



RUTGERS LAW RECORD

The Internet Journal of Rutgers School of Law | Newark
www.lawrecord.com

Volume 38

2010-2011

CHINA'S APPROACHES TO INTELLECTUAL PROPERTY INFRINGEMENT ON THE INTERNET

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INTRODUCTION

The state of intellectual property infringement jurisprudence on the Internet is rapidly changing.¹ Neither the courts nor rights holders who have relied on the legacy frameworks yet understand how to address the new market or technological landscape that the Internet is painting around them.² Search engines, auction sites, and social networks are each examples of an Online Service Provider (“OSP”). These OSP’s form the core of OSP’s with which the law in each country must contend.³ These OSP’s are of central importance because they are the loci of a great amount of infringement in both copyright and trademark in international trade.⁴ The issue is complicated because communities of people not affiliated with the OSP are often the main contributors of the infringing content.⁵ In light of recent cases in Asia, where courts have applied different methodologies and thus reached different conclusions⁶, it is crucial to understand to what degree OSP’s are liable for infringing content on their sites.

The viral rate of change presents rights holders with the overwhelming problem of taking advantage of new opportunities while trying to protect themselves in courts with traditional infringement methods.⁷ Multinational Corporations (“MNC’s”) face the special problem of having to deal with the courts in Asia adapting to the Internet in a variety of ways. Despite some influence

¹ Eric P. Schroeder, *Trademarks, The Internet, and the New Social Media: A Fresh Battleground for Old Principles*, 2009 WL 3358960 (ASPATORE), *10 (2009). Intellectual property jurisprudence is just developing in China, while changing significantly in places where the law is of older vintage.

² *Id.*

³ *See id.* at 1.

⁴ *See id.* at 10.

⁵ *See id.*

⁶ *See, e.g.*, Danny Friedmann, *Sweet Irony: Is IP Dragon Liable For Hosting IPR Infringing AdWords?*, IP Dragon, (Oct. 14, 2009), <http://ipdragon.blogspot.com/2008/01/internet-copyright-law-2006-difference.html>.

⁷ Schroeder, *supra* note 1, at 1,10.

from international agreements, rights holders win in some cases and lose in others, even on nearly identical infringement cases.⁸

Similarly, OSP's are trying to chart a course through the liability minefield as they provide services fundamental to the basic functioning of the Internet and to the growth of markets that, in turn, depend on the Internet.⁹ Throughout the ecosystem of providers, a range of stances toward infringing content can be found, from disdain coupled with heavy policing, followed by indifference without explicit notice to remove content, ending in dependence on and facilitation of infringement.¹⁰ The defensive legal tools available to OSP's, including "fair use" and "safe harbor" provisions of local law and treaties, are also not totally congruous with the structure of the Internet.¹¹ Thus, OSP's, especially those trying to honor intellectual property rights, find themselves equally in a whirlwind.¹²

The Internet poses a triple threat to the predictability of infringement law by its global reach, the participation of many jurisprudential voices, and rebalance of power in that participation. In the United States, some light has been shed on trademark infringement, at least in counterfeit goods cases.¹³ Within the European Union, cases involving the same infringing content reach differing outcomes from the US and from each other.¹⁴

Most notably however, the economic rise of China has raised many questions in light of its very different legal, cultural and economic traditions and its increasing global importance. There is strong evidence that key Chinese OSP's like Baidu and Yahoo China may have been born of MP3 infringement and continue to depend on it.¹⁵ Much attention has been given to explaining the opposing outcomes reached in the very similar cases of music rights holders' loss against Baidu and the same rights holders win versus Yahoo China.¹⁶ The explanation's importance cannot be underestimated for rights holders seeking to enter or survive in Chinese markets.¹⁷

This note explores the nature of the disparate case outcomes involving OSP's in China by comparing the strategies of several important OSP's, as well as the market and governmental zones in which they operate in the context of several important copyright cases in China. Paying special attention to China's increasingly important role in international markets, this note suggests that predicting or explaining legal outcomes behind its translucent legal wall is more uncertain than in

⁸ The IPKat, *High Court: L'Oréal v eBay – eBay Wins Again?*, May 22, 2009, http://ipkitten.blogspot.com/2009/05/breaking-news-uk-high-court-loreal-vs_22.html.

⁹ See Schroeder, *supra* note 1, at 1. It may be fair to say that most every market's growth depends increasingly on the Internet's growth.

¹⁰ Go East Entm't Co. Ltd. v. Beijing Alibaba Info. and Tech. Co., Ltd., *infra* note 138 and related discussion; Schroeder, *supra* note 1, at 7 (eBay removed listings after notice of counterfeit goods).

¹¹ Lynda J. Oswald, *International Issues in Secondary Liability for Intellectual Property Rights Infringement*, 45 AM. BUS. L.J. 247, 259 (2008).

¹² See The IPKat, *supra* note 8.

¹³ See Schroeder, *supra* note 1, at 7.

¹⁴ See Friedmann *supra* note 6; Schroeder, *supra* note 1.

¹⁵ Shane Farley, *Questioning Baidu's SEC Filings*, Seeking Alpha, Sep. 10, 2009, <http://seekingalpha.com/article/160845-questioning-baidu-s-sec-filings>.

¹⁶ See e.g., Danny Friedmann, *Internet Copyright Law 2006 Difference Between Winning (Baidu) and Losing (Yahoo China)?*, IP Dragon, January, 1, 2008, <http://ipdragon.blogspot.com/2008/01/internet-copyright-law-2006-difference.html>.

¹⁷ Maths, *IFPI Wrongly Blames Chinese Law for Baidu Loss, but Wins Yahoo Case*, Music 2.0, December 22, 2007, <http://www.music2dot0.com/archives/95>.

other jurisdictions. Though a unified analysis is impossible, this note attempts some synthesis among the cases. First, it argues that safe-harbor statutes do have a material effect on outcomes. Second, the parties' good faith effort to cooperate with infringement laws and each other is the most decisive factor in winning the cases. Finally, this note suggests that trade protectionism may effect the outcomes to some degree, and will continue as the Internet forces a change of business models which MNC's depend upon, and as world economic power rebalances.

Part I briefly describes the state of Internet technologies and the law relating to infringement focusing on the development of Chinese intellectual property law. Part II discusses copyright cases by large music rights holders against Baidu and Yahoo China. Part III is a conclusion.

BACKGROUND

A. The Technologies

1. *The Internet*

From its humble beginnings just forty years ago in 1969 with only two computers connected together between university based research projects, over one very slow connection, the Internet has revolutionized the way people live.¹⁸ The Internet itself is no more than a blank slate upon which individuals may communicate any type of information to each other, while maintaining full control of their own individual network, a so-called "open architecture" network.¹⁹ Since 1991, and certainly after the expansion of the Internet beyond universities in 1996, the amount of content on the web has exploded.²⁰

2. *Search Engines*

Having lots of data available is a blessing, but its scattered nature is a bane, and thus the need to search the data is more of a problem than creating the data.²¹ Modern search theory and technology began at Cornell and Harvard with Gerard Salton's development of the SMART information retrieval system and his watershed book, "A Theory of Indexing."²² Search engines are comprised of several parts.²³ First, programs called "spiders" crawl across the web gathering data about links and the text, images, video, audio, and other information they represent.²⁴ Second, they index the information gathered.²⁵ Finally, they give the user an interface to perform searches and rank the results.²⁶

¹⁸ BARRY M. LEINER ET AL., *A Brief History of the Internet*, <http://www.isoc.org/internet/history/brief.shtml>

¹⁹ *Id.*

²⁰ *See id.*

²¹ Aaron Wall, *History of Search Engines: From 1945 to Google 2007*, <http://www.searchenginehistory.com> (last visited Nov. 22, 2009).

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

While many search engines have come and gone since the first one in 1990,²⁷ Google and Yahoo are the most sophisticated and have the most market share today.²⁸ All of the currently popular search engines generate revenue from selling advertisements rather than charging users a flat fee or a per search fee common on other information search providers.²⁹ These advertising models are quite sophisticated and allow customers to manipulate link relevancy so that their preferred links appear towards the top of result lists.³⁰ While Google has a lead over Yahoo in the United States as of the second quarter of 2010, it is not the market leader everywhere, particularly in China where Google is second to Baidu, with all others trailing far behind.³¹

Both Google and Yahoo technologies mediate between the user and the search data, but other methodologies are being developed and deployed which take advantage of decentralized cataloguing and indexing, eliminating the “person in the middle.”³² Examples of these increasing popular technologies are “social bookmarking” sites like “del.icio.us,” user ranking systems like digg.com, and feed searches from other social networking frameworks like “Twitter” and “Facebook.”³³ While the neutral purpose of search is to organize and make information accessible, in order to profit, search engine providers are now going beyond passive searching into areas such as email, productivity software, and direct facilitation of commerce.³⁴

Search engines can be held indirectly liable for the intellectual property infringement of sites to which they link.³⁵ China recognizes a form of contributory liability for OSP’s.³⁶ In addition to recognizing liabilities, China also carves out defenses to contributory liability through “safe-harbor” provisions.³⁷ In order to be within the safe harbor, search engines must create some version of a “takedown” procedure that allows rights claimants to verify their intellectual property rights and give the search engine notice of infringing links.³⁸ Lastly, the search engines must either remove the links or state why they will not, and in some cases take further action against repeat offenders.³⁹

B. Chinese IP Law and Safe Harbor

1. History

²⁷ *Id.* “Archie” was the first search engine based on filenames rather than document text.

²⁸ *See id.*

²⁹ *See id.*

³⁰ *Id.* Links that appear higher in the list are chosen 95% of the time. *Id.*

³¹ *Baidu Tookup 70% Revenue of China Search Market in Q2, 2010*, Analysys International, Sep. 10, 2010, available at english.analysys.com.cn/article.php?aid=90910.

³² *See Wall, supra* note 21.

³³ *See id.*

³⁴ *Id.*

³⁵ *See Go East Entm’t Co. Ltd. v. Beijing Alibaba Info. and Tech. Co., Ltd.*, *infra* note 138 and related discussion.

³⁶ *See e.g. Go East Entm’t, infra* note 157.

³⁷ *Id.*

³⁸ For example, Google uses a process in accordance with the Digital Millennium Copyright Act, that allows notification, counter notification, and publishing of the notice to a third-party which serves to make others aware of the infringement. *Digital Millennium Copyright Act*, <http://www.google.com/dmca.html#notification>.

³⁹ *Id.* For example, Google may terminate user accounts associated with repeat offenders for other services it offers that do require user registration.

China had virtually no formalized intellectual property law until 1898.⁴⁰ During the late Qing dynasty period of the 1850's through 1890's, a few patents lasting ten to fifteen years were granted for important business ventures.⁴¹ In 1898, the Qing emperor promulgated the first widely applicable patent law.⁴² This was followed in 1904 by the "Trial Regulation of Registration of Trademark," which was drafted by Robert Hart, an Englishman working as the Inspector-General of the Imperial Customs and Tariffs office of the Qing emperor.⁴³ In 1910, the copyright law was also imported from abroad, mainly from Japan and Germany.⁴⁴ Because of the upheaval surrounding the initial overthrow of the emperor in 1911, these new intellectual property laws were neither widely implemented nor enforced.⁴⁵

During the unstable period from 1911 until the founding of the People's Republic of China in 1949, other attempts at intellectual property laws were promulgated, but their practical effect was limited by the constant armed conflict between the Kuomintang and the Communists.⁴⁶ During the formation and early Communist period from 1949 to 1979, intellectual property laws were seen as antithetical and unnecessary to a socialist economy, and thus not even considered.⁴⁷ After the death of Mao Zedong, Deng Xiaoping undertook to leverage the improving Chinese industrial and economic situation by beginning a policy to open up the Chinese economy to court foreign investment.⁴⁸

In 1980, China joined the World Intellectual Property Office, inaugurating their entrance into international intellectual property law.⁴⁹ Domestically, China first created the Trademark Law in 1982, followed by the Patent Law in 1984, and finally the Copyright Law in 1990.⁵⁰ Unlike previous attempts at instituting intellectual property law in China, these basic laws and their interaction with treaties substantially took root by the turn of the century.⁵¹

2. *Current Law*

Today, the Trademark, Patent, and Copyright laws passed during the 1980's still form the backbone of Chinese intellectual property law.⁵² The domestic laws themselves were amended between 2000 and 2001 to bring them into line with judicial experience, technological advances and China's membership obligations to the World Trade Organization ("WTO").⁵³ The basic IP laws

⁴⁰ Yinliang Liu, *An Introduction to the Intellectual Property Laws of China*, China Univ. of Pol. Sci. and Law at Beijing, June 12, 2009, at 4 (unpublished presentation materials, on file with author).

⁴¹ *See id.*

⁴² Deming Liu, *Now the Wolf Has Indeed Come! Perspective on the Patent Protection of Biotechnology Inventions in China*, 53 AM. J. COMP. L. 207, 210 (2005). The "Regulations to Promote Industrial Technology" existed only two months after being enacted by Emperor Guang Xui in 1898 during the short-lived Bourgeois Democratic Reform Movement.

⁴³ Liu, *supra* note 40, at 5.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ Deli Yang, *The Development of Intellectual Property in China*, World Patent Information, Volume 25, Issue 2, June 2003, 131, 134.

⁴⁷ *Id.*

⁴⁸ *See id.*

⁴⁹ *See id.* at 6.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.* at 7.

⁵³ *See id.*

have been amended in conformance with international treaties, particularly Trade Related aspects of Intellectual Property Rights (“TRIPS”) agreement under the WTO.⁵⁴

In quick succession during the 1990’s, China became a signatory on most of the important international treaties on intellectual property, including the WTO/TRIPS agreement in 2001.⁵⁵ Finally, in 2007, it entered both the WIPO Copyright Treaty (“WCT”) and the WIPO Performances and Phonograms Treaty (“WPPT”).⁵⁶ According to China’s General Principles of Civil Law and the Civil Procedure Law (2007), provisions of treaties into which it has entered override any corresponding provisions in domestic law with which they conflict.⁵⁷ Thus, intellectual property law treaties are the supreme law of the land, except where China may have reserved a right under a treaty.⁵⁸

In addition to the statutory laws, China’s highest court, the Supreme People’s Court (“SPC”), and various ministries⁵⁹ that administer intellectual property, promulgate interpretations given weight by lower courts.⁶⁰ In 2004, the SPC clarified the application of copyright law online.⁶¹ Notably, in 2006, the State Council promulgated the Regulation on Protection of the Right to Network Dissemination of Information (“Internet Regulation”) that attempts to explain the application of copyright law in Internet cases.⁶² However, because China is a civil law country, the rulings of the State Council do not displace rulings of the People’s Congress.⁶³ Most initial intellectual property disputes begin in an administrative agency but can be appealed to a local People’s Court.⁶⁴ If there is an imminent threat to property rights, courts will issue an injunction against the purported

⁵⁴ *Id.* at 8. Some examples include: Protection of New Varieties of Plants, Protection of Software, Protection of Layout-Designs of Integrated Circuits, Customs Protection of Intellectual Property Rights and several others. In addition, laws were passed to regulate the Collective Management of Copyright (2005) and Law for Countering Unfair Competition (1993). *Id.*

⁵⁵ *Id.* at 12. China entered the following treaties or conventions in quick succession: Paris Convention for the Protection of Industrial Property (1985); Madrid Agreement Concerning the International Registration of Marks (1989); Bern Convention for the Protection of Literary and Artistic Works (1992); Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms (1993); Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks (1994); Patent Cooperation Treaty (1994); Budapest Treaty on the International Recognition of the Deposit of Micro-organisms for the Purposes of Patent Procedure (1995); Locarno Agreement Establishing an International Classification for Industrial Designs (1996); Strasbourg Agreement Concerning International Patent Classification (1997); International Convention for the Protection of New Varieties of Plants (1999); WTO Trade Related Aspects of Intellectual Property Rights (2001). *Id.* 12-14.

⁵⁶ *Id.* at 14.

⁵⁷ *Id.* at 10.

⁵⁸ *Id.*

⁵⁹ *Id.* at 9. The administration of IP is handled by the following offices: State Intellectual Property Office (SIPO) for Patents; State Trademark Office (STMO); State Copyright Administration; Ministry of Agriculture and State Forestry Administration for new plant varieties; Ministry of Commerce; State Administration of Customs.

⁶⁰ *See id.* at 8.

⁶¹ *Interpretation by the Supreme People's Court of Several Issues Relating to Application of Law to Trial of Cases of Dispute over Copyright on Computer Network*, Jan. 7, 2004 (China), available at http://www.cpahklt.com/Archives/Interpretation_of_Dispute_over_Copyright_on_Computer_Network.html.

⁶² *Regulation on Protection of the Right to Network Dissemination of Information*, Order No. 468 of the State Council, July 1, 2006, available at <http://www.chinaitlaw.org/?p1=print&p2=060717003346>. (Also referred to as the “Provisions of Copyright Protection Regarding Transmissions Through Digital Networks”). Friedmann, *supra* note 16.

⁶³ Maths, *supra* note 17.

⁶⁴ Liu, *supra* note 40, at 16.

infringer.⁶⁵ Similar to U.S. law, both civil damages and criminal damages are possible under the law.⁶⁶ Finally, foreign nationals from countries with which China has agreements with will be treated as domestic nationals for purposes of application and enforcement of IP rights.⁶⁷

CONTRIBUTORY INFRINGEMENT IN CHINA

A. Copyright Cases in China

1. *IFPI v. Baidu*

a. Intermediate People's Court

In November of 2006, the Beijing No. 1 Intermediate People's Court decided against Universal Music, Inc. via its industry rights protection organization, the International Federation of the Phonographic Industry ("IFPI"),⁶⁸ in favor of Baidu, a popular Chinese search engine,⁶⁹ on a direct copyright infringement theory.⁷⁰ The court held that Baidu had no subjective fault for providing streaming or downloading of infringing music files.⁷¹ Baidu sufficiently performed its legal duty to IFPI by taking down infringing links when specifically made aware of them.⁷² Moreover, the courts found that the burden fell on the right holders to police the infringement. However, they failed to perform their duty to give adequate notice of infringing links and misused their litigation rights.⁷³

According to the Intermediate Court, the plaintiff chose the wrong defendant.⁷⁴ The plaintiff should have pursued the owners of the websites who hosted the infringing titles.⁷⁵ Baidu had no ability to distinguish between legal and illegal files, and had no responsibility to find out which files were infringing according to the court.⁷⁶ The court cautioned that if the plaintiff's claim was established, it would result in the destruction of the whole search engine industry and hinder the development of science, technology, and the progress of human civilization.⁷⁷

IFPI sued Baidu for infringing its exclusive right to communicate its musical works via public information networks ("Internet Right") under the Copyright Law of China ("CLC").⁷⁸ Baidu

⁶⁵ *Id.*

⁶⁶ *Id.* at 16-17.

⁶⁷ *Id.*

⁶⁸ *IFPI's Mission*, ifpi.org, http://www.ifpi.org/content/section_about/index.html (last visited on Jan. 20, 2010).

⁶⁹ *Baidu.com*, <http://www.baidu.com>. Baidu was the first Chinese company to be listed on the NASDAQ-100.

Friedmann, *supra* note 16.

⁷⁰ *Gold Label Entm't Ltd. v. Beijing Baidu Network Info. Scien-tech Co., Ltd.*, Unpublished English translation by IFPI legal team on file with author (Beijing No. 1 Inter. People's Ct., Nov. 17, 2006).

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.* "The Article 41 of the Chinese Copyright Law provides that a producer of sound recordings or video recordings shall have the right to authorize others to reproduce, distribute, rent and communicate to the public via information networks such sound recordings or video recordings and the right to obtain remuneration therefore. The right of communication of information on networks was a new right in the 2001 amendment of the Chinese Copyright Law. The

allegedly infringed by providing streaming and download links to MP3 files containing works copyrighted by Universal, Inc.⁷⁹ A total of sixteen songs, all performed in a Chinese language by Chinese artists, were allegedly infringed.⁸⁰ IFPI asked the court to force Baidu to stop the streaming or downloading of these songs, make a public apology to IFPI, to compensate IFPI thirty thousand dollars, and pay all litigation costs.⁸¹

IFPI argued that Baidu provided the necessary link between users and illegal downloading or streaming of music files.⁸² Baidu was necessary because it created the only searchable list of available songs on hosting websites that did not have a “music channel” of their own.⁸³ IFPI submitted statistics showing that more than half of the websites to which Baidu linked did not have a “music channel.”⁸⁴ Evidence from the China Internet Information Center and news reports were presented by IFPI showing that Baidu is primarily used as a music search service.⁸⁵ Further, Baidu was accused of infringement by making money from advertisers eager to reach users who used the site for MP3 search.⁸⁶ IFPI even inferred that Baidu controlled, or in some way was connected to, the servers actually hosting the illegal MP3 files.⁸⁷

Baidu countered that it is merely a neutral OSP using a common technique to redirect users to files on other sites.⁸⁸ It further argued that its search results were automatically generated and that it did not do any identification, selection or modification of the results.⁸⁹ Baidu also claimed that it was not intentionally or negligently infringing. On the contrary, it provided a “Right Declamation” process to protect the property rights of owners by taking down infringing links when they are informed.⁹⁰ Finally, Baidu petitioned the court to recognize it as the leading domestic search engine and very valuable to the Chinese people.⁹¹

The key issue in the case was whether Baidu’s MP3 search service infringed IFPI’s Internet Right.⁹² Because the relevant acts took place in 2005, the court applied CLC and the Interpretations of the SPC on Application of Laws for Trying Cases Relating to Internet Copyright Disputes (“SPC Interpretations”).⁹³ The court easily found that Universal Music was the copyright owner of the titles.⁹⁴ Continuing the analysis, the court explored four more elements: (1) defendant’s subjective

Article 10 (12) provides that the right of communication of information on networks, that is, the right to communicate to the public a work, by wire or wireless means in such a way that members of the public may access these works from a place and at a time individually chosen by them.” *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.* Evidence numbers 5 and 6.

⁸⁴ *Id.* Evidence number 9.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* Evidence 10-16. The redirection is done by sending the user’s browser program a special response know as an “HTTP 302” response which, in turn, causes the user’s browser to access a target file. Thus, Baidu is not in the middle between the user and target file. *See id.* Evidence 4 and 21.

⁸⁹ *Id.* Evidence 8.

⁹⁰ *Id.* Evidence 24.

⁹¹ *Id.* Evidence 20-21.

⁹² *Id.*

⁹³ *Id.*; Gold Label Entm’t Ltd. v. Beijing Baidu Network Info. Scien-tech Co., Ltd., *supra* note 70.

⁹⁴ *Id.*

fault; (2) whether “streaming” or “downloading” is infringing; (3) availability and sufficiency of Baidu’s infringement prevention methods; and (4) availability and sufficiency of plaintiff’s technological prevention methods.⁹⁵ The court rejected most of IFPI’s evidence as irrelevant to the question presented.⁹⁶ Only Baidu’s evidence bearing on its value as a search engine to the people of China was rejected as irrelevant.⁹⁷

On the subjective fault element, the court held that Baidu lacked fault because it had no control over the content to which it links.⁹⁸ The court reasoned that a search engine cannot predict, distinguish, or control the content uploaded by others on other hosts.⁹⁹ Secondly, Baidu did not link to any forbidden content on sites that it indexed.¹⁰⁰ With respect to streaming the music, the court found that because music cannot be visually sensed, streaming serves as the only way to display the results to the user.¹⁰¹ Even though a pop-up box prompted that music would be downloaded from “mp3.baidu.com,” the court found that Baidu was not liable as an intermediary because the music actually downloaded from a site not controlled by Baidu.¹⁰²

Secondly, the court held that Baidu’s takedown procedure was sufficient to fulfill any duties to remove content for which it had notice.¹⁰³ Notice must be given that specifically lists which links are infringing. A general statement of infringement of a certain song is not enough.¹⁰⁴ In this case, the IFPI failed to carry out its burden to notify Baidu specifically.¹⁰⁵ IFPI’s lawyer sent a letter to Baidu requesting them to stop the infringement and asked for compensation, but did not provide the name of the rights owner or the addresses of the infringing websites.¹⁰⁶ Most importantly, the court found that Baidu tried to cooperate by asking for relevant documents and a list of URL’s, but the IFPI Asian Regional Office did not respond.¹⁰⁷

On the third and fourth elements, rights holders have the burden of protecting their copyrights on the Internet, including the use of unalterable technical measures enforced by Chinese law.¹⁰⁸ The court reasoned that, although it is true that the right owner’s cost to protect their rights are increased on the Internet, they can find infringement easily using their own search engine’s capabilities.¹⁰⁹ Further, a new balance must be struck in the judicial protection of rights because of the progress of science, technology, and the demand of social culture, in comparison with the traditional way to transmit works.¹¹⁰ The court reiterated that rights holders can use the existing

⁹⁵ *Id.*

⁹⁶ *Id.* The court rejected Evidence numbers 8, 10, 16, 17, 18, 19, 20, 21 and 22.

⁹⁷ *Id.* The court found that Evidence 20 to 23 and 25 are irrelevant.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *See id.*

¹⁰³ *Id.*

¹⁰⁴ *See id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *See id.*

legal framework providing for technical protection measures, which will carry civil penalties against any person tampering with the measures.¹¹¹

In addition, IFPI strongly inferred that Baidu might actually run, or be otherwise connected with the sites actually hosting the music files.¹¹² IFPI contended that because many of the hosting sites did not have any search or listing capability of their own, and that the download prompt box on Baidu had “mp3.baidu.com” in its URL text, it implied that Baidu was actually behind these illicit sites.¹¹³ The court answered that IFPI was flatly wrong and that it cited no credible evidence to connect Baidu to the hosting of the illegal files.¹¹⁴

b. Higher People’s Court

On appeal in August 2007, the Beijing Higher People’s Court (“HPC”) upheld all the lower courts rulings, but added that Baidu could potentially be held contributorily liable, though it could not be held directly liable for infringement.¹¹⁵ IFPI added an argument for contributory liability on appeal and also claimed that the lower court had committed error on nearly all its holdings.¹¹⁶ The court reasoned that through its search linking, Baidu provides facilitating conditions for the communication of infringing recordings and makes it easy for users to stream and download implicated infringing recordings, thereby expanding and extending possible infringement.¹¹⁷

In holding that Baidu could not be held directly liable for infringement, the court stated that the infringing act consists solely of providing works by uploading.¹¹⁸ Baidu was powerless to control the music file hosting sites, which were themselves liable, and did not use them as external storage devices, as IFPI had alleged.¹¹⁹ The court found it important that, when a file on a linked third party website was deleted or the server was shut down, a user would be unable to obtain the file from the third party website by clicking the link on Baidu’s web page.¹²⁰

However, for the purposes of liability, Baidu only facilitates because the creation of file lists does not directly involve use of the copyrights, and the listing is essentially a linking service.¹²¹ To incur liability for facilitation according to the SPC Interpretations, the OSP must be “well aware” of the infringement and not take steps to remove the data.¹²² In this case, neither generating the file

¹¹¹ *Id.*

¹¹² *See id.*

¹¹³ *See id.*

¹¹⁴ *Id.*

¹¹⁵ Universal Music Ltd. v. Beijing Baidu Network Info. Scien-tech Co., Ltd., Unpublished English translation by IFPI legal team on file with author (Beijing Higher People’s Ct., Dec. 20, 2007).

¹¹⁶ *Id.* IFPI argued that the lower court erred by finding no infringement of its Internet Right, no subjective fault, insufficient notice, that MP3 search service was different from a normal search service and would hinder the progress of human civilization if allowed to persist, and that use of technical measures was a pre-condition to finding infringement. IFPI also tried to include evidence of Baidu’s “music box” service, but had to concede that the service did not exist during the trial phase. *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.* The court also noted that “similar means” to uploading could be used. *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*; Interpretation by the Supreme People's Court of Several Issues Relating to Application of Law to Trial of Cases of Dispute over Copyright on Computer Network, *supra* note 61.

lists, nor IFPI's attorney letter made Baidu "well aware" of the infringement.¹²³ Thus, the court held that Baidu did not continue to assist the infringement after notice, and in fact, Baidu had taken down all the links which were provided to it between the trial and the appeal.¹²⁴

2. *IFPI v. Yahoo China*

a. Intermediate People's Court

In April 2007, the Beijing No. 2 Intermediate People's Court found Yahoo China ("YC") contributorily liable for infringing the "Internet Right" of several Chinese language musical works linked to by its MP3 search service.¹²⁵ The IFPI, on behalf of Go East HK, sued YC, who was owned by Alibaba, a Chinese company.¹²⁶ While the court found that YC had not directly infringed, the search engine was liable for being "well aware" that it facilitated ongoing infringement.¹²⁷ Importantly, the court broadly interpreted a new regulation on OSP liability¹²⁸ to not require even general notice of infringement, as long as the OSP otherwise should have known of illegal links.¹²⁹

IFPI argued that YC had both directly and indirectly infringed the "Internet Right" in several songs held by GO East, one its Hong Kong based rights holding members.¹³⁰ IFPI demanded a public apology and just over seventy-one thousand dollars in damages and fees.¹³¹ Without authorization, YC's "Try-Listen" service directly infringed by allowing download and streaming from third-party servers of music files produced by the plaintiff.¹³² Yahoo China countered that it was a passive search and linking service because all "Try-Listen" links were generated automatically and all file requests were redirected.¹³³ In addition, IFPI claimed direct infringement because YC activities went beyond a search engine by actively collecting information about the tracks and categorizing it, making the illegal downloads easier for users.¹³⁴

Yahoo China responded that none of the music files were directly inspected to obtain artist or genre information; rather, the data was gleaned from user search terms and interactions.¹³⁵ Further, YC used infringing third-party resources as their own by providing the "Music Box" service, which allowed users to create publicly shared lists of links to music files that other users

¹²³ *Id.*

¹²⁴ *See id.* (The court also rejected IFPI's argument that the Intermediate Court had held the use of a technical measure to be a pre-requisite to liability).

¹²⁵ *Go East Entm't Co. Ltd. v. Beijing Alibaba Info. and Tech. Co., Ltd.*, Unpublished English translation by IFPI legal team on file with author (Beijing No. 2 Inter. People's Ct., Apr. 24, 2007).

¹²⁶ *Id.*

¹²⁷ *See id.*

¹²⁸ *Regulation on Protection of the Right to Network Dissemination of Information*, *supra* note 62. The regulation entered into force on July 1, 2006, shortly before the defendant was alleged to have not taken down infringing links. *See Go East Entm't Co. Ltd. v. Beijing Alibaba Info. and Tech. Co., Ltd.*, *supra* note 125.

¹²⁹ *See Go East Entm't Co. Ltd. v. Beijing Alibaba Info. and Tech. Co., Ltd.*, *supra* note 125.

¹³⁰ *Id.*

¹³¹ *See id.*

¹³² *Id.*

¹³³ *Id.* The redirected requests point to files on a server which YC argues is not under its control, neither does YC take any active steps to prepare the list of links such as categorizing them by genre.

¹³⁴ *Id.* (IFPI also tried to show that YC was a music search site, rather than regular search engine, by producing evidence that YC's site was different from the Google and Yahoo English sites).

¹³⁵ *See id.*

could play without leaving the website.¹³⁶ Similarly, YC retorted that “Music Box” just allowed users to collect links, and that Baidu had the same service.¹³⁷

Yahoo China had also induced and facilitated infringement when it failed to remove all the infringing content of which it was aware, according to IFPI.¹³⁸ In a letter on July 4th, 2006, IFPI asked YC to remove all links to eighteen tracks.¹³⁹ In response to IFPI’s first letter asking for removal of all links related to all its members, YC did not directly respond to the request. However, YC said that it would soon take technical measures to prevent users from foreign countries from using YC’s music search.¹⁴⁰ In addition to demanding removal of all possible links, IFPI’s next letter provided infringing URL’s.¹⁴¹ Yahoo China responded by asking for a power of attorney.¹⁴² Upon receiving the power of attorney, YC asked for an electronic version of the URL’s in the previous letter.¹⁴³ Yahoo China responded by beginning to manually remove links; however, only the links provided in the URL’s could be removed.¹⁴⁴ Finally, IFPI asked again for removal of, not only the links provided by the URL’s, but all links that were related to the eighteen tracks at issue.¹⁴⁵ Yahoo China claimed to have already completed the task.¹⁴⁶

The Court held that on the issue of direct infringement, YC was not liable.¹⁴⁷ The Court placed direct liability on the third-party websites only.¹⁴⁸ The court also ruled that the links and ability to stream redirected files on the site did not, by themselves, constitute control over the user.¹⁴⁹ The Court accepted YC’s argument that the purpose of lyrics and other artist information in the try-listening window was to make it convenient for relevant holders to claim their rights.¹⁵⁰

However, the Court held that YC had subjective defaults by failing to remove all links to IFPI members’ music and in turn helping others infringe “Internet Rights”.¹⁵¹ Under the new Internet Regulation, an OSP who provides linking services shall not be liable if the link is disconnected from an infringing work after the receipt of notice from a right owner, but is jointly liable for infringement if aware of, or ought to be aware, that the linked work is an infringement.¹⁵² Thus, according to the Court’s broad interpretation, an OSP can be liable if it fails to take down infringing content after notice from a right owner, or even if it is not given notice, but otherwise knows of infringement.¹⁵³

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *See id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *See id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *See id.*

¹⁵⁰ *See id.*

¹⁵¹ *See id.*

¹⁵² *Id.*

¹⁵³ *See id.*

It is unclear whether the Intermediate Court's holding was based on proper notice or whether YC had knowledge despite lack of proper notice.¹⁵⁴ However, the Court focused on YC's bad faith in its responses to IFPI's demand letters.¹⁵⁵ Moreover, the Court found that YC had not even removed all the links for which it was given URL's.¹⁵⁶ In its core holding on contributory liability, the Court reasoned that upon receiving IFPI's letters describing their Internet Right and song information, YC was made legally aware of infringement.¹⁵⁷ Because YC was aware and continued facilitation, the Court ordered removal of the remaining links and payment to GO East HK of about \$4,000 in damages and costs.¹⁵⁸

b. Higher People's Court

On appeal, the Beijing Higher People's Court upheld the entire judgment of the lower court and rejected all the parties' grounds for appeal.¹⁵⁹ First, IFPI contended that the first instance award was too low and prejudicial to GO East.¹⁶⁰ Second, it asked again that YC be directly liable because it was purely a music search service that guided the download process and categorized search data.¹⁶¹ Lastly, it asked for another twenty-six tracks to be included in the judgment.¹⁶²

For its part, YC argued that the trial court was unreasonable when it held that proper notice need not include the URLs of all allegedly infringing links.¹⁶³ The court erred in its interpretation of the notice requirement because it did not take into account the legitimate interests of third-parties and was not in accord with copyright law generally.¹⁶⁴ Second, irrespective of notice, the trial court's interpretation of "know or ought to know" was in error.¹⁶⁵ The correct interpretation according to YC is that "the network service provider is able to take appropriate measures based on such knowledge."¹⁶⁶ Yahoo China cautioned that if this interpretation was accepted it would be a "disaster" for the search engine industry.¹⁶⁷

The Higher Court upheld the lower court rulings on inducement and facilitation of infringement, and rejected direct infringement, but further elaborated the test for knowledge and subjective fault.¹⁶⁸ Under the Internet Regulation, if an OSP should foresee infringement based on its own competence, or what an average OSP in the industry should foresee, it has subject fault.¹⁶⁹ In this case, because YC is a member of the search engine industry with a profitable music search

¹⁵⁴ *Id.* Yahoo China later appealed on the basis that the Intermediate Court had held that proper notice was given. *See* Go East Entm't Co. Ltd. v. Beijing Alibaba Info. and Tech. Co., Ltd., *infra* note 159.

¹⁵⁵ *See id.*

¹⁵⁶ *Id.* The court found that links were removed for only fifteen of the eighteen tracks for which URL's were given. *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ Go East Entm't Co. Ltd. v. Beijing Alibaba Info. and Tech. Co., Ltd., Unpublished English translation by IFPI legal team on file with author (Beijing Higher People's Ct., Dec. 20, 2007).

¹⁶⁰ *Id.*

¹⁶¹ *See id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *See id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *See id.* The higher court also upheld the damage amount and rejected IFPI's request to include the additional twenty-six tracks. *Id.*

¹⁶⁹ *See id.* The court based its conclusion on Article 23. *Supra* note 124 and related discussion.

service, it should foresee, and thus it knows or should know, the legal status of sound recordings that it searches and links.¹⁷⁰ Further, after being notified in several letters, YC should especially be aware of the infringement of the twenty-six litigated tracks.¹⁷¹ Because YC only deleted the links it had received, it was held contributorily liable for not performing its legal duties.¹⁷²

Finally, the court rejected YC's contention that the lower court interpretation of proper notice would be "disaster" for the search engine industry.¹⁷³ In fact, the Court clarified that the Intermediate Court did not hold that proper notice under Article 14 of the Regulation had been given at all.¹⁷⁴ Impliedly, the lower court holding was solely on the issue of knowledge notwithstanding notice. Thus, innocent OSPs would not be liable when they had neither notice nor otherwise had knowledge of infringement.¹⁷⁵

B. Analysis

Explanations for the opposite results the HPC reached on the same day in the Baidu and Yahoo China cases range from optimistically simple¹⁷⁶ to extremely cynical.¹⁷⁷ The first version of the story, favored by IFPI, is that the 2006 Internet Regulations worked a change in the law applicable to the YC case, but not the Baidu case.¹⁷⁸ It is true that the YC court applied the Internet Regulation to acts occurring after July 2006, but the Baidu court did not for acts before that time.¹⁷⁹ Similarly, the disjunctive language of the Internet Regulation appears to support the YC court's interpretation that proper notice does not automatically provide safe-harbor.¹⁸⁰ Yet, the use of the foreseeability standard to determine knowledge is more tenuous.¹⁸¹ In broad terms, the Internet Regulation and the YC court's mostly fair interpretation are on shaky ground because they seem to swallow, or are at least at odds with, the safe-harbor framework of the CLC and the SC Interpretations.¹⁸²

However, any contention that the ruling set a standard under the new law seems a bit hyperbolic, and perhaps is a misunderstanding of the civil law system in China.¹⁸³ This conclusion has strong critics, including prominent Chinese lawyers.¹⁸⁴ Primarily, the misunderstanding is that

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *See id.*

¹⁷⁵ *See id.*

¹⁷⁶ *See Beijing Court Confirms Yahoo China's Music Service Violates Copyright*, ifpi.org, http://www.ifpi.org/content/section_news/20071220.html (last visited on Jan.24, 2010).

¹⁷⁷ *See* Nat Torkington, *Yahoo! Spanked Over Copyright in China*, O'Reilly Radar, <http://radar.oreilly.com/archives/2007/12/yahoo-spanked-o.html> (last visited on Jan. 24, 2010).

¹⁷⁸ *See Beijing Court Confirms Yahoo China's Music Service Violates Copyright*, *supra* note 176.

¹⁷⁹ *Go East Entm't Co. Ltd. v. Beijing Alibaba Info. and Tech. Co., Ltd.*, *supra* note 159; *Interpretation by the Supreme People's Court of Several Issues Relating to Application of Law to Trial of Cases of Dispute over Copyright on Computer Network*, *supra* note 61. However, the *Baidu* court did apply article 3 of the SPC Interpretation which covers the same issue.

¹⁸⁰ *Id.*

¹⁸¹ *See* *Go East Entm't Co. Ltd. v. Beijing Alibaba Info. and Tech. Co., Ltd.*, *supra* note 159.

¹⁸² Maths, *supra* note 17.

¹⁸³ *Id.* Maths goes very far indeed, calling IFPI Chairman John Kennedy's explanation "ignorant" or at worst "misinformation". IFPI characterized the holding as a "landmark" which "set the standard for Internet companies through the country," and as "extremely significant" in clarifying copyright rules.

¹⁸⁴ *Id.*

the State Council's regulation does not supersede the higher level Copyright Law made by the NPC.¹⁸⁵ Likely also, Article 3 of the SPC Interpretation covering safe-harbor, which the Baidu court applied, should be of the same potency as the Internet Regulation in future cases.¹⁸⁶ Most importantly, as a civil law system, the reasoning and interpretation in these cases bind neither all Chinese courts, nor even all Beijing courts.¹⁸⁷

Litigation strategy and tactics were most likely other deciding factors in the various outcomes.¹⁸⁸ Some critics accused IFPI of missing a real opportunity to stem infringement in the Baidu case because they are unfamiliar with Chinese laws.¹⁸⁹ Accordingly, IFPI should have used a less aggressive strategy by arguing for indirect infringement, rather than wholesale direct infringement.¹⁹⁰ IFPI missed an opportunity to hold Baidu accountable when accusing it of being connected to the infringing servers without substantial evidence.¹⁹¹

However, the level of good faith the parties pursued with the law and each other was perhaps the most important factor bearing on the results.¹⁹² Yahoo's refusal to remove all the infringing links of which it was notified was the major difference between the two cases.¹⁹³ In addition, unlike Baidu, YC showed bad faith by using frustration tactics in its responses and by making dubious arguments about its intentions.¹⁹⁴ Lastly, IFPI won in the case where YC walked away from negotiations, but lost in the case where it turned its back on a deal.¹⁹⁵

Yahoo China took additional actions that arguably induced, rather than merely facilitated, infringement which were not at issue in Baidu.¹⁹⁶ First, YC provided a "Music Box" function that encouraged users to create playlists of infringing songs which they, and others who liked similar music, could play without leaving the site.¹⁹⁷ Baidu also had a similar function, but which was not at issue in that case.¹⁹⁸ Second, Yahoo also categorized its search results by artists and genre to make them more useable, though it suspiciously claims to have not done so by inspecting the files themselves.¹⁹⁹ On the whole, IFPI had more evidence of infringement in the YC case because of the additional services which most likely encouraged users to come back to the site and even create their own set of illegal links.

¹⁸⁵ *Id.*

¹⁸⁶ *See id.*; *See* Go East Entm't Co. Ltd. v. Beijing Alibaba Info. and Tech. Co., Ltd., *supra* note 159.

¹⁸⁷ *Supra* notes 16-17.

¹⁸⁸ Maths, *supra* note 17.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.* Maths implies that it is "common knowledge" that Baidu may be one of the OSP's that clandestinely hosts music files on their servers. A successful legal result served to embolden Yahoo to infringe with impunity.

¹⁹² *See id.*; *See also* Go East Entm't Co. Ltd. v. Beijing Alibaba Info. and Tech. Co., Ltd., *supra* note 125.

¹⁹³ *See* Friedmann, *supra* note 16; *see also* Maths, *supra* note 17.

¹⁹⁴ *See e.g.* *supra* notes 115, 149-155, 159.

¹⁹⁵ *See supra* notes 116, 16.

¹⁹⁶ *Supra* note 168 and accompanying text.

¹⁹⁷ *Supra* note 145 and accompanying text.

¹⁹⁸ Go East Entm't Co. Ltd. v. Beijing Alibaba Info. and Tech. Co., Ltd., *supra* note 125. However, the "Music Box" service was only at issue in the direct infringement claim in the YC case and held not to create liability on its own. *Supra* note 156 and accompanying text.

¹⁹⁹ *Supra* note 144 and accompanying text.

Beyond the elements that made up the trials themselves, some extrinsic factors arguably governed the opposing contemporaneous outcomes.²⁰⁰ For example, it has been suggested that an overruling in the *YC* case may have created too much disruption in the law, or been otherwise inappropriate.²⁰¹ Perhaps more fortuitously, the large damages against Yahoo China came at the start of China's Intellectual Property Week.²⁰² In a less conspiratorial vein, others suggest that Baidu won, in part, because it is a local product rather than a foreign one.²⁰³ Because of the turbulent internal politics and market factors, as well as lack of precedential force of the cases, the jurisprudential rationales should not be overly relied upon.²⁰⁴

CONCLUSION

This note attempts to shed light on the factors that might explain the highly variable results in two important contributory infringement copyright cases on the Internet in China. To respond to the changing conditions brought about by the Internet, policy makers are rapidly making contributory infringement laws with safe-harbor provisions based on their own experiences and international pressure, especially from the United States and other developed nations. Likewise, courts are struggling to interpret contributory liability within new intellectual property law, which in turn tries to address the rapid changes brought about by the Internet on a global scale. Beyond the jurisprudence, many jurisdictions are dealing with different internal politics and market conditions that inevitably affect the legal outcomes. These conditions are especially true of China, and especially important to those who dream of conquering Chinese markets.

In China, the focus is on copyright of musical works both because music distribution has been key to Internet business there, and because it has little consumer market for luxury goods. The state of the law in China is very much in flux because of its recent economic rise to power and consequent importation of intellectual property law from the West. The unfamiliar, and often obscured, legal system makes litigating in Asia even more difficult for large market seekers predominantly from the West. Unfortunately, since the chief contributory infringement of copyright cases, released on the same day, came to opposite conclusions based on similar facts, the legal community involved in Internet trade is arguably scratching its head about China.

Constructing a divine synthesis of the law is a futile, but attractive, enterprise with results that are certain to be misleading at best. Despite this inevitability, some useful synthesis can be achieved from the cases explored in this note. First, it is apparent that some form of safe-harbor, modeled on US law via international agreements, exists in China. Second, other factors being equal, the decisive factor is to what degree an OSP demonstrates good faith in working with rights holders in trying to remove infringing content to the best of its technical ability. Similarly, rights holders win very little by accusing OSP's of clandestine or direct liability; neither do they gain much by insisting on unreasonable measures against infringement, technical or otherwise.

²⁰⁰ See Friedmann, *supra* note 16; see also Maths, *supra* note 17.

²⁰¹ Maths, *supra* note 17. Maths argues that IFPP's stronger strategy and evidence in the *YC* case may have made upholding the severe verdict much easier, and likewise, the weaker performance in *Baidu* may have made overruling harder in that case. *Id.*

²⁰² *Id.*

²⁰³ *Supra* note 186 and accompanying text.

²⁰⁴ Maths, *supra* note 17. This may be especially true with respect to English language music, of which there were close to none in these cases. See *supra* note 186 and accompanying text.

Finally, protection of local economic agents and cultural factors are not surprisingly correlated with who wins and who loses. This reaction is likely amplified by a globalized marketplace born in the wake of the Internet, the ongoing rebalance of worldwide economic power, and the current economic downturn. In the final analysis, the most that can be gleaned now is that much uncertainty remains. However, there is no question that the uncertainty is a mortal concern to key market actors, and one can certainly predict that jurisdictions, even beyond Asia, will be pressed hard to resolve the issue of spiraling infringement at the behest of multinational corporations whose business model depends on intellectual property rights.