LET A HUNDRED FLOWERS BLOOM
The Future of Copyright in China

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Introduction

- Natural right
  - Confucianism
  - *To Steal a Book is an Elegant Offence*

- Utilitarianism
  - Piracy mostly targets foreign works
  - Widening access to knowledge
  - Boosting local business and employment

- International Obligations
  - The Berne Convention
  - The TRIPS Agreement
  - WCT & WPPT
Copyrightability and Censorship
Copyrightability and Censorship

- Article 4
  - Works the publication or dissemination of which are prohibited by law shall not be protected by this Law.
Copyrightability and Censorship

- The US-China WTO Dispute (WT/DS362)

- The Berne Convention (1971)
  - Article 5(1)
    - Minimum protection requirement
  - Article 5(2)
    - No formality requirement

- The TRIPS Agreement
  - Article 41.1
Copyright and Censorship

• Amendment
  • A copyright owner shall not exercise her rights in a way that violates the Constitution and law or harms public interest.
Copyright and Censorship

- Judicial protection for pre-censorship works
  - Injunction
  - No damages

- Comments
  - Infringement in January, 2015
  - Litigation in March 2015
  - Approval in May 2015
Neighboring Rights

- Audiovisual Works
  - Motion picture (Article 3)
    - Copyright
  - Video Recording (Article 39)
    - Neighboring right
- Implications
  - No public performance right within neighboring rights
  - Right of making available for interactive transmission
Neighboring Rights

- Draw a line in the sand
- Music videos
  - Levels of creativity
    - Scripted
      - Motion picture
      - Copyright – public performance right
      - License from record label as producer
    - Unscripted recording of a live concert
      - Video recording
      - Neighboring right – no public performance right
      - License from Music publisher (via collecting society) for musical composition

- Are all motion pictures scripted?
Neighboring Rights

- German law
  - Photography and cinematography
    - Copyright
      - Above certain levels of creativity
    - Neighboring right
      - Below certain levels of creativity

- Chinese law
  - Photography
    - Copyright with a modicum of creativity
    - Neighboring right irrelevant
  - A selfie by a monkey
    - Copyright
Neighboring Rights

- Sports
  - Unauthorized streaming
    - World Cup
    - Olympics
  - Motion picture?
  - Video recording?
Neighboring Rights

- **Sports**
  - Not video recording
  - Broadcast (Article 44)
    - WIPO Broadcasting Treaty?
    - No right of making available

- **Options**
  - Simulcast
    - Rebroadcasting right
  - Delayed broadcast
    - Reproduction
Enforcement

- Are foreign concerns over Chinese copyright enforcement unfounded?
  - U.S.
    - Plaintiffs prevailed in 50%-60% cases
  - China
    - Foreign plaintiffs prevailed in 90% cases
Enforcement

- Enforcement Hurdles
  - Procedures
  - Remedies
  - Protectionism
Enforcement

• Procedures
  • Foreign evidence
    • Notarization and legalization
  • No discovery
    • Hiring private investigators
• Filing
  • A & M v. Napster
    • 21 plaintiffs
    • 1150 samples
    • Millions involved
  • Beijing News v. Zhejiang Online
    • One plaintiff
    • 7706 works
    • Filings?
      • Filing fees, copying fees, legal fees
Enforcement

- Remedies
  - Injunctive Relief
    - A & M v. Napster
      - Covering all works that plaintiffs own
      - Including future works
    - Not equitable relief
      - Covering works specified
  
- Statutory Damages
  - US
    - US$200-US$150,000 per work
  - China
    - < US$ 150,000 (RMB 1,000,000) per work
  - CAVCA v. Xinjianghui
    - 49 songs performed by a karaoke bar
      - US$ 9800 – US$ 7,350,000
      - US$ 3950 (RMB 24,500)
      - US$ 80 per work
Protectionism

- Hangzhou Architectural Infringement
Enforcement

• Are foreign concerns over Chinese copyright enforcement unfounded?
  • U.S.
    • Plaintiffs prevailed in 50%-60% cases
    • 90% cases are settled quickly
    • Remaining cases are usually 50/50
  • China
    • Foreign plaintiffs prevailed in 90% cases
    • Defendants are unwilling to settle in simple cases
    • Undeterred by penalties
Thank You!

谢谢您