

# China Law Update

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## **Is Law Enough for Regulating P2P Technology?**

On December 8, 2009, the largest Bit Torrent ("BT") download base, BTChina, was shut down by the State Administration of Radio, Film, and Television ("SARFT") for "lack of Certificate". SARFT explained that the regulation of Internet audio-visual services is a long-term project. Until the site resolves its piracy issue it can not be re-opened. According to a CCTV report on December 17, 2009, SARFT announced that it had shut down more than 700 websites, including nearly 30 of the BT download sites. This incident raises deep concern among Chinese netizens: why did the Chinese government suddenly intensify efforts to crack down BT sites? Does this mean that the peer-to-peer (P2P) download technology will meet its end in the near future?

### **Public interest and copyright protection**

The development of the P2P technology has profoundly changed the model of information delivery on the Internet. P2P file-sharing has become the main approach to sharing information on the Internet. Using the new generation of P2P technologies, individual users can share files with each other without accessing the server. For business enterprises, there is a huge opportunity for the P2P technology, and various business models have been developed based on the P2P technology. Before the development of P2P, the transition from analog to digital technology, the expansion of Internet bandwidths, and the advancement of compression technology laid the foundations for change. As a result, the P2P technology triggered large-scale file-sharing and reproduction, and the dissemination of such products on the Internet became increasingly more common. It cannot be denied that the P2P technology has brought many benefits to the public: it saves consumers significant costs to obtain files, satisfies the individual needs of consumers, provides a platform for innovators, and promotes the diversification of entertainment products. At the same time, however, a large number of copyrighted works on the Internet are now freely copied and distributed, imposing huge financial losses on copyright owners. Thus, the development of the P2P technology has posed an unprecedented threat for copyright owners. The balance between copyright protection and the public interest has therefore been upset and the copyright regulatory system on the Internet now faces new challenges.

### **Countermeasures in Chinese Law**

In regards to protection legislation in the field of digital works, the State Copyright Administration issued *Provisions on the Copyright of Digital Products* (now defunct) as early as December 9, 1999, which confirmed that digital products made from existing works, regardless

of the form in which the existing works were expressed and finalized, are subject to the *Copyright Law of the PRC*. Moreover, it stipulated a collective management system for digital works.

*Interpretations of the Supreme People's Court on Several Issues Concerning the Application of Law in the Trial of Cases Involving Copyright Disputes over Computer Network* was promulgated by the Supreme People's Court on November 22, 2000. It has been revised twice and has become the most commonly used basis for the application of Chinese copyright laws. It therefore already stipulated the rules regarding the liabilities of Internet service providers before the amendment of the Copyright Law of the PRC was even adopted.

The State Copyright Administration and the Ministry of Information Industry issued *Measures for the Administrative Protection of Internet Copyright* on April 29, 2005, which initially stipulated the Safe Harbor system. In addition, *Interpretation of the Supreme People's Court and the Supreme People's Procuratorate Concerning Some Issues on the Specific Application of Law for Handling Criminal Cases of Infringement upon Intellectual Property Rights* and *Reply of the Supreme People's Court and the Supreme People's Procuratorate on Relevant Issues concerning Audio-visual Products Involved in the Handling of Criminal Cases of Infringing upon Copyrights* were promulgated by Supreme People's Court and the Supreme People's Procuratorate on December 22, 2004 and September 26, 2005, respectively. They state that the dissemination of others' literary works, music, film, television or video products, computer software, and other works to the public through information networks shall be deemed "reproduction and distribution" as prescribed by Article 217 of the Criminal Law.

*Regulation on the Protection of the Right to Network Dissemination of Information*, which was promulgated on May 18, 2006 and came into effect on July 1, 2007, further clarifies the "Notice and take down" regime and became an important legal basis for relevant, follow-up cases.

In the specific P2P infringement cases, such as *Zhengdong Record v. Shijiyueb*, *Busheng v. Kuro.com.cn*, *Boshengfangan*, *Dizhi Culture v. Baidu*, *Huang Yimeng*, *Zhongkai Culture v. Shulian*, and so on, the attitude of the Chinese Courts is quite similar to that of U.S. Courts. Generally speaking, Chinese Courts support the claims of infringement against P2P service providers.

Heated debates regarding P2P technology arise each time the Chinese government promulgates new laws and regulations concerning P2P infringement, and each time P2P service providers are sued in Chinese Courts. People always question whether free downloading via P2P technology would come to an end. However, P2P technology was withstood the test each time. In fact, P2P technology has become increasingly mature and file-sharing has enjoyed a broader user group. Therefore, SARFT's stringent measures against BT websites this time are highly likely to produce the same result.

## **Solutions**

As a matter of fact, laws regulating P2P infringement will encounter the following bottlenecks: first, since P2P infringement is covert and collective by nature, either for service providers or for

copyright owners, the costs of copyright protection on the Internet are still high; second, since the application of P2P technology is broad and private, it is difficult to distinguish legal downloading behaviors from illegal ones; and third, P2P technology develops quite fast and, relatively speaking, the law can not always keep up with the pace of technological progress. P2P technologies prohibited by existing laws will soon be replaced by more advanced P2P technologies. For example, in order to circumvent the law, center-type P2P technologies (such as Napster, BitTorrent) has give way to distributed P2P technologies (such as Grokster, Kazaa).

The traditional regulation model is aimed primarily at infringement in real space. In cyberspace, however, new regulations that attempt to regulate online copyright infringement may not be effective. The copyright system, which has adapted to the development of technology since the Gutenberg era, has lost its self-adaptability in the digital age, and internal adjustments can no longer meet the needs of copyright owners. Therefore, a new kind of mechanism is needed, stemming from a broader perspective, to protect copyrights as well as to safeguard the public interest.

In my opinion, online copyright protection should vary depending on the type of copyrighted work. Different online copyright licensing models should be adopted, taking consideration of four elements: law, architecture, market, and norms. Among them, the law, which is the core element, not only regulates network behaviors directly, but also indirectly regulates network behaviors by influencing the other three elements.

## **Conclusion**

In sum, with the development of the P2P technology, traditional legal protections no longer meet the needs of copyright protection in cyberspace. The absence of state regulatory supervision in the past few years is one of the causes for the proliferation of such infringements. While state regulatory agencies use legal means to shut down illegal network services, they should combine considerations of architecture, markets and norms to guide users, and encourage business enterprises to establish a legal servicing system. Only through this way can the balance between copyright protection and public interest be restored.

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