

International intellectual property violations in the Music Industry (Concentration on China)

By Christopher Chandler

(Story “A”): Seeing as the festive season of Christmas is upon us, let us discuss what North American college students will be receiving as gifts. Possibly a brand new 80GB iPod, or maybe even that sleek and stylish 17-inch, 2.33GHZ MacBook Pro. Once opened and powered up, many young adults will figure out the different ways of enjoying their new toys. Eventually, this will lead them into the online world and iTunes, but who said they are bound to this program? Many college students prefer saving money wherever they can, so when the option of free music permeates, it’s hard to say no. Many students and young adults will venture into the illegal world of BitTorrent’s, and P2P (Peer-to-Peer) Networks looking for the latest Billboard #1 hit song to download.

(Story “B”): Now, let me introduce you to the northern Thai city of Chiang Mai. It is the same joyous season of Christmas, but without the iPod and laptop computer. Instead, these young adults work with CD players and other forms of dated equipment. Choices range from acquiring their favorite artist’s new album at the local record store for \$15.99 USD or downtown markets for a pirated \$4.99 USD – possibly even cheaper. The majority of Thai citizens and tourists choose the \$4.99 USD route. What do story “A” and “B” have in common? The majority of people chose a pirated path of physical and online intellectual property violation.

In a 2005 “Special 301” annual review by the United States Trade Representative (USTR) on Intellectual Property Violations, I found that 52 countries were rounded into designated categories of Priority Foreign Country, Priority Watch List, and Watch List.¹ These categories place countries that have some/various violations that deny adequate and effective protection of intellectual property rights (IPR) or fair and equitable market access for U.S. persons that rely on intellectual property protection. Priority Foreign Countries such as Ukraine are those pursuing the most onerous or egregious policies. They have the greatest adverse impact on U.S. right holders or products, and are subject to accelerated investigations and possible sanctions. Priority Watch List Countries embodying Turkey, Argentina, Pakistan, Russia, and Venezuela, do not provide an adequate level of IPR protection or enforcement. These countries also lack market access for persons relying on intellectual property protection. Watch List Countries such as Italy, Croatia, Latvia, Taiwan, Vietnam, Thailand, Canada, The European Union, and Korea are those meeting bilateral attention to address their underlying IPR problems. The above are just some of the 52 countries, but one I wish to focus on for this essay is China, astonishingly listed as a separate entity by the USTR due to the fact that their infringement levels remain unacceptably high.

China is the pinnacle of IPR violations. We must concentrate on China now, because they not only contribute to the problem, but also will play a critical role in shaping the future of international piracy for better or worse. Before you make a flawed judgment on this scenario, let

¹ Office of the United States Trade Representative – www.ustr.gov/Document_Library/Reports_Publications/2005/2005_Special_301/Section_Index.html?ht - Article: 2005 Special 301 Report

me douse you with some shocking facts. Out of the estimated \$512 Billion counterfeit market, China counts for nearly 2/3 of counterfeit goods. Not only is China exporting these pirated goods abroad, but also selling them rapidly at home, as the copyright industry estimates more than 90% of all music Cd's, movie DvD's, and software sold in the developing country are pirated.² About 75% of counterfeit goods seized at the U.S. border (\$214 Billion) originate in China. These are just some of the estimates from overall counterfeit goods. Now, let's examine how the music industry is being affected by this illegal epidemic.

In an IIPA report (2003), domestic Chinese music companies lost \$286 million due to piracy – this figure only represents physical copies, it does not include the losses from thousands of websites and many P2P file-sharing networks that make copyrighted works available for free. This same report also gave us a ratio of China's population in relevance to the world markets music sales. Although China's population rings in at the worlds largest, it only accounted for 0.6% of the world market for music sold on a physical format (CD, Cassettes, etc.), this compared with the United States and Britain who combined for nearly 50% of the world's sales. This is a staggering figure when you ponder China's impact in the near future as a newly industrialized nation, with a breathtaking GDP growth of 10.4% in the year 2006 to the third quarter.³ The above figures are scary to think about coupled with the knowledge that China now boasts the second highest number of Internet users in the world – increasing by 27% annually, in January 2006 had reached 110 million users. With millions of Internet users and the fact that Baidu.com – China's largest Internet search engine – in 2004, had “MP3” and “BitTorrent” in the top five most popular search terms foretells a dismal future.⁴

Now that we understand some of the figures and facts, what is China currently doing about their IPR problem? For a start, in 2001, a copyright law was set in place to help an outdated 1990 copyright law – the first copyright law in China – to fight challenges that faced IPR posed by new technologies. This new law was quite innovative as it created thirteen categories on the heading's of economic rights, distribution, rights of reproduction, rental, exhibition, performance, screening, broadcasting, cinematographic works, and communication through an information network. With a new and updated copyright law set in place and the international community upbeat about China's recent steps, the prosperous nation set out to elucidate its stance on punishment. In December 2004, China clarified its position on punishment for IPR violation: 1.) For physical/tangible IP violation, illegal profits of \$3,600 USD or more, or doing \$6,000 USD in gross illegal sales, can be punishable by a fine and/or a maximum of three years in prison. Earning about \$18,000 USD in illegal profits, or doing about \$30,000 USD in total illegal sales, can be punishable by a fine and/or three to seven years in prison. 2.) For Internet IP violation, reproducing and distributing more than 1,000 illegal copies of a copyrighted work without the permission of the owner will be punished by a fine and/or a

² Berkeley Technology Law Journal [Vol. 21:795] – The Future Of Music And Film Piracy In China – By Eric Priest

³ The Economist – Article: Emerging-Market Indicators (November 25th-December 1st 2006 Issue)

⁴ Berkeley Technology Law Journal [Vol. 21:795] – The Future Of Music And Film Piracy In China – By Eric Priest

maximum of three years in prison. If found to distribute more than 5,000 copies, the level of punishment is set at three to seven years imprisonment and/or fines.⁵

As you can see, we have both the facts and figures of IPR violation coupled with the extensive punishment you might receive if caught breaking these laws, but is this whole scenario really working? Are these newly specified laws working and fighting IPR violations? Do they tackle the “Twentieth-Century piracy” – unauthorized copying and selling of DVD’s, VCD’s, and CD’s – and “Twenty-First Century piracy – internet file-sharing – effectively? **NO**. The sanctions and laws are in place, but are rarely enforced by Chinese authorities, usually leaving the copyright owners to file legal proceedings that challenge these violations. Chinese government officials literally “talks the talk” but do not “walk the walk”. Widespread piracy around China is the result due to lack of will on the central government’s part in confronting and fighting the problem. With a “staying the course” approach by leaving the job up to Chinese government officials, we will probably find IPR enforcement dwindle as massive piracy prospers, reminding us of another failing “staying the course” tactic used in the middle east. If we cannot count on the Chinese government, then what can the international community do to hinder this rampant piracy?

Many music industry think tanks have come up with the idea of an Alternative Compensation System (ACS) for sharing music online. This idea turns the threat of Internet piracy into an opportunity for music industry professionals. An ACS would help China make significant strides towards solving the problem of internet piracy, would help the domestic Chinese music industry thrive, might simmer down most of the physical/tangible pirated music on the illegal street market, could provide Chinese consumers with access to an unprecedented wealth of music entertainment for considerably less than what most consumers currently pay – even for pirated products –, might spur growth in the Chinese computer, home electronics, and internet industries, and finally could help increase a much needed respect for intellectual property laws in China.

Over the past few decades, music has turned into a “public good”. This public good is “nonrivalrous” – enjoyment of the music by one person does not prevent enjoyment of it by other persons.⁶ Second, music has become “nonexcludable” – once the music had been made available to one person, it is difficult to prevent other people from gaining “free” access to the music.⁷ This causes many problems for the music industry, which ACS could help solve.

How would this system work? First off, with ACS, copyright owners would register digital copies of their works with a government agency such as the NCA in China. This entity would maintain the system and track usage of registered works. Registered compositions with the NCA would each have an individual digital fingerprint. These fingerprints would allow the system to track how many times a certain work is downloaded for accounting purposes. Users

⁵ Berkeley Technology Law Journal [Vol. 21:795] – The Future Of Music And Film Piracy In China – By Eric Priest

⁶ Promises to Keep: Technology, Law, and the Future of Entertainment – (Stanford University Press, August 2004) – By William W. Fisher III

⁷ Promises to Keep: Technology, Law, and the Future of Entertainment – (Stanford University Press, August 2004) – By William W. Fisher III

who download these tracks will be able to do so free of copyright restrictions, advertisements, encryption, and most importantly, cost. The music files could be distributed via P2P networks or by a centralized website on the Internet. In return for this legal access to copyrighted works, users would pay a sales tax on products and services that allow file sharing such as computer equipment, Internet access fees, MP3 players, and CD/DVD writable media/burners. Once the system is in place, the NCA would track how many times a work is downloaded in a given period and distribute an appropriate amount of tax receipts to the owner of the copyrighted work. If each of those accounts were to incur a small tax of say 72 cents per month, this would generate close to \$564 million per year. Considering the value ACS provides, an increase of 72 cents should not be annoying to most broadband subscribers, as it amounts to about a 5% to 7% tax on typical monthly broadband fees in China of \$10 to \$13.⁸ Even if you deduct a 20% fee for administrative costs, that still leaves nearly \$451 million to distribute among music and film companies. Putting that number in perspective, it is more than the total 2004 combined value of the legitimate Chinese music market (\$212 million) and movie market (\$180 Million).⁹

With an ACS program, consumers would find large cost savings, with an unprecedented amount of various programming and downloading that is uncontaminated by advertisements. Consumers would also find that the next time he or she was searching for a song, they would not run into any price discrimination. Artists would benefit from this system in the way that they could expect a trustworthy source of income, and greater freedom in selecting middlemen to distribute their work. Also, artists in both the United States and China would be less dependent on record companies for the distribution of their work, which in turn would give them more freedom in contract negotiation with prominent labels. Most importantly, society at large would find a clipping in the costs associated with enforcing copyright law and eliminating the culturally unhealthy practice of boundless lawbreaking.¹⁰

ACS does look like an advantageous and innovative system, but will still bring some drawbacks. First, the taxation system might not be fair on certain consumers who do not use the system for entertainment purposes, meaning when purchasing music related products, they will be unfairly taxed. Also, this program might bring erosion of the artists' ability to control public presentations of their works. The final disadvantage, and probably biggest, would be outflow across national boundaries. This means, for example, that a German citizen can download a whole bundle of "Chinese / American" made music for free, without paying the taxes on their equipment. Overall, I believe if this system were to work properly, it would have to be ubiquitously instituted across the first world music market.

Even with the disadvantages, foresight predicts that ACS is the only legitimate and well-thought plan that might work against IPR violations in the music industry. Swimming against the P2P/Illegal file-sharing current will not work. Even though the RIAA has succeeded in winning many cases against Napster and Grokster, it seems once a P2P shuts down, the next one opens up

⁸ Berkeley Technology Law Journal [Vol. 21:795] – The Future Of Music And Film Piracy In China – By Eric Priest

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¹⁰ Promises to Keep: Technology, Law, and the Future of Entertainment – (Stanford University Press, August 2004) – By William W. Fisher III

a few days later. China is a different scenario than the United States from a legal standpoint. Proven by a recent ruling in the Baidu.com Vs. Gold Label (EMI), Go East (Universal), Cinepoly (Universal), EMI, Warner, Universal, and Sony BMG case. What the IFPI describes as “inexplicable”, the First Intermediate Court in Beijing ruled that the service did not constitute an infringement as its music files were downloaded from third-party Web servers.¹¹ This ruling shows that Chinese law is currently out of step with court decisions made against similar services around the world. China is a special case in IPR infringement, and should be treated with a different antidote.

During the month of November 2006, movements around combating IPR violations in the International community have stepped up pressure on China. Russia – #2 in IPR Violations –, signed an agreement with the USTR explicitly stating that the country would immediately start taking action to address piracy and counterfeiting, as well as further improve its laws on intellectual property rights protection and enforcement to comply with international standards.¹² Further west, Bulgaria and Romania are looking to improve their IPR protection, by meeting EC standards before they are classified as EU members (January 1st 2007). Known by some, as the soon to be “Pirates of the EU”, Bulgaria and Romania will be forced to tackle IPR violations or face unprecedented sanctions by the EC.¹³

China has enjoyed some unprecedented economic growth, yet it still struggles with massive social, institutional, and economic challenges. IPR is a topic that China must take seriously for the betterment of itself and the international community. Each year, the music industry loses about \$4.2 Billion USD worldwide, equaling to millions of dollars a day, because of all forms of piracy.¹⁴ Let us take ACS, China, and International Intellectual Property Violations seriously. It not only hurts the music industry financially, it also dampens the mood of our vibrant music culture. If piracy is not stopped, who knows? Maybe, one day you will wake up to that special 7:00AM radio-alarm-clock to hear...Silence.

¹¹ Billboard Business/Music Industry News – www.billboard.biz/bb/biz/archivesearch/article_display.jsp?vnu_content_id=1003410137 - Article: IFPI Blasts Baidu China Court Ruling

¹² Billboard Business/Music Industry News – www.billboard.biz/bb/biz/archivesearch/article_display.jsp?vnu_content_id=1003410265 - Article: U.S., Russian Gov'ts Sign Bilateral Pact

¹³ Billboard Business/Music Industry News – www.billboard.biz/bb/biz/archivesearch/article_display.jsp?vnu_content_id=1003350433 - Article: Pirates Of The European Union

¹⁴ Recording Industry Association Of America (RIAA) - <http://www.riaa.com/issues/piracy/default.asp> - Anti-Piracy Issues

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