enforcement regime remains largely ineffective and non-deterrent."

A significant difference in the copyright laws of China and the U.S. is that China does not criminalize copyright infringement conducted without the intent of gaining profit. For example, a person buying a software product in

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China and distributing it to all his friends will not go to jail. In contrast, the American courts may impose criminal punishments on copyright infringers acting without the intent of gaining monetary profit. In such cases, the Courts will apply the No Electronic Theft Act (the NET Act).

The NET Act is a federal law passed in 1997 providing for criminal prosecution of individuals engaged in copyright infringement under certain circumstances, even when the infringer acted without the intent of gaining monetary profit. Under the NET Act, the maximum penalties can be five years in prison and up 250,000 USD in fines. The first publicized judgment against an individual under the NET Act was reported by the U.S. Justice Department in 1999. In that case, an Oregon student pleaded guilty to illegally posting software, musical recordings, and digitally recorded movies on his Web site.

China's problems in relation to the copyright enforcement are caused by three categories of factors, namely, (1) cultural factors, (2) social factors, and (3) legal factors. Below, these three categories are discussed in more detail.

Cultural factors

One of the reasons for the weak enforcement of copyright laws in China is that many Chinese people do not believe that copying is wrong. As Anna Han, an expert in Chinese law stated, "The greatest compliment that a Chinese artist can receive is having someone copy their work." In this context, Anna Han noticed that many foreign copyrighted works were reprinted and sold for profit. She noticed that in some cases even the words "[a]ll rights reserved" had also been reprinted.

It is worth mentioning that the Chinese government sponsors the search engine Baidu (www.baidu.com) which provides links to third-party websites offering counterfeited intellectual property goods. The Chinese government dominates 70% of the revenue received by Baidu.

Baidu offers various services, including a search engine for audio files, websites, and images.

It garners nearly 9 billion hits per month. Baidu was established in 2000 by Robin Li and Eric Xu, Chinese nationals who studied abroad. During the second quarter of 2010, more than 50 percent of the search queries in China were made through Baidu. In 2007, Baidu became the first Chinese company to be added to the NASDAQ-100 index.

Baidu has been recently under legal attack of copyright holders. In particular, in September 2012, a Beijing court awarded seven Chinese authors, including the blogger Han Han, who is widely known in China, damages against Baidu for copyright infringement. The court found that, by publishing copies of the plaintiff's works without authorization, Baidu's literature searching service violated the intellectual property rights of the plaintiffs. Therefore, the court ordered damages amounting to RMB 145,000 (USD 22,937) to be provided to the seven authors.

Social factors

Social factors that contribute to the weak enforcement include (1) the longstanding practice in China of not deterring copyright infringements and (2) corruption of public officials.

In regard to the practice of not deterring copyright infringements, it should be noted that Chinese people regard litigation as bad conduct. That is why the integrity, authority, and enforcement of the copyright law may remain problematic for a long time.

Pertaining to the corruption, it should be noted that the low salaries of the public officials make them more susceptible to bribes. Moreover, the parties may use the Guanxi to unduly influence or bribe the judge for a favorable result. Guanxi refers to a network of contacts that an individual can call upon when he or she needs something done. The importance of Guanxi in China should not be underestimated. Often, the right Guanxi makes all the difference in ensuring that a business venture will be successful. For a company, having the right Guanxi significantly reduces the disappointments and frustrations when conducting business in China. Guanxi does not have to be based on money. It is legal in China and not regarded as bribery in any way. So persons using it do not have to feel uncomfortable about it.

Legal factors

As discussed above, the Chinese copyright law does not provide for criminal penalties against copyright infringers who act without intention of profit. This lack of criminal penalties significantly reduces the effectiveness of copyright protection because there is no true deterrent for the majority of the people.

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Conclusion

On the basis of the information provided in this article, it can be concluded that the enforcement of copyright laws in China differs significantly from the enforcement in the U.S. One significant difference in the enforcement of copyright laws in China and the U.S. is that, in China, the copyright laws can be enforced administratively. While administrative enforcement can be quicker and cheaper than judicial enforcement, it should be noted that administrative agencies cannot always ensure impartiality of the decisions. The reason is that administrative procedures typically do ensure the same procedural safeguards as the court proceedings.

Another major difference between the enforcement of the copyright laws in China and the U.S. is the strictness of the enforcement. While the U.S. is regarded as a country providing strict protection of the intellectual property rights of the intellectual property rights holders, China has a longstanding tradition of not enforcing intellectual property rights. Behind these traditions, there are cultural, social, and legal factors. The main cultural factor relates to the widely accepted understanding in China that copying of author's work is beneficial for that author. The social factors relate to the unwillingness of the Chinese people to use litigation and to the higher level of corruption in China. The legal factor relates to the lack of criminal penalties against copyright infringers who act without intention of profit.

While China has made significant progress in the area of copyright protection, privacy of intellectual property goods in China is still a major problem. The solution to this problem seems to be not only in implementing a body of laws to deter people from stealing and distributing foreign films, but in the strict enforcement of the copyright laws. In order to ensure strict enforcement, China needs to counter the factors mentioned in the previous paragraph. This can be done by educating the people that intellectual property rights were introduced with the aim of protecting the interests of the authors.

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