

ON-LINE COPYRIGHT PROTECTION IMPROVES IN CHINA

In early 2008 two high-profile cases concerning on-line copyright infringement, *EMI Group Hong Kong Company Limited v Alibaba* and *Universal Music Company Limited v Baidu Online Network Technology (Beijing) Company Limited*, were heard by the People's Courts in Beijing. At first glance, these two cases involved only a narrow set of related legal issues. However, a closer look at the underlying implications of these two cases uncovered a more profound message. Intellectual property protection in China is improving and maturing. This is a trend obvious to those with an interest in intellectual property rights in China. China has made lightning quick progress in the protection of intellectual property rights in an unimaginable short period of time. Such positive change was seriously doubted by many even after China had joined the World Trade Organization, and goes to prove that the protection of intellectual property rights in the middle kingdom is improving and will continue to improve. In the modern China foreign enterprises can be assured that they have access to convenient methods to enforce their intellectual property rights.

Both defendants in the *Alibaba* and *Baidu* cases are large corporations with significant capital, large business interests, and extensive relationships. *Alibaba* is an e-commerce company specializing in consumer-to-consumer and business-to-business on-line transactions. It is also used as an internet search engine by many internet users in China. *Baidu* is one of China's most popular internet search engines for internet sites and the downloading of audio files. The infringing acts in the *Alibaba* and *Baidu* cases involved the provision of links to third party websites where audio-files could be downloaded. These audio-files had songs that *EMI* and *Universal* had copyright to as producers. Internet users could use the *Alibaba* and the *Baidu* websites to access third party websites for the purposes of downloading these audio-files. The issues in this case that are important can be narrowed down to two issues. The first issue was the sending of copyright infringement warning letters to the ISPs. The second issue regarded the liability for the ISPs regarding contributory copyright infringement. In this case the contributory infringement was for the provision of links to websites where the infringing audio-files could be downloaded. The cases were heard by the same judges, Chief Justice *Linhui Zhang*, Justice *Dongmei Zhang*, and Justice *Hongning Cen*, but had different results. The *EMI* Group was successful and *Universal* was unsuccessful. A comparison of the two legal issues mentioned above is necessary to reveal the reasons, and highlight one of the convenient steps that may be used to protect copyright.

The sending of copyright infringement warning letters may mean the difference between winning or losing in copyright infringement litigation. This is a simple but important lesson for all copyright owners and interested parties. The most important lesson is that sending an infringement warning letter to a copyright infringer is better than not sending an infringement warning letter to a copyright infringer. Not sending a warning letter and then filing for a lawsuit with the People's Courts may put the odds against you. Sending a warning letter and then filing for a lawsuit with the People's Courts will put the odds in your favour. The odds will not guarantee a win, but may mean the difference between success and failure in a copyright infringement lawsuit. Why not play with the odds in your favour? The drafting of a warning letter, and the necessary evidence that must be attached, is not a difficult or complicated process. Warning letters will include the copyright owner's full name, their contact details, evidence of their copyright which may be evidenced by a voluntary copyright registration certificate, the internet link which is required to be taken down, and the initial

evidence of copyright infringement. The reference to voluntary copyright registration is mentioned here as it is a useful, yet often overlooked method of protecting copyright. When compared with registration time frames and procedures for other intellectual property the voluntary registration for copyright is simple and quick. In many cases only several months are needed before a voluntary copyright registration certificate is issued by the Copyright Registration Department of the China Copyright Protection Centre. The China Copyright Protection Centre is a semi-government body directly under the control of the General Administration of Press and Publication and the National Copyright Administration. Not registering copyright will not mean copyright is lost, but does provide a useful piece of evidence that may be used as proof of copyright ownership. The People's Courts will regard the sending of a warning letter as notice to the infringer that they are infringing the copyright. This will show the People's Courts whether the infringer is aware, or in other words has knowledge, that they are infringing someone's copyright.

Knowledge of the copyright infringement is a critical step in determining the second issue which was contributory liability of the copyright infringer. If the ISP receives a copyright infringement warning letter, together with evidence of copyright ownership and proof of the infringing acts, and still refuses to take down the links then the People's Courts will regard the ISP as assisting with the copyright infringement. The infringer may then be held liable under the *General Principles of the Civil Law*. In the Baidu case it was Universal's failure to file a copyright infringement warning letter, as well as their lack of evidence and legal basis, that was the reason the People's Court did not consider Baidu liable as a contributory infringer. With the worldwide growth of the internet and the booming of the Chinese economy, on-line copyright is an issue that foreign enterprises in China cannot ignore. Foreign enterprise must understand this new positive trend in order to protect against their liability for copyright infringement, and protect their own copyright from being infringed.

The broader implications of these two cases highlight the fast progress that has been made by China to ensure for copyright owners wishing to protect their copyright in China. Copyright protection is improving in China, as is the protection of other kinds of intellectual property. Simple steps like the use of warning letters and registering your copyright, can be used to protect your copyright. Not only can those infringers directly responsible for copyright infringement be pursued, but also those infringers that contribute to copyright infringement may also be targeted. Nevertheless, much progress is needed before China's intellectual property system can offer comprehensive protection for intellectual property rights holders, as in other legal jurisdictions. In fact China itself is the first to admit, even in official announcements such as the *National Intellectual Property Rights Strategy* that was issued on 5 June 2008 by the State Council, that the phenomenon of intellectual property rights infringement is still very prominent and the intellectual property system is not perfect in China. However, the Chinese intellectual property system has become stronger. Enforcement of intellectual property rights is improving, and will continue to improve to the benefit of all intellectual property rights holders.