



PRC IP Law Newsflash

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CHINA ISSUES NEW RULES TO CRACK DOWN ON INTELLECTUAL PROPERTY INFRINGEMENT

Introduction

China undertook a major step in strengthening the protection of intellectual property rights on 11 January 2011 with the issuance of the *Opinions on Several Issues Regarding the Application of the Law in Handling Intellectual Property Criminal Cases (Opinions)*, which were jointly promulgated by the Supreme People's Court, the Supreme People's Procuratorate and the Ministry of Public Security.

The Opinions include 16 provisions which provide clearer guidelines on what types of infringement activities are subject to criminal sanctions, particularly with respect to the Internet. As is elaborated upon below, the Opinions clarify the definition of "profit motive" (which is a pre-condition for criminal liability under the *Criminal Law of the People's Republic of China (Criminal Law)*), and specifically detail the types of circumstances in which criminal penalties can be imposed under the Criminal Law.

Key Provisions

1. Article 10 – Profit Motive

Unlike many other countries, China requires a profit motive in order for criminal liability to be imposed. In connection to this, Article 10 of the Opinions specifies what types of activities (besides general sales) can be regarded as profit-motivated for the purpose of imposing criminal liability on the infringing party, namely:

- charging fees for the publication of advertisements in another person's work or tie-in sales of a third party's work with another person's work;
- charging fees for the transmission of others' works on the Internet or by otherwise utilizing infringing works uploaded by others;
- charging registration or other fees for the transmission of others' works on the Internet in the form of a registration system; and

- additional circumstances in which profits are generated by taking advantage of others' works.

As is illustrated above, Article 10 includes certain activities on the Internet which generally may not be regarded as being carried out to obtain profits, particularly where users are not being charged directly for content. For example, any website offering free content to users would be deemed to have a profit motive if such website were hosting advertisements. Many websites are now thus subject to a greater criminal liability risk given the broad interpretation of profit-motivated activities under Article 10.

2. Article 13 – Criteria for Online Infringement Conviction and Punishment

Article 13 stipulates that where a person who, for the purpose of making profits disseminates others' works (*e.g.*, literary work, musical composition, motion picture or a television program), such person committing the infringement will be subject to serious criminal liability (as set forth under Article 217 of the Criminal Law) in the following circumstances:

- the turnover of the unlawful business operation that disseminated such works is RMB 50,000 or more;
- 500 or more copies of the illegally disseminated work is downloaded or otherwise viewed by users;
- users have clicked to view or download the illegally disseminated work 50,000 times or more;
- where the work is illegally disseminated through a registration system, and 1,000 or more users have registered for such system;
- turnover or number of registrations or copies viewed or downloaded reaches half of the amount set forth in any two of conditions (1) to (4), notwithstanding the total turnover or amount set forth in such conditions; or
- other serious circumstances.

Moreover, Article 13 of the Opinions provides that where the applicable number or amount is 5 times that which is stipulated in the above examples, the infringing party shall be subject to more serious criminal liability (*i.e.*, "other special circumstances" as set forth under Article 217 of the Criminal Law).

As is illustrated above, Article 13 sets a strict criteria for the conviction and punishment of online infringement, again, many websites are thus subject to greater criminal liability due to the low threshold set, such as 500 copies of

illegally disseminated works, or 50,000 clicks by a user to view and download a work, the evidence of which can be collected easily.

Commentary

The Opinions illustrate that China is taking significant steps to reduce intellectual property infringement. In this regard, the Opinions not only provide more detailed rules on the application of criminal liability, but they also aim to subject a greater number of intellectual property infringement activities to criminal sanctions (*e.g.*, by creating a broader definition of profit-making activities and specifying what types of activities on the Internet subject the infringing party to serious criminal liability).

However, obtaining a criminal judgment against another party for intellectual property infringement remains challenging due to the fact that the infringement must be intentional (which is the precondition for an intellectual property crime, and can be difficult to prove in practice in a PRC court). Several recent civil judgments have ruled that certain types of websites (*e.g.*, UGC websites and search engine websites) have "known" or "should have known" that the content uploaded by users infringed third party's rights as the infringements were obvious. However, there is great uncertainty as to whether the standard adopted in the civil judgments will be used in the criminal judgments as well.

Moreover, although not expressly stated under the Criminal Law, infringing parties can also likely raise the "Safe Harbor Rule" set forth under the *Regulations on the Protection of the Right of Communication Through Information Networks* as a defense to liability. Specifically, websites and other online or mobile platforms hosting content provided by third parties have the opportunity to remove the relevant content after receiving notice that it infringes another person's rights before liability is imposed.

The Opinions signal an increased focus by the government on improving legal protection for intellectual property in China. It is worth noting that on 22 January 2011, VeryCD, a famous file sharing website in China, suddenly closed its music channel service for video downloads and now only provides links of relevant videos to other video websites (such as Tudou) to its users.

Another thing worth noting is that a meeting held by the National Copyright Administration (**NCAC**), the Ministry of Industry and Information Technology (**MIIT**) and the Ministry of Public Security (**MPS**) on joint action against online piracy (剑网行动) took place on 28 January 2010. At this meeting, Wang Zhicheng (deputy director-general of Copyright Management Department of NCAC) further clarified that safe harbor rules are not applicable to most online video websites and certain activities such as intentionally editing, and selecting the content of links will be deemed as an intentional act and liability shall be incurred for such. However, it is still too early to anticipate the correlation between this and the Opinions.

Ultimately, time will be needed to ascertain the overall effect of these new rules both as a deterrent mechanism to prevent infringement and to increase the likelihood that those infringing others' rights can be subjected to criminal liability.

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