

How Safe is the Harbour?

An Analysis of China's New Internet Copyright Legislation

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Since its accession to the World Trade Organization, the Chinese government continues to take incremental steps towards improving the protection of intellectual property rights. In April 2005 the National Copyright Administration (“NCA”) and the Ministry of Information Industry (“MII”) jointly issued China’s first legislation dealing with online copyright protection, the *Administrative Protection of Copyright on the Internet Procedures* (the “**Procedures**”). Modeled on the *U.S. Online Copyright Infringement Liability Act* (the “**Act**”), the Procedures are intended to harmonize China’s regulations in this area with international norms in order to enable China to accede to the 1996 World Intellectual Property Organization internet-related treaties. More specifically, the Procedures attempt to clarify the responsibilities for online internet copyright protection and create a safe harbour for internet service providers (“**ISPs**”), representing another milestone in the fight against piracy.

The Act provides a safe harbour for any ISP that offers “transmission, routing or providing connections for digital online communications between or among points specified by a user, of material of the user’s choosing, without modification to the content of the material as sent or received.” Additional protection is afforded to providers of online services or network access or the agents thereof that provide system caching, storage and information tools. The Procedures, while quite similar in many ways to the Act, are both structurally and substantively slightly narrower in their scope than the Act.

Though the Procedures constitute a respectable attempt to address these issues, questions remain as to whether they strike the proper balance between protecting the interests of copyright owners and those of ISPs.

Scope of the Activities Covered by the Procedures

Similar to the Act, the Procedures apply to “uploading, storing, linking or searching activities related to works or audio and video products provided automatically over the internet through internet services at the instruction of an internet content provider without any editing, revision or selection of the stored or transmitted contents.” The Procedures, unlike the Act, do not provide any detail as to what each of these activities encompasses. It is also unclear why the types of content were narrowly drafted to include only works and audio and video products instead of using a broader concept that would clearly include activities such as file sharing.

The Procedures make a distinction between the entities that engage in internet service provision and those that use the content on the internet. ISPs are generally defined as internet information service providers or their entrusted organizations, whereas “internet content providers” are specifically defined as any online user that publishes relevant content on the internet. This broad definition would include anyone who posts information to bulletin boards, discussion forums, chat rooms and other message boards.

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Responsibility for Enforcement of Internet Copyright

The Procedures divide the responsibility for enforcement of internet copyrights between the copyright owner and the ISP. However, the practical effect of the Procedures may place ISPs in an unfair role of arbitrator within a process constructed to protect them from liability.

1. Notice Requirement

Under the Procedures, the primary burden for stopping online copyright infringement rests with the copyright owner, who must deliver a notice to the provider of the infringing content (the “Notice”). To be effective, the Notice must satisfy the following requirements: (i) be issued by the copyright owner in writing; (ii) contain proof of ownership by the copyright owner; (iii) contain proof of identity of the copyright owner, including the owner's address and contact details; (iv) identify the location of the infringing content; (v) provide evidence of the infringement; and (vi) contain a statement affirming the truthfulness of the content of the Notice.

These requirements potentially impose a relatively heavy burden on foreign copyright owners. Firstly, it is not uncommon for foreign copyright owners to delegate responsibility for policing copyright infringement in China to their licensees in China. The requirement that the copyright owner issues the Notice can be quite burdensome for a company that licenses a large quantity of copyrightable material.

Another challenge for copyright owners is how to satisfy the evidentiary requirements of the Notice. The Procedures do not provide any clarification as to what constitutes proof of ownership. Therefore copyright owners in jurisdictions in which copyrights are not required to be registered that do not register their copyrights will have difficulty satisfying this requirement.

More importantly, the Procedures are silent on what constitutes evidence related to copyright infringement. ISPs are not trained in the doctrine of copyright law and have no way of determining whether the evidence that is provided is sufficient or even constitutes evidence of infringement.

Article 10 of the Procedures provides that a Notice that does not contain all of the required elements is deemed not to have been issued. This provision clarifies that an ISP has no obligation to act if a

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Notice is defective. Though ostensibly a procedural requirement, Article 10 glosses over the critical substantive issue of how an ISP should determine whether the requirements have been met or what happens in the event of an error. For example, it is not clear whether an ISP would be liable if it was unable to remove infringing content because it received a Notice that contained an inaccurate location of the infringing content. An ISP in this situation would be deemed to have knowledge by

virtue of receiving a valid Notice and, consequently, would have an obligation to remove the infringing content. There is no provision that addresses circumstances in which an ISP receives incomplete information, and the Procedures are silent as to whether an ISP would be held liable if it were unable to remove such content in these circumstances.

2. Counter-Notice

The rights and obligations of the alleged infringer are similarly ambiguous. The Procedures permit alleged infringers to challenge an allegation of infringement by providing a Counter-Notice (the "Counter-Notice") to the copyright owner and the ISP. The form of the Counter-Notice is very similar to that of the Notice but must contain the following information: (i) proof of identity of the alleged infringer; (ii) proof of legitimacy of the removed content; (iii) location of the removed content; and (iv) a statement affirming the truthfulness of the contents of the Notice. Again, there is no guidance as to how an ISP is to evaluate the adequacy of the information provided in a Counter-Notice.

3. Responsibility of ISPs

Receipt of a valid Notice requires an ISP to take action immediately to remove the content specified in the Notice. Failure to do so renders an ISP subject to administrative penalties. In addition, the ISP must retain the Notice for a period of six months and record the content of the information provided in the Notice, the time, the internet address or domain name used to publish the information. This record must be retained for 60 days. Presumably this requirement is intended to assist copyright enforcement authorities in the investigation of copyright infringement cases. However, the intent for the discrepancy in the retention requirements for the two documents is unclear.

If an ISP receives a valid Counter-Notice, it is permitted to restore any materials removed pursuant to a Notice and will not be liable for restoring such materials. Again, in each case there is no indication of what happens if an ISP, for example, receives and acts on a Notice that it believes to be valid which is later determined not to include adequate information or evidence.

The Safe Harbour

The crux of the safe harbour provided by the Procedures is the idea that ISPs should not be held liable for infringing activities of which they have no knowledge. Implicit in the scope of the Procedures, as set forth in Article 2, is the idea that if the ISP acts solely as a passive conduit in the dissemination of infringing materials it will be protected. There appears to be a presumption that activities such as editing, revising or selecting content for dissemination cannot be engaged in per se without knowledge of the ISP. Therefore, engaging in such activities would fall outside the scope of the safe harbour.

Article 12 of the Procedures expressly provides that no administrative or legal liability shall attach (a) if there is no evidence that the ISP was “fully aware” of the infringement or (b) if the ISP complies with the procedures by removing the infringing content upon receipt of a Notice. However, there is no discussion of what constitutes awareness, leaving open to interpretation the question of what level of knowledge constitutes full awareness.

Enforcement


One significant issue that has hindered internet copyright enforcement cases is the question of which administrative bureau has jurisdiction over any particular case. Article 4 of the Procedures provides that the copyright administrative bureau of the place of infringement has jurisdiction over any case with respect to such infringement. The term “place of infringement” is defined as the place in which the actual servers used to provide the internet information service are located. Though the Procedures finally settle an issue that has constituted a significant impediment to enforcing copyright infringement cases, this provision is less than ideal from the perspective of a copyright owner, who may confront local favouritism in its attempts to bring an action to enforce its rights in a location that was effectively chosen by the alleged infringer, i.e. the location of the alleged infringer’s server.

Remedies

China is often criticized for not imposing adequate penalties on intellectual property infringement. The Procedures are no exception from this generalization. ISPs that violate Article 11 are only subject to administrative penalties by the local copyright administrative bureau or may be ordered to cease engaging in the infringing act. The range of damages is also limited to confiscation of illegal income or a fine of three times the turnover from illegal business or not more than RMB 100,000 in cases where it is difficult to assess the amount of turnover.

Conclusion

In the past five to ten years, Chinese courts have handled several cases involving internet copyright infringement and have generally favoured copyright owners. The Procedures represent a significant step in correcting this imbalance by providing a basic framework for protecting ISPs from liability for the actions of third parties that may use an ISP's service to perpetrate copyright infringement. However, it is unclear how the Procedures will be implemented in practice. A major concern is that there is not enough clarity regarding the role of ISPs in evaluating the information provided to them in Notices and Counter-Notices. Another concern is that the copyright authorities have not addressed the issue of what constitutes full

awareness of an infringement on the part of an ISP. It is too early to tell how copyright administrative bureaux will interpret this requirement or whether the intent was to leave it vague to allow copyright officials room to maneuver. The Procedures also fall short from the standpoint that peer-to-peer networks, which are currently the main front in the battle against copyright infringement, are not addressed. For now, the Procedures do provide a basic framework in which ISPs and copyright holders can enjoy a basic level of certainty with respect to understanding their rights and responsibilities. 

For full translation of the Procedures, please refer to page 60 of the July issue.