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Digital Music Copyright Protection Dilemma-a Discussion on Draft Amendments of China's Copyright Law

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Abstract. On March 31, 2012, China's National Copyright Administration of the People's Republic of China (NCAC) published the Draft Amendment to the Copyright Law at its website to seek public feedback. Some articles in the current Draft Amendments, such as Articles 46 and 48, have attracted the most attention from the public, especially the music industry, because they involve unauthorized use of copyrighted material. Some musician indicated that "the draft clearly favored Internet." This paper wants to discuss those controversial articles under the Draft Amendments and some other solution except legislation for musicians to face digital era with an aim to make a healthy development of digital music sector in China.

Keywords: Digital music, Copyright, Draft Amendments, Solution

Introduction

Consumer choice has been revolutionised, as new models for consuming and accessing music are rolled out in new and existing markets. The number of paying subscribers to services such as Spotify and Deezer has leapt in 2011, from an estimated 8 to more than 13 million. At the same time, cloud-based services, such as iTunes Match, have become a reality in the marketplace, helping drive the popularity of music downloading.

The truth is that record companies are building a successful digital music business in spite of the environment in which they operate, not because of it. Figures in Digital Music Report 2012 show that more than 1 in 4 Internet users globally regularly access unlicensed sites that contain copyrighted music. This is a startling statistic that captures the challenges we face in developing a sustainable legitimate digital music sector.

We are undoubtedly making important progress in changing this environment, dealing with both peer-to-peer (P2P) and other forms of digital piracy. In the US, music and film companies have agreed with Internet service providers (hereinafter ISPs) a new copyright alert system. In France, the Hadopi law has been successfully implemented and research shows it is accepted and having an impact on consumer behaviour.

South Korea, a pioneer of anti-piracy legislation which has required an effective role from ISPs in stopping infringement, is seeing continued market health. New Zealand implemented a new graduated response law in 2011 and surveys show it is already affecting consumer behaviour positively. In Europe, a series of successful court actions required ISPs to block access to the Pirate Bay, prompting substantial reductions in users of that service.[1]

As to China, China's music industry accrued \$82.8 million in total sales in 2011, according to the International Federation of the Phonographic Industry (IFPI). But 76 % of that total revenue came from digital sales. In 2010, more than 70 % of the revenue from China's music companies came from digital music sales, although the IFPI said that 99 % of the music in China was pirated.[2] In recent years, affected by piracy and the Internet, China's domestic music industry has been declining greatly.[3] Instead of the music creators, the ISPs turned out to be the beneficiaries of the increasing trend of music digitization.[4]

On March 31, 2012, China's National Copyright Administration of the People's Republic of China (NCAC) published the Draft Amendment to the Copyright Law (hereinafter the "Draft Amendments") at its website to seek public feedback. Some articles in the current Draft Amendments, such as Articles 46 and 48, have attracted the most attention from the public, especially the music industry, because they involve unauthorized use of copyrighted material. Under the Draft Amendments, some governmental organizations would be responsible for authorizing use of copyrighted works. Such Draft Amendments also have aroused great controversy among famous local songwriters. Among them, Gao Xiaosong, a famous singer-songwriter indicated that "the Draft clearly favored Internet." Meanwhile, many people felt disappointed that Paragraph 1, Article 69 provides that ISPs which provide pure technical services have no examination obligation. [5]

Therefore, this paper wants to discuss those controversial articles under the Draft Amendments and some other solution except legislation for musicians to face digital era with an aim to make a healthy development of digital music sector in China.

The pros and cons of digital music copyright protection related Draft Amendments of Copyright Law

As mentioned above, on March 31, 2012, the NCAC released the Draft Amendments to the Copyright Law and the Brief Explanations on the Draft Amendments ("Brief Explanations") for soliciting public opinions. Unlike the two previous revisions, the Draft Amendments proposed by China on its own initiative are home-grown.

The current Draft Amendments make significant changes to the Copyright Law both in style and content. The Draft Amendments have 8 chapters and 88 articles, while the Copyright Law has 6 chapters and 61 articles. The proposed amendments include:

- (1) adding provisions regarding the lease rights of authors and performers and the broadcast rights of performers and phonogram producers;
- (2) perfecting the systems of technical protection measures and rights management information;
- (3) putting forward a new category of copyright works for "works of applied art" as well as the "three-step test";
- (4) specifying information network transmission rights and broadcast rights;
- (5) clarifying the ownership of the audio-visual works and the works created in the course of employment;
- (6) establishing the framework for the measures of administrative mediation of copyright disputes; and
- (7) improving the infringement compensation standards (i.e. the maximum statutory damages were raised from RMB500,000 to RMB1,000,000 and the infringers who conduct infringing acts repeatedly shall pay a punitive damages of 1 to 3 times the amount of compensatory damages).[6]

Inter alia, here are two issues under the Draft Amendments which will influence the music industry esp. digital musicians as well as the Internet industry esp. ISPs.

1. Statutory licensing

A statutory license means that a user can, under statutorily-defined circumstances, use a work without getting the permission from the copyright owner, provided that remuneration is paid to the right owner. The Copyright Law provides that a statutory license could be applied under five circumstances, such as editing and publishing textbooks, reprinting newspapers and periodicals, producing sound recordings, and broadcasting of radio stations and television stations. The legislative intent of the statutory license is to promote transmission of works. In practice, however, the copyright owner's right to get remuneration could not be guaranteed.

The NCAC believes that the value and function of the statutory copyright licensing are in compliance with China's actual conditions. In the NCAC's view, the failure in practice mainly lies in the deficiency of remuneration payment and legal remedy mechanisms. Therefore, the Draft Amendments adjusted and perfected the statutory licensing system from these two perspectives. In particular, the Draft Amendments adopt provisions

that require users to file records in advance, pay remuneration in time and clearly indicate the source of work being used. The Draft Amendments also provide that the copyright management administration may, on a case-by-case basis, impose administrative penalties on the users who do not perform such obligations in a timely manner.

Article 46 of the Draft Amendments provide that, after 3 months from the first publication of a sound recording, other recording producers may use, under the statutory circumstances, the recorded music to make sound recordings without permission from the copyright owner of the music. Music industry representatives strongly opposed this Article, commenting that the period of “3 months” is so short that the production cost could hardly be recovered. Some musician even teased that: “Song is just like our kid but after 3 months it will become other people’s kid.” Famous musician Gao Xiaosong also argued that Article 46 was a route to encourage cyber privacy.[7] According to critics, this could seriously harm the innovativeness of music production, and will directly threaten the survival of record companies, as well as other music transmission media such as radio stations.

However, Article 46 also sets forth some pre-conditions for a statutory license. According to Article 48 of the Draft Amendments, if a user has filed records of the use of the works, indicated the necessary information such as source of the works and paid corresponding remuneration, he/she can use the published works without permission from the copyright owner. The Copyright Law does not aim to protect the interests of a specific group of people but the interests of the copyright owners, the first recording producer, the other recording producers and the public in order to balance the interests of different parties.

From a historical perspective, a statutory license of recording of musical works was devised with an aim to prevent big record companies from monopolizing the music recording market. Big record companies can, by signing exclusive license agreements with song writers and composers, obtain the exclusive right to produce recording products of relevant musical works. By doing so, big record companies will monopolize the music recording market, so as to control the pricing of the products. However, it is worth discussing whether the period of “3 months” as currently proposed in the Draft Amendments, is reasonable or not.

In order to reach a balance between the interests of the first recording producer and those of other recording producers, the lifecycle of recording products should be fully considered when determining a reasonable period.

2. Network transmission

There are three paragraphs in Article 69 of the Draft Amendments. Paragraph 1 provides that ISPs which provide pure technical services have no examination obligation. Under the Draft Amendments, the ISPs would not be obliged to review copyright rights information where they simply provide storage, search, connection, and other technical internet services to users. In fact, the Regulations on Protection of Information Network Transmission Right (the “Transmission Regulations”) also provide a similar rule — the “Safe Harbor” Rule of technical neutrality or principle of liability for fault— for the sake of balance between the interests of the creators of works and those of the online transmitters. The “Safe Harbor”Rule is commonly adopted by many countries in the world to exempt the ISPs from liability for infringement of copyright. The rule that the ISPs bearing fault liability tracks the general principle when determining liability for infringement damages. It is impracticable and technically impossible to request the ISPs to review the contents on the network. Therefore, such provision takes roots from China’s current situation.

Paragraph 2 of Article 69 sets forth the duty of care and removal liability for an ISP in a copyright infringement dispute. An ISP is obliged to delete the infringing contents upon receipt of notification from a copyright owner. If not, the ISP shall bear joint and several liabilities with the network users. Paragraph 3 of Article 69 provides for the ISP’s joint liability where it knows or should have known of the users’ alleged

infringements. Such a provision is usually called the “Red Flag” Rule. Under the rule, the ISPs are shouldered with a duty of care, and shall bear liabilities if they fail to adopt necessary measures to stop the infringement. This provision aims to distinguish the ISP’s misdeeds according to the theory of direct and indirect infringements. If network users conduct direct infringement, the ISP will be jointly and severally liable if it also bears subjective malicious intent to infringe (i.e. it knows or should have known the infringement was conducted by network users).

Opponents hold that the above provisions do little to protect the rights of copyright owners against numerous infringements from the network enterprises. Considering the difficulty of identifying the network user who has conducted infringement, the interests of copyright owners could not be substantially protected under such provisions. However, creativity will be stifled if the copyright owner’s works can be obtained free of charge through the Internet piracy. As discussed above, the Copyright Law aims to balance the interests of various parties, and partial protection for interests of a certain specific group fall far short of the legislative intent.[8]

Is there other solution except legislation for musicians to face digital era

The digital era mainly differentiates with the past days is the occurrence of many open tools, production, marketing and community etc..The obtaining cost reduces and the resource will no longer be grasped by a few people. Musicians may directly contact the audiences and communicate with their fans. As mentioned above, in recent years, affected by piracy and the Internet, China's domestic music industry has been declining greatly. Some popular singers whose albums used to sell millions of copies can now only generate legal sales of several thousand. However, according to the insiders, it's just that the "industrial chain" has changed dramatically. Singers who used to live solely on royalties have now shifted to digging for money from various live performances.[9]

In a lately interview of the American veteran artist Neil Young, he mentioned that in the current era, musicians had more spaces and choices than ever, therefore, don't just complain the industry. In fact, in Taiwan, there are companys specializing in operating digital publication service. Some musicians have already opened the foreign market. For example, Taiwanese renowned DJ Eddie Hu's works have been recommended by Electronic Music Digital Indicators Platform—Beatport as ‘10 Deeo-House and Tech-House songs should be listened’. The ‘Revox Records’ of Echo Album operated by Hu has sold songs in many global index digital downloading music stores with the digital publication concept and has become the pioneer of Taiwanese brand of dance music as well.[10]

Conclusion

In the Internet era, how to protect music’s digital copyright is truly a headache for every country. In one aspect, music products in the digital era rely on Internet transmission’s characteristic to reduce circulation costs, and make the transmissibility of copyright owners’ works reach the unprecedented height. But in another aspect, the original copyright protection mechanism is subverted in the present era and the protection mechanism aiming at new copyright characteristics has not kept pace with the times yet. It can not be denied that Internet has its own rule of game. Comparing with Internet industry esp. ISPs, the party of copyright owners is in a relatively weak position. Both parties don't have equal strength in playing the game. Actually, this is not a ‘zero-sum game’. To introduce the rule of game which is beneficial to all attending parties by the presiding agency in China as soon as possible is indeed the way to solve the problems.

References

- [1] Digital Music Report 2012, <http://www.ifpi.org/content/library/DMR2012.pdf>.
- [2] A record tailspin in music industry, 2012-07-06

- http://www.chinaipr.gov.cn/newsarticle/news/photo/201207/1670236_2.html
- [3] Great change in China's music industry, http://www.chinaipr.gov.cn/newsarticle/news/local/201203/1284181_1.html, March 15, 2012.
- [4] CPPCC Deputy: IPR on copyrighted music needed legislative protection, http://www.chinaipr.gov.cn/newsarticle/news/Local/201203/1282829_1.html, March 9, 2012.
- [5] &[9] Copyright Law providing that one may use music works without authorization was questioned(Chinese version), <http://www.chinamedia360.com/newspage/20120826/3E51BBC3F7194CC0.html>, April 5, 2012.
- [6] Copyright Law of the People's Republic of China (Revision Draft), <http://www.cpahkld.com/EN/info.aspx?n=20120409074848717495>
- [7] Yang Cheng, Digital music copyright Protection is in a dilemma (Chinese version), http://zqb.cyol.com/html/2012-05/03/nw.D110000zgqnb_20120503_1-12.htm, May 3, 2012.
- [8] Jiao Hongbin, Key Disputable Issues regarding the Draft Amendments to China Copyright Law, <http://www.chinalawinsight.com/2012/06/articles/intellectual-property/key-disputable-issues-regarding-the-draft-amendments-to-china-copyright-law/>, June 14, 2012.
- [10] Liu Weizhi,† New survival for musicans in the digital era (Chinese version), http://mag.udn.com/mag/digital/storypage.Jsp?f_ART_ID=404817, Aug. 1, 2012.