Online Digital Content Protection issues in Taiwan

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In recent years, there is a phenomenon that governments in various countries launched different programs or action plans to stimulate the development and use of digital content, with the hope to boost a new economy based upon this promising industry. The rise of digital content signifies the shift of economy from manufacture of physical items to high value intangibles. However, the nature of digital content such as easy-copy, low-cost and high-quality, render the new industry even more vulnerable to piracy. Furthermore the threats to lose profits and even the future of the whole industry pose a severe challenge to governments. In order to support digital content industry to continue thriving in a healthy and sound environment, proper legal protection and stringent enforcement measures, especially for on-line digital content, will definitely have a profound impact in the long run.

Taiwan Government also put digital content as one of the most promising industries for the next generation. Human resources and financial supports have been allocated, and we have seen more and more talents and companies joining this industry. However, in the meanwhile, in addition to the continuous task on cracking down piracy, our Government has been working on amending relevant laws and regulations in order to provide a solid legal infrastructure for digital content industry. In this paper, I would like to introduce you the major achievements regarding our recent amendments of Copyright Law, Rating system for digital content and the draft of “Digital Content Industry Promotion Act”. Of course, two local peer to peer cases and other legislative proposals regarding ISP responsibility will also be discussed.

A. the Impact of Copyright Law amendments in 2003 and 2004 on Digital Content

With Taiwan 's accession to World Trade Organization, Taiwan is under the obligation to amend her domestic intellectual property laws to be in line with the minimum standards as required in TRIPs. Besides, the society of Taiwan , at the same time, is experiencing a knowledge-based revolution. Almost every kind of information is digitalized, but relevant laws offer little or inadequate legal protections which in turn arouse more piracy on internet and greatly reduce our confidence in internet creativity. Copyright Law is the existing law that has been confronted with the most impacts from the progress of scientific and technological development. Therefore, c opyright law has been amended successively in July 2003 and August 2004 so as to cope with the increasing application of digital science and technology. The key amendments that have profound impact on digital contents are summarized as follows:

a. The Right of Temporary Reproduction 1:

Whether “temporary reproduction” is a type of reproduction under copyright law has been a issue of discussion for years, and finally in 2003, the amendment gave an positive answer. Temporary reproduction of copyrighted works is deemed a type of reproduction, but is not protected under copyright law if the temporary reproduction is transient, incidental, an essential part of a technology process, and without independent economic significance, where solely for the purpose of lawful network relay transmission, or for the lawful use of a work. A “lawful network relay transmission” includes technically unavoidable phenomena of the computer or machine occurring in network browsing, caching, or other processes for enhancing transmission efficiency.

For the above amendment,, the definition of "reproduction" was also amended to include the "direct, indirect, permanent and/or temporary reproduction activities" 2.

b. The Right of Public Transmission 3

One of the most important amendments regarding the protection of digital content is the new article about “public transmission”. The term is defined as “to make available or communicate to the public the content of a work through sounds or images by wire or wireless network, or through other means of communication, including enabling the public to receive the content of such work by any of the above means at a time or place individually chosen by them.”

The act of public transmission is characterized in its mode of operation by means of interactive computerized or Internet transmission which is different from the mode of operation of transmitting the contents of copyrighted works in a unilateral manner such as public oral transmission, public broadcasting, or public performance etc.

To confer the new added definition of “public transmission” 4, the Article 3-1-7 regarding the definition of "public broadcast" 5 was also amended 6, so as to distinguish the operation modes of "public transmission" and "public broadcast" in order to avoid confusion while using these two different terms.

c. Protection of Electronic Rights Management Information

When copyright law confers the “public transmission” right to authors, the introduction of “Electronic Rights Management Information” will definitely facilitate the author to be easily accessed and encourage more exploitation of digital contents. The term " electronic rights management information" refers to the electronic information which is used to identify a copyrighted work, the title of the work, author, economic rights holder or person licensed thereby, and the period or conditions of exploitation of the work, including numbers or symbols that represent such information 7. Anyone who removes or alters the electronic rights management information without authorization shall be imposed civil liability for damages and criminal liability for sentence up to one year imprisonment, detention or fine.

d. Technology Protection Measures [8]

The term "technology protection measures", that is, the "anti-circumvention measures", means the equipments, devices, components, technology or other technological means employed by copyright owners to prohibit or restrict, in effective manner, others from accessing or utilizing his/her work without prior authorization. Anyone who disarms, destroys or by any other means circumvents the technological protection measures employed by the copyright owner shall be subject to civil liability for damages.

The new amendment further specifies that any equipment, device, component, technology or information for disarming, destroying, or circumventing technological protection measures shall not, without legal authorization, be manufactured, imported, offered to the public for use, or offered in services to the public. Violation of this article shall be imposed criminal liability for sentence up to one year imprisonment, detention or fine.

e. Specific Punishment for Use of Pirated Software [9]

Before the 2004 amendment, the use of pirated software for commercial purposes shall be deemed an infringement of copyright only if the user has “actual knowledge” that he is using pirated software for that purpose. The application of this article, however, was controversial because it was difficult to prove that the user did have “actual knowledge” of the contended facts. Hence in the 2004 amendment, the requirement of “actual knowledge” was deleted, and therefore, as long as there is the fact of using pirated software, the user shall have no excuse to running away form civil liability for damages and criminal liability for sentence of up to two years imprisonment or detention, or in lieu thereof or in addition thereto, a fine of no more than five hundred thousand New Taiwan Dollars (hereinafter called NT Dollars).

f. Increasing the magnitude of criminal liability for illegal optical disk copyright infringement

Owing to the massive harmful power on digital content by illegal optical disks, the amendment increases the magnitude of criminal liability for illegal optical disk copyright infringement. A person who infringes on the economic rights of another person by means of reproducing a work onto an optical disk shall be subject to imprisonment ranging from six months to five years, and in addition thereto, may be fined ranging from five hundred thousand to five million NT Dollars.

Besides, heavy criminal liability is also imposed on a person who distributes or with intent to distribute publicly displays or possesses a copy of optical disk knowing that it infringes on the economic rights shall be subject to imprisonment ranging from six months to three years and, in addition thereto, may be fined ranging from two hundred thousand to two million NT Dollars.

Both offenses are actionable not upon complaint.

B. Local P2P case analysis and possible solution

No matter we accept it or not, Internet has changes our life style in many ways . People find that many real-life activities could now find their counterparts “on line”, which bring us not only convenience and exciting experiences, but sometimes also raise problems. Downloading on-line music has drawn much attention during recent years. This newly flourishing business model provides music lovers a wide range of selections on-line, through peer to peer technology at relatively low cost. However, this new business did not receive supports from record companies and music right holders. On the contrary, these P2P companies were accused of the main cause for the sharp drop in profits for the past few years. Although it is difficult to prove the direct relationship between lost of profits and the downloading services, we have seen many copyright infringement cases were brought to courts in the United States (Napster/Groster cases), Holland /Australia (Kazaa case) and Japan (MMO case) and the judgments, even with similar facts, were opposite! This situation just reflects the complexity of the whole issue and arouses more discussion on this topic.

In August 2003, International Federation of the Phonographic Industry, Taiwan Branch (hereinafter referred to as IFPI Taiwan) brought complaints against two local P2P companies in Taipei and the courts also reached opposite judgments. It is the main purpose of this paper to discuss the two judgments and possible solution in the future.

Before we start to discuss the two cases, I would like to take this opportunity to briefly clarify our copyright law liability system. Unlike American legal system, where liability for violation of copyright law is civil liability in nature, the legal responsibility for copyright infringement in Taiwan is criminal liability, and therefore, courts in Taiwan will apply stricter standard in deciding whether violation of copyright is intentional.

a. ezPeer case

This is the first P2P case in Taiwan and Taipei Shihlin District Court found in June 2005 that the defendant, ezPeer company, is not guilty of copyright violation charges for the following reasons:

1. In the indictment, the prosecutor claimed that ezPeer provides on-line music downloading services through a “centralized P2P framwork”, so it is reasonable to conclude that ezPeer has “actural knowledge” about the fact of copyright infringement by its members. With such knowledge in mind, ezPeer still provides file-exchange services, and therefore, ezPeer is suspecious of violating copyright of the record companies. The Court, however, held that ezPeer is in fact a “decentralized P2P framwork”, and further held that it is not important to decide the type of P2P framework in this case because the original structure of P2P was not designed for the purpose of violating copyright.

2. The Court maintained that the downloading and transmission of musical files by individual member might satisfay fair-use circumstances or other requirements for legal exploitation of the works. From the evidences submitted by the prosecutor, the Court is not able to ascertain if ezPeer is able to distinguish the legality of conducts acted by its members. Under such circumstances, the Court helded that it is also impossible to conclude that ezPeer is an accomplice in this case.

3. Under present relevant laws, ezPeer is under no legal obligation to take active actions to provide special devices or measures to filter off the downloading and transmission of musical files that are suspecious of violating copyright law.

Of course, ezPeer judement ignited another pro and con debate in Taiwan . It is interesting to note that the judgment of ezPeer case was rendered on the 30 th of June, 2005, only three days after the Groster judgment which was rendered on the 27 th of June 2005. We are not sure if the Groster judgment has any impact on the Kuro case, but as we will see below, the judgment of Kuro case is just totally opposite to ezPeer.

b. Kuro case

On the 9 th of September , 2005, Taipei District Court reached its judgment on Kuro case, and held that the defendant, providing unauthorized music downloading services for the purpose of making profits, is jointly responsible as conspiracy with its individual member for infringing plaintiff's copyright. The CEO and General Manager of Kuro were sentenced for three-years' imprisonment separately, and both were fined three million NT Dollars; the responsible person (chairman) of Kuro was sentenced for two-years' imprisonment and Kuro's member, Miss Chen, was also sentenced for four-months' imprisonment, which could be substituted by fine, and which also obtained a respite for three years.

In addition to criminal action, IFPI also filed a civil lawsuit claiming for compensation, and this case finally reached a peaceful settlement on the 15 th of September, 2006. Kuro promised to pay IFPI Taiwan 3 millions and 5 hundred thousand NTD as compensation. A new company /will be incorporated to continue the legal music platform business. The members' list, brand name and the employees of Kuro will be transferred to the new company under a license agreement. In the future, the new company will provide downloading services not with P2P technology, but with streaming model, and the member fee will have a jump from the present 99 NTD/month to 150 NTD/month.

A brief comparison can be made between the two local cases:

1. Taipei Court found that when Kuro's server is under normal

operation, and when Kuro's member would like to download a specific music file from another member, Kuro's server will provide IP address, route and establish connection in order to facilitate its member to conduct fast search and to download the music file; If the connection is interrupted during transmission, Kuro's server will automatically locate other member's IP to resume the transmission. The Court was convinced under these facts that Kuro was a “centralized P2P framework”.

2. The Court further found that Kuro published a great deal of commercial advertisements on various media to increase its membership; Kuro also established “feed-back mechanism” on its own website to encourage the users to download music file. Given all these evidences, The court was convinced that Kuro, who had actual knowledge that the P2P technology it provided will be utilized by others as a tool to carry out criminal activities, should induce the general public to pay or buy its membership to infringe other's copyright in order to pursue its own commercial benefits. In doing so, the court held that Kuro has already foreseen that its member will use P2P technology to conduct unauthorized music downloading, the copyright holder's damages and the causation between the two, and the result of causing lost of profits on plaintiff is not against Kuro's intent. Therefore, Kuro must be responsible for violating copyright liability.

We found that the supporting evidences really play important roles in helping the Court to reach its final judgment and that is one major reason why we have two cases with similar facts but having opposite results. The P2P issue, with the settlement between Kuro and IFPI Taiwan, is at rest for the time being, but efforts trying to have legislative solution are just begun.

There was suggestion to amend Copyright Law to have a “compensation system” to solve the P2P problems. This proposal, however, did not receive much support among scholars and legislators. Recently another proposal was brought to our attention that our Copyright Law shall adopt a procedure similar to the one adopted in DMCA. This new proposal arouses another big issue: how should we regulate ISP? This issue has been in debate for years in Taiwan , and so far there is still no consensus on this point. As a matter of fact, ISP relates not only to copyright issues, privacy protection, anti-porn/violence for minors on internet are also important topics needed to address our concerns. So far, it is too early to comment the future of this new proposal, but we will keep close watch of its future development. From III's point of view, a single legislation encompassing all issues regarding ISP will be a better solution.

C. Rating system for digital contents

With the rapid advances of technology and the widespread use of computers, Internet has become an indispensable part in our daily lives. When we enjoy the convenience of having easy and quick access to almost all kinds of information, we are exposing ourselves, at the same time, to a world which is flooded with impoper or even indecent contents. Those contents deliver either wrongful or harmful messages to the viewers and sometimes cause negative impacts on their minds forever. This situation poses a quite serious problem especially for children and teenagers who are encouraged to acquaint themslves with the cyber space but do not equipped with proper knowledge and ability to distinguish healthy and useful contents from unhealthy and harmful ones. Hence, in addition to protectingof the right of digital content, while in the process of promoting digital content industry, setting clear rules to regulate content providers to protect minors are also very important. In order to insure the sound development of the physical and mental status of the minors, Article 27, Paragraph III of the “Children and Youth Welfare Act 10” requires that “the competent authority should publish rating regulations for publication 11, compouter software and internet content”. This is not to impose any restrictions on the freedom of speech on internet, but rather a protection measure by providing a basic reference for parents and the minors to decide which content is appropriate for them.

a.Regulations of Internet Content Rating

The “Regulations of Internet Content Rating” was first published by Government Information Office (hereinafter referred to as GIO) on the 26 th of April, 2004. The regulation provides a grace period of 18 months in order to avoid rushness and, therefore, the exact enforcement date was the 26 th of October, 2005. This Regulation was further amended in October 2005.

The most important spirit of the Regulation is “self discipline” principle. According to the amended regulation, content providers shall classify the contents either “restricted” or “non-restricted” by themselves. Restricted contents providers are required by the Regulation to put a “restricted” label on the homepage or relevant web pages in a conspicuous manner. Before the amendment, the rating system was classified as “common for all”, “protected” (which means the content is not suitable for children under 6), “parents guide” (which means that the content is not suitable for children under 12; for the youth between 12 to 18, parents guide is needed) and “restricted” (not suitable for people under 18). So under the present classification, Internet content that is not rated as “restricted” may be viewed by children under guidance or under the discretion of parents, guardians or others taking care of them 12.

In order to carry out the functions specified in the regulation, the “Taiwan Internet Content Rating Promotion Foundation 13” (hereinafter

referred to as TICRF) was established by GIO on the 7 th of January, 2005 . This will facilitate the development of Internet-related industry while protecting freedom of speech online and regulate user behavior.

b. Regulations of Computer Software Rating

The “Regulations of Computer Software Rating” was published by Industry Development Bureau (hereinafter referred to as IDB) of Ministry of Economic affairs on the 6 th of July, 2006 and will be enforced on the 5 th of January of 2007. Following the Internet Content Rating Regulation, this regulation adopts the “self-discipline” principle, and “four tiers” rating classification. However, there a re some points to be noted:

1. The term “computer software” in this Regulation refers only to “computer games”, excluding other kinds of software like searching engine, data mining, tool or educational software.

2. Only the game software that can be played through “computer” shall be the subject under this regulation. Games played on other devices, such as mobile phone, PDA, television or other devices. As a result, video games do not fall within the definition of “computer game” under this regulation and, therefore, is not regulated so far.

3. The competent authority for the new Regulation is IDB. Not like GIO establishing a foundation under its donation, IDB will encourage the private sector to organize professional groups to provide consultation services regarding any question or misunderstanding arising from this regulation. Anyone who would like to challenge the rating label marked by the computer software providers, may also bring their cases to any of those professional groups for opinions.

5. The new Regulation requires that the computer software providers must put the label not only on the web page providing downloading services but also on the package in a conspicuous manner. It further requires that for “restricted” software, a warning sentence like “This software is intended for use for persons above 18” must be properly marked.

D. The “Digital Content Industry Promotional Act” (Draft)

a.To restore the copyright pledge recordation system

As we have pointed out that copyright and other intangible assets are playing a more and more important role in the knowledge based economy. Therefore, the purposes of copyright law are no longer limited in protecting the rights of the authors, but are extended to facilitate the maximum exploitation of these works in order to manifest their potential economic values. As we all know that the most valuable assets for digital content companies are their intangibles, such as patents, copyrights or trademarks. In the early stage, those start-up companies might rely heavily on government's financial supports. However, when digital content companies are becoming more mature and try to make use of their intellectual properties as collateral to reach a loan agreement with the banks, they will find that the banks are not willing to accept these intangibles as collateral 14. The situation for copyright is even worse in Taiwan since our copyright competent authority no longer provides copyright recordation services to the public 15, and therefore, the banks are even less interested in accepting copyright as collateral because they are not able to estimate their risks with accuracy in any particular case when those important information regarding the “intangible collateral” is not available from any trustworthy government agency or private organization.

In order to provide a formal channel of disclosure and to ignite the economic potential in intellectual properties in the future, our government is planning to restore the copyright pledge recordation system in the draft of “Digital Content Industry Promotional Act”, aiming that this will offer the digital content companies a better position to negotiate with the bank and other financial institutions for loan agreements.

b. Exploitation of Work Whose Authorship is Unknown

At a higher level of the panorama, Copyright Law encourages the exploitation of other's works in order to facilitate further idea exchange and culture development. However, such a privilege is granted by law only when the users obtain author's authorization in advance, except in some specified fair-use circumstances or using works which already in public domain. However, author's authorization is sometimes difficult or even impossible to obtain when the author's whereabouts is unknown 16. This is especially true in the internet environment when the flow of information is so fast and the amount of information is enormous. This situation undoubtedly creates a big hurdle for content users and impedes their willingness to continue creative activities on internet . In order to solve this problem and to reach full utilization of digital contents, our Government is planni ng to bring this licensing deadlock to an end by setting a procedure which allows the users to submit sufficient evidences to the copyright competent authority to prove that he/she has exhausted all possible means but still fail to locate the author. After reviewing all the documents and evidences, copyright competent authority will grant the authorization on a non-exclusive basis, and the user has to deposit the license fee as prescribed in the approval letter and then use the work in the manner as prescribed therein.

Taiwan Government is hoping that in the internet era, authors are urged to exercise their rights granted under Copyright Law in a much more positive manner by using “electronic rights management information” to enable others to share authors' wisdom and to help the whole society to benefit from the wisdom-sharing process.

Conclusion

The whole world is facing a new digital era that nobody has ever experienced before, especially the Internet world. Traditional legal system is no longer enough to deal with problems related to the creativities of intangible assets. Members of modern society, need to find the best solution to irrigate and protect these digital fruits, and, at the same time, to resolve or prevent problems or expected harm from the development of digital content industry. To set up a new legal system along with various industrial policies is deemed a good solution to build up sound environment for the growth of digital industry.

Challenges and hurdles will be confronting us every single day. They come to existence even faster than before. Their existences just send us clear messages that it is time to submit more proposals to promote digital industry, to create maximum profit to the digital society as a whole and to prevent harmful results from this trend of digital tide. We believe that Taiwan Government is now well prepared to face this new age and to overcome all the expected or unexpected challenges. Major changes of legal structure will be achieved step by step within the following years and it is expected that when cases relating to digital content are accumulated to certain amount , the consensus to solve those legal

issues will become much clear. When we reach this point, our society will be more comfortable and confident in using and creating digital contents and the digital industry in Taiwan will be mature.

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1. This amendment is made pursuant to Article 9 of the TRIPs which provides that every member of the WTO shall adhere to the provisions set out in Article 1 through Article 21 of the 1971 Berne Copyright Convention. Article 9 of the Berne Convention entitles the authors of the literary and art works protected by the Convention the exclusive right to licensing, in any manner or form, the reproduction of his/her copyrighted works.
2. The ROC Copyright Law Article 3-1-5
3. This amendment was made by making reference to Article 8 of the WCT and Article 10 and Article 14 of the "WPPT", and Article 2, and Article 2 –1 and 2-2 of the EU 2001 Copyright Directives
4. "Public transmission" means to make available or communicate to the public the of a work' content through sounds or images by wire or wireless network, or through other means of communication, including enabling the public to receive the content by any of the above means at a time or place individually chosen by them
5. "Public broadcast" means to communicate to the public the a work's content through sounds or images by means of transmission of information by a broadcasting system of wire, wireless, or other equipment, where such communication is for the purpose of direct listening reception or viewing reception by the public. This includes any communication, by transmission of information via a broadcasting system of wire, wireless, or other equipment, to the public of an original broadcast of sounds or images by any person other than the original broadcaster
6. The amendment was referenced to the provisions set out respectively in Article 8 of the WIPO Copyright Treaty (hereinafter referred to as "WCT") and Article 10 and Article 14 of "The WIPO Performance and Phonograms Treaty" (hereinafter referred to as "WPPT")
7. The ROC Copyright Law Article 3-1-17 , The definition of the term " electronic rights management information" was added with reference to the provisions set out respectively in Article 12 of the WCT, and Article 19 of the WPPT which requires all signatory countries to provide full protection and remedies to the integrity of electronic rights management information, Article 7 of the EU 2001 Copyright Directives, Article 1202 of the US Copyright Act, and Article 2-1-21 of the Japanese Copyright Law.
8. The ROC Copyright law Article 3-1-18 , this item was added in 2004 amendment. The definition of the term "technology protection measures" are added to the 2004 Copyright Law pursuant to in Article 11 of the WCT and Article 18 of the WPPT respectively, requiring the mandatory and adequate legal protection to the "anti-circumvention measures". And, the Article also makes reference to the relevant provisions provided in Article 6 of the EU 2001 Copyright Directives"; Article 1201 of the US Copyright Act; Article 20,1,20 of the Japanese Copyright Law; Article 18 of the "On-line Digital Contents Industry Development Act" and Article 30 of the "Computer Programs Protection Act" of Korea respectively.
9. The ROC Copyright Law Article 87-5 and 87-6
10. The Act was put in force on the 28th of May, 2003
11. ROC Government has already enacted rating regulations for publication (books, magazines, etc.) and movies/TV programs.
12. Many teachers and parents group are criticizing the new rating classification. They agree that it is sometimes difficult for the content providers to mark correct label for contents which are either “protected” or “parent guide”. However, they argue that it is irresponsible to shift the whole burden to parents who do not have enough profession or simply do not have time to do so.
13. For more detailed information, please visit TICRF's website at http://www.ticrf.org.tw/
14. The conservative attitude of the banks and other financial institutions are understandable. First of all, the market for intangibles as collateral is just not mature for the time being, and we do not have enough experiences in the area of intangible assets evaluation. Secondly, banks are more familiar with traditional collateral, like lands, houses, etc. In fact, they are quite confused about how to deal with all these intangible assets in their hands. Thirdly, an effective mechanism for the withdrawal of banks and financial institutions from the market is still lacking, which greatly increases the risks for banks, and in turn, will render banks more hesitated to reach any loan agreement with digital content companies from the very beginning.
15. The Copyright Law of Republic of China was first promulgated in 1928. At that time, copyright protection would be obtained only if the author fulfilled the strict “registration” process. In 1985, Copyright Law was undergoing an overall review, and an internationally accepted principle that “copyright protection will be automatically obtained upon completion of the work” was adopted. However, copyright registration system was still maintained for voluntary application for registration and the issuance of copyright registration certificate. In 1992, a more loose “copyright recordation system” was adopted to replace the “copyright registration system” to avoid any confusion. In 1998, after many years' debates, copyright recordation system was finally abolished for the following reasons:
1). The existence of “copyright recordation system” always delivers wrong information to the public that copyright law still requires registration for protection of a work. So it would be better to abolish the recordation system to avoid any misunderstanding in the future.
2). In a copyright lawsuit, the courts, instead of conducting substantial fact-finding procedure to ascertain who the copyright holder is, very often require the party claiming copyright protection to submit copyright registration certificate or recordation transcript to prove that he/she is the copyright holder. In doing so, the spirit of copyright law was led to such a distortion that would render the public even more confused about the true meaning of copyright law.
3). Due to limited manpower in our copyright competent authority, services for applications either for copyright registration or recordation will consume a lot of administrative resources , and the crowding-out effect would have negative influence on the allocation of resources to other pending copyright issues or basic researches at hand.
16. This is termed “orphan works” by Professor Lawrence Lessig.

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