

〈共同企画・アジア特集〉

Facing the Future: The Distribution of Digital Content and the New Issues of Intellectual Property System

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Recent years, the Chinese government shows a high degree of concern for the development of the information industry. In 2006, The Regulations on the Protection of the Right of Communication through Information Network was passed and it regulates the distribution of digital content through the network. The author gives an analysis of the possibilities to build a regional framework to distribute the digital content among Asian countries which will help to spread the Asian culture to the world. The author gives the suggestion for building a regional framework of the common system in Asia.

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1. What specific issues have been discussing concerning the distribution of digital content in China?

A: This question can be viewed in three aspects:

— The aspect from the government level. In recent years, the Chinese government shows a high degree of concern for the development of the information industry from the national strategic level. In 2000, “the CPC Central Committee on the Development of the National Economy and Social Development in the 10th Five-Year Plan” pointed out: to “improve the culture industrial policy, to strengthen the construction and management of cultural market, and to promote the development of the cultural industry.” The “Plan” first proposed the “cultural industry” concept. In 2006, “The Outline of the National Economic and Social Development in the 11th Five-Year Plan” further

clarified the idea of that in the “11th Five-Year Plan” period “to encourage the development of the digital content industry in education, culture, publishing, broadcasting and film, to enrich Chinese digital content resources, to develop the animation industry; to take the growth of the information resources as an important part of the economic reconstruction and the changes of the mode of economic growth from the national strategic level.” In September 2006, the General Office of the CPC Central Committee and the Office of the State Council issued the “Framework of the Cultural Development in the 11th Five-Year Plan Period”, clarifying in the next five years, the industries of film and television production, the publishing, the advertising, the performing arts, and the animation should be strengthened and promoted; and to establish the production base in digital film, to start the project of the domestic animation, these projects play a leading and driving role as major cultural projects.

— The aspect from the Industry level. It involves mainly two aspects, one is from a technical point of view on the development of digital content industries. For example, the development of the hardware from the record player, tape, to the LD, and then to CD, DVD, and then to today's SD. SD features are, the first, CD, DVD can not match the security mechanism; the second, better storage devices than that in CD, DVD; the third, a broader players' environment than CD, DVD; the fourth, easily allowing CD, DVD shops in transition in business; and the fifth, the content of CD, DVD can be put into SD card. All websites in the future can sell the digital content, but, no legal protection, no business. The industries in China is now talking a lot on the technology protection issues when the digital content applying on SD. Another aspect is that how the information service providers (databases or digital content businessmen, they call themselves "digital library") are facing the difficulties of the copyright authorization, the huge amount of payment for copyright and the lots of copyright litigations.

— The aspect from the legal academic level. In recent years, legal academics, particularly intellectual property law experts study in-depth the development of the copyright protection in an environment of network: in 2001, China amended its copyright law, stresses clearly the copyright protection in an environment of network, this protection keeps the same basic principles as the protection of traditional works, that is, whenever the law gives an exclusive right to authors, performers, producers of audio and video recordings (the right to communication through information network), others should have to respect it, without permission, without usage, unless the legal exceptions. The amended Copyright Law provides the protection of

technical measures and the protection of right management information. In 2006, the Regulations on the Protection of the Right of Communication through Information Network gives detailed articles relating to the author's right of communication through information network, the liabilities of the information service providers, in particular, it provides the "safe harbor" for the ISPs, to regulate the distribution of digital content through the network. The legal academic circle also gives its attention to the recent cases involving the network.

2. Considering the distribution of digital content, including the positive part that needs to promote and the negative part that needs to restrain, what should be promoted, and what should be restrained?

A: The digital content is part of the information. General speaking, from the view point of an expert of information law, the distribution of information should be free from limitation, if it has to be limited, the limits on the scope and content, should formulated by the relevant laws or regulations; lack of legal standards, the limits set for the distribution of information should not be accepted or it should be opposed.

(1) What digital content should be promoted? In order to promote it, what kind of measures should be adopted, and what legal system should be improved?

(2) What digital content should be restrained? In order to restrain it, what kind of measures should be adopted, and what legal system should be changed?

What should be promoted and what should be restrained, sometimes the government gave no specific laws and regulations, therefore, it would be difficult to be accepted by the public and the policy suffered widespread criticism when the government announced its policy to encourage (and to restrain) certain cultural products. For example, in 2006, the Ministry of Culture launched the “National Kara-oke content management system”, the official claimed that this system aimed at preventing unhealthy songs into the KTV while gradually solve the interests conflicts among the music industry, copyright holders and kara-oke operators. However, relevant department has not developed the standard between health and non-health.

Another example, in December 1, 2007, “Kara-oke Programme Production Norms” issued by the Ministry of Culture took into effect. This “Norms” sets very clear standard for the content of programming acquisition, adding, tagging and kara-oke programme of audio and video technology indicators, and the source coding indicators. It requires the songs should be “published in the mainland of China as a song or audio-video products, or the songs have been shown on the public television station”. If the songs are not complying with the conditions, they should be passed the examination by the administration and prepared corresponding evidences before they could be put into the kara-oke programme. The kara-oke programme shall not contain any content that “The Entertainment Management Ordinance”, “The Rules for the Management of Audio-video Products”, “The Measures for Reviewing the Contents of Audio-video Products”, “The Regulations for Import and Export of Audio-visual Products”. As the “Norm” sets a detailed standard for restriction of the content, its implementation in this area causes no objections.

3. In order to facilitate the distribution of digital content of images, how to build the ideal framework for handling the majority of the relevant copyright and neighboring rights?

A: Regarding the distribution of the digital content of the images, in order to meet the needs of technology development, in 2001 China's copyright law was revised to regulate the right of communication through information network, the protection of technical measures and the protection for the rights management information, and in 2007, China joined the two copyright treaties relating to Internet. Regardless of how changes in technology, from the perspective of legislation and the law enforcement, all activities should be based on the traditional copyright principles, that is, once the law gives the exclusive right to the authors, performers, producers of audio and video recordings, others has the obligation to respect, without a permit, without a use unless the legal exceptions. Under normal circumstances, if anyone unauthorized uses other's copyrighted works, he or she should bear the relevant legal liabilities.

Nearly all the countries provide special articles on the liabilities of the Internet service providers under different circumstances, the relevant laws which have made provisions. Facing a copyright dispute, if blindly pursues an ISP's responsibility, the ISP will be too risky. In China, four specialized ISPs are given the conditions for exemption from infringement by the Protection of the Right of Communication through Information Network. The first one is the access service provider, the

second is the possession provider, the third is the speed provider, while the fourth is the link provider. If the four ISPs fulfill their obligations under the regulations, they can be exempted from infringement. Such a system is called “safe harbor”. All countries keep the same idea and set the same system.

At present, on the implementation of China’s copyright law, particularly in relation to the network with the rights of communication through the information network, the existing copyright law did not play the role it should play. Author’s rights under the law were taken away by some of the Internet service providers or manufacturers of the digital content through a piece of contract, the payment were unreasonable and the authors could not receive the interests that the law gave them. And for those businessmen who kept the copyright did not put the works into distribution but to take the copyright as a tool to fight against their competitors on the market, and this made the market into even a worse order. Therefore, it is necessary to consider to develop the copyright contract law and unfair competition law for the copyright market.

4. In order to promote the international distribution of digital imagine content, as an international cooperation, (1) what is the expectation? (2) is there any possibility to build a regional framework of the common system in Asia?

A: For the international distribution of the digital imagine content, the expectations are:

— Considering the review of the content, there should be a general standard that can be

accepted by all participants;

— Considering the access to relevant content, the access of the content should be very convenient, there should be not lots of technical barriers;

— Considering the reasonable price, the practitioners in the digital imagine content industry should work out a reasonable price list that could be accepted by all the parties;

— Considering the opening and the exchanging of information, there should be an open platform for exchange information and to facilitate the exchange of information to the public;

— Considering the copyright collective organizations, it should be set up in Asia a federation for all the collective organizations, special assistance should be given to the new collective organizations in China;

— Considering a unified copyright licensing contract, it should be formulated to promote a model contract for the creators and the investors, to promote a model contract for the copyright collective organizations and the digital content users.

The possibilities to build a regional framework of the common system:

— Asian countries lay stress on the digital content industry;

— Asian countries lay stress on maintaining and protecting cultural diversity and mutual respect;

— Digital content distribution cannot be separated from the cooperation among Asian countries;

— Asian countries share the same view towards the standard of digital content between healthy and un-healthy;

— A successful cooperation in the distributions of digital content among Asian countries will help

spread the Asian culture to the world.

Issues are faced when build a regional framework of the common system in Asia:

— The creation and production of digital content involving all the different languages, culture, custom, religion, creed, etc., there may be some of the ideological barriers from the governmental administrations, it needs the mutual exchanges and cooperation in the common ground while reserving differences, removing misunderstanding, and reducing the negative impact of ideology to a minimum;

— To establish various interest groups in digital content industry, relying on the industries their own self-discipline, cooperation, and promote the digital content industry development. In this aspect, the Chinese industry-related interest

groups, some are very weak, some are not yet established, or have not yet integrated, especially for the groups of the creators, which in urgent need of support and assistance from other Asian groups;

— To promote the idea of “opening of information” and “freedom of information”, to study the possibility of a legislative guide of “digital content copyright law” in order to protect the creators while to study the possibility of a legislative guide of “digital content contract law and unfair competition law” in order to protect the investors (including the Internet content service providers), to promote Asian countries to amend their existing intellectual property law.

— To set a technique standard for digital content related hardware players, such as memory card.