Is the New PRC Copyright Law Sufficient to Protect the Distribution Right of Recording Makers in the Music Industry?

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Abstract

This study aims at finding out whether the amended Copyright Law in China is enough to protect the distribution right of sound (music) recording makers, which is under neighbouring rights’ protection in the Copyright Law, of the music recording industry.

The 21st century is said to be the digital era. Music can also be distributed in digital form. To this day, music business is measured in “record sales”, which lead to the increasing interdependence of sound (music) recording makers and the music industry. Since these producers work in recoding business, their right of distribution is extremely essential in protecting the music industry. This right is protected under the neighbouring rights of the PRC Copyright Law. However, the new PRC Copyright Law is still too simple and superficial to protect this right in terms of the law content, Article 39 and 41, and protection from infringement.

Thus, it is suggested that the Article 39 and 41 have to be redrafted and improvement has to be made when protecting producers’ distribution right from infringement.
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1. Introduction

The 21st century is said to be the digital era. The advent of digitalization has extended the application of the economics of innovation and research and development (R&D) to the methods of production of information goods. Any material, for example music that is compressed into digital form can be viewed as information or “content” that become a good or service in the hand of end user.¹

Nowadays, most people described the music industry as “the record business”. To this day, music business success is measured in record sales.² Because of the rising importance of musical recordings, a new type of musical copyright was created, the neighbouring right(鄰接權). In China, neighbouring rights related to producers of sound recordings are protected under the Copyright Law.

The PRC Copyright Law came into effect on June 1991³ and was recently amended in 2001. Despite the passage of the Law, China’s piracy rates are still the highest in the world.⁴ Legitimate sales of sound recordings stood at U.S. $198 million in 2003

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¹ Ruth Towse, “Copyright and Economics”, Music and Copyright, Edinburgh University Press, Chapter 3, P.58
³ PRC Copyright Law, effective on 1 June 1991
while pirate sales are estimated to be worth U.S. $591 million.\(^5\) As a result, the sufficiency of Copyright Law and the Chinese government enforcement to protect the musical recording industry is still questionable.

Hence, the objective of this paper is to find out whether the amended Copyright Law in China is enough to protect the distribution right of sound (music) recording makers, which is under neighbouring rights’ protection in the Copyright Law, of the music recording industry.

### 2. Relationship Between Copyright And Music Recording Industry

#### 2.1 The Importance Of Sound Recording For Music Industry

As mentioned in the introduction, sound recording industry has become more important. Today, music and sound recording industry are non-separable. Distributing of musical works, to a certain extent, has become visualized as sound recordings and sales records.\(^6\) To broadcast music through sound recordings, a musical work needs to depend on the hardworking of producers and people’s efforts in technology development. Profits gained by recording industry, on the other hand, stimulate music

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\(^6\) 孫秋寧, 論音樂作品的法定許可錄音, 北大法律評論(2002), 第五卷, P.199
reproduction. In this sense, protecting the rights of producers also means protecting the whole music industry at the same time.

It is submitted that because of the interdependence of musical works and sound recordings, the rights of recordings’ producers should be protected. If the rights of recordings’ producers are protected, it also means securing and encouraging them to produce more recordings for music. Since recording makers are mainly working in the distribution field, right of distribution is especially important for them.

According to PRC Copyright Law, rights enjoyed by sound recorders are under the section of neighbouring rights.8

2.2 What Is Neighbouring Rights (鄰接權)

An intellectual property right is an intangible moral property.9 Copyright, like patents, helps to stimulate intellectual effort,10 and so as neighbouring rights.

Neighbouring rights are rights enjoyed by distributors of the work, because it is

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7 孫秋寧, 論音樂作品的法定許可錄音, 北大法律評論(2002), 第五卷, P.199
8 The PRC Copyright Law, Chapter IV, refer to Appendix I
9 吳漢東, 知識產權保護論, 法學研究, 2000 年第 1 期, P.68
10 Henry J.H. Wheare, Lovell White Durrant, Current and Future Climate, IP Protection in China 2nd edition – Practical Strategies, Asia Law & Practice, Ch 1, P. 3
closely related to copyright, it is namely neighbouring rights.\textsuperscript{11} This right is derived from the distribution of creation and it is independent from copyright.\textsuperscript{12}

Initially, neighbouring rights protect performers only.\textsuperscript{13} But due to the rapid development of technology, many “authors”, other than performers, are included when making a recording, for example lyricists and recording makers.\textsuperscript{14} Thus, the scope of neighbouring rights has extended to protect recording makers.\textsuperscript{15} The development of phonorecords and video recording technology provide an easy way to transcribe live performances into records for sale. The problem worsens with the broadcasting technology development.\textsuperscript{16}

To make it precise, here is an example:

Figure 1. Music Industry Value Chain (extracted\textsuperscript{17})

<table>
<thead>
<tr>
<th>Composer</th>
<th>Publisher</th>
<th>Artists &amp; Repertoire</th>
<th>Production (Recording)</th>
<th>Manufacturing</th>
<th>Marketing and promotion</th>
<th>Distribution</th>
</tr>
</thead>
</table>

This graph shows the activities of creating a musical product. In general, lyrics and

\textsuperscript{11} 蔡良才, 著作鄰接權, 知識産權保護制度, 北京工業大學出版社, P.225
\textsuperscript{12} 何山 俏水 編著, 中華人民共和國新釋, 中國法制出版社, P.145
\textsuperscript{13} 鄭成思, 版權法, 中國人民大學出版社, P.51
\textsuperscript{14} 王瑞明, 光盤複制單位被告侵害著作權的現象及有關問題的思考, 中國版權, 2004 年 2 月第 1 期, P.42
\textsuperscript{15} 鄭成思, 版權法, 中國人民大學出版社, P.14 - P.15
\textsuperscript{16} 鄭成思, 版權法, 中國人民大學出版社, P.14 - P.15
\textsuperscript{17} Roger Wallis, Copyright and the Composer, Music and Copyright, Edinburgh University Press, P.105
songs composed by lyricists and composers enjoy copyright; Artists, performers and producers enjoy neighbouring rights. That is, as shown in the figure, apart from activities of composer, neighbouring rights protect other activities.

In the case of recording maker, huge amount of money is spent on buying equipments, building recording room, hiring singers and processing the product. However, other followers can make a copy of the product at a low cost with little effort and gain profits from selling it. As a result, even though they are not the creators of the work, they are still protected under neighbouring right due to their efforts in distribution.

It is submitted that sound (music) recording makers have spent a lot of time and efforts in making the recordings. Though no creation is made in the recordings, we should admit that their devotion is valuable. Moreover, recording industry is important for the music industry, hence, protecting the rights of recording makers also mean protecting the music industry.

2.3 Differences Of Copyright And Neighbouring Rights

Although both copyright and neighbouring rights belong to intellectual property rights
and are protected by the Law, they are different in natures:

In terms of the subject of protection, copyright protects authors of the work, while neighbouring rights protect distributors; In terms of the object of protection, copyright protects people’s original creation, while neighbouring rights protect works in distributing or broadcasting format, e.g. books, performances.\(^ {20}\)

It is submitted that based on their differences, we can conclude that copyright protects rights of composers and lyricists, who are the authors of musical works, and neighbouring rights protect rights of recording producers, who are the distributors of musical works, under copyright law. As a result, neighbouring rights and copyright are two different types of concepts in terms of “who” and “what” they are protected. Despite their differences, it is obvious that their appearances are signs of human beings showing concerns towards their musical creations.

2.4 Neighbouring Rights In China

According to the copyright law in different countries, protection of neighbouring rights can be divided into six categories\(^ {21}\):

\(^{20}\) 蔡良才. 著作鄰接權. 知識産權保護制度. 北京工業大學出版社. P.225
\(^{21}\) 鄭成思. 版權法. 中國人民大學出版社. P.51-P.52
1. Protection of performers only (e.g. Paraguay)

2. Protection of recording makers only (e.g. America)

3. Protection of broadcasting organizations only (e.g. Cuba)

4. Protection of performers and recording makers (e.g. Switzerland)

5. Protection of broadcasting organizations and recording makers (e.g. Australia)

6. Protection of performers, recording makers and broadcasting organizations (e.g. China)

Among the categories above, China belongs to the 6th category. In China, neighbouring rights include the rights enjoyed by publishers, by performers, by record and video makers and by radio and television stations. However, although neighbouring rights are independent from copyright, it is written under the PRC Copyright Law. It does not use the term “neighbouring rights” directly.

Neighbouring rights are stated as “rights and interests related to copyright” in the

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22 鄭成思, 版權法, 中國人民大學出版社。P.51
23 鄭成思, 版權法, 中國人民大學出版社。P.51
24 鄭成思, 版權法, 中國人民大學出版社。P.51
25 鄭成思, 版權法, 中國人民大學出版社。P.51
26 鄭成思, 版權法, 中國人民大學出版社。P.51
27 鄭成思, 版權法, 中國人民大學出版社。P.51
28 Vincent Wang, New Changes to Copyright Protection in China, China Law & Practice, December 2001/January 2002, P.74
29 Regulation of the Implementation of the Copyright Law of PRC
30 Regulation of the Implementation of the Copyright Law of PRC
Article 26 The term “rights and interests related to copyright” as referred to in the Copyright Law
Regulation for the Implementation of the Copyright Law of People’s Republic of China\textsuperscript{31} and the rights of sound recording makers are stated in the Copyright Law Chapter four, Section three, from articles 39 to articles 41.\textsuperscript{32}

It is submitted that from the description above, it seems that the objects of protection in China are more comprehensive than other developed countries e.g. Australia, in spite of the term “neighbouring rights” are not in use. But, still, China’s neighbouring rights are too simple and superficial in terms of the articles.

3 Rights Of Sound Recording Makers

3.1 What Is Sound Recording Maker?

According to Regulation for Implementation of the Copyright Law, Article 5 point number 4, sound recording maker is the first producer of the product.\textsuperscript{33} Sound makers and these Regulations means the rights enjoyed by publishers in the typographical designs of their books or periodicals, the rights enjoyed by performers in their performances, the rights enjoyed by producers of sound and video recordings in their sound and video recordings, and the rights enjoyed by radio and television stations in their broadcasting programmes.

\textsuperscript{31} 唐廣良. 日、中兩國著作權制度差異探究—兩國音樂著作權制度比較. 知識產權研究. 第10卷. 2000年12月. P.119

\textsuperscript{32} 李順德. 周祥. 中華人民共和國著作權法修改導讀. 知識產權出版社. P.146-153

\textsuperscript{33} 李順德. 周祥. 中華人民共和國著作權法修改導讀. 知識產權出版社. P.146

The PRC Copyright Law Article 39 –41, please refer to Appendix I

Copyright Law of the People’s Republic of China:
Regulation for Implementation
Article 5 For the purposes of the Copyright Law and these Regulations, the following expressions shall have the meanings hereunder assigned to them:
include recording publisher, radio and other people who have contributed in making the recording.34

3.2 Rights Enjoyed By Sound Recording Makers

Sound recording producers enjoy the neighbouring rights of the product35 and Article 41 of the law states producers’ rights, which include right of reproduction (複製權)36, right of distribution (發行權), renting right (出租權), right to make it available to the public through information network (資訊網路傳播權) and to receive remuneration.37

The term of protection is 50 years, expiring on December 31 of the fiftieth year after the first completion.38 The years of protection is the same as the period set by the European Union for neighbouring rights including sound recording makers.39

It is submitted that in music industry, recording makers mainly serve as the distributors since they are responsible to make the recordings available to the public.

Hence, among the rights given by the PRC Copyright Law, right of distribution is very important to them.

(4) “producer of sound recordings” means the person who first makes the sound recordings

34 李順德 周詳 著, 中華人民共和國著作權法修改導讀, 知識產權出版社, P.146
35 何山 俏水 編著, 中華人民共和國著作權法新釋, 中國法制出版社, P.151
36 複製權: 指錄音製作者本人或者授權他人將其製作的錄音製品複製成一分或多分錄音製品權利
37 李順德 周詳 著, 中華人民共和國著作權法修改導讀, 知識產權出版社, P.152
38 The PRC Copyright Law, Article 41
39 韋之. 歐盟著作權保護期指令評價, 中外法學, 1999 年第 6 期, P.88
3.3 Definition of Right Of Distribution

In the old PRC Copyright Law, right of distribution was defined as supplying the original or reproductions of the work by sale or rental to satisfy the reasonable demands of public. It is stated in the Regulation of Implementation of Copyright Law Article 5, renting of work is considered as right of distribution.

In the new Copyright Law, renting right is dealt exclusively from the right of distribution. This amendment is made to comply with the TRIPS Agreement. Hence, renting right is nothing new in the PRC Copyright Law. The new definition of distribution right is “the right to provide the original copy or reproductions of a work to the public by selling or donating.” Does the separation of renting right with distribution right means that renting of work is no longer a kind of distribution?

According to Germany’s Copyright Law, selling and renting of the original work or transfer of reproductions are considered as distribution. From the Copyright Law of another country and the definition of the old PRC Copyright Law, some lawyers in

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40 IP Protection in China 2nd edition –Practical Strategies, Asia Law & Practice, P.116
The PRC Copyright Law, Article 10

41 李順德 周詳 著. 中華人民共和國著作權法修改導讀. 知識產權出版社, P.80

42 李順德 周詳 著. 中華人民共和國著作權法修改導讀. 知識產權出版社, P.80

43 The PRC Copyright Law Article 10 (6)

44 金勇軍 付清中. 發行權窮竭原則 - 舒福克斯公司訴音像大世界侵犯著作權糾紛案 - 法學1999年第1期, P.58
China also said that “Right of distribution means through selling or renting of original work or its reproductions to satisfy demands of the public.”

Thus, it is submitted that the separation of renting right and distribution right is to clarify the legal rights of renting of sound recording makers. Simply from the definition of distribution, both selling and renting of products are ways of distribution.

Apart from selling and renting, distribution can also present in other ways just like advertising. Hence, in Germany, putting a work on the counter with the purpose of selling is also a kind of distribution. However, the PRC Copyright Law does not clarify this point, only the “right to make it available to the public through information network” can be put under this category. Using Germany’s Copyright Law as reference, distribution in other ways should also be considered as distribution, if it can fulfill the criterion of making it available to the public.

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45 金勇軍 付濱中, 發行權窮竭原則 - 評福克斯公司訴音像大世界侵犯著作權糾紛案 -法學 1999 年第 1, P.58
46 金勇軍 付濱中, 發行權窮竭原則 - 評福克斯公司訴音像大世界侵犯著作權糾紛案 -法學 1999 年第 1, P.58
47 肖永平 岳為群, 論著作權中的發行權用盡規則, 湘潭工學院學報(社會科學版), 第2卷第2期, 2000年12月, P.51
48 金勇軍 付濱中, 發行權窮竭原則 - 評福克斯公司訴音像大世界侵犯著作權糾紛案 -法學 1999 年第 1, P.58
In conclusion, right of distribution means using the work in a tangible way; the object of the work can be the original one or its copy. Distribution means selling, renting or ways that can provide the original work or its reproductions to the public.\(^49\)

### 3.4 Is The Content Of The Law Adequate To Protect Phonorecords Producers’ Right Of Distribution?

In terms of the content, it is important to know that the PRC copyright law was amended in 2001. The National Copyright Administration(國家版權局), which is set up in 1985 for handling both internal and external copyright affairs,\(^50\) mentioned three reasons for the amendment. One of the reasons was the defect of the Law itself i.e. unable to meet the needs of strengthening management and effective preventing copyright infringement and disability in front of the new technologies.\(^51\) There is no doubt that the new copyright law is more comprehensive and is more in line with international conventions.\(^52\) However, problems still exist in terms of the content.

3.4.1 Article 39: definition of “musical work of which a lawful sound recording has

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\(^{49}\) 金勇軍 付濤中. 發行權窮竭原則 ＃評福克斯公司訴音像大世界侵犯著作權糾紛案 ＃法學 1999年第1期, P.58

\(^{50}\) 中華人民共和國國家版權局. http://www.ncac.gov.cn/introduce/znfw.jsp


\(^{52}\) Vincent Wang, New Changes to Copyright Protection in China, China Law & Practice December 2001/ January 2002, P.72
As stated in the third paragraph of Article 39, other producers can use the recording of copyright owner without his or her permission if the product is legally recorded. However, it has ignored the distribution of the product. Since “record” is an action of duplication, the problem here is whether a product, which is legally recorded, equal to the distribution of that product.53

For example, a musical work has just been recorded by a sound recording company, namely Company A, but Company A has not yet distributed or broadcasted it to the public. Can other recording companies duplicate the product and distribute it to the public before Company A?54

It is submitted that this ambiguity can lead to conflicts in recording industry because interests of the first producer are exposed to infringement. According to the definition of distribution, which mentioned before, distribution means provide the work or its reproductions to the public. If the law allows other companies to distribute the duplicated product before Company A, as stated in the example, in

53 孫秋寧, 論音樂作品的法定許可錄音: 北大法律評論(2002), 第五卷, P.204- P.205
54 孫秋寧, 論音樂作品的法定許可錄音: 北大法律評論(2002), 第五卷, P.204- P.205
the future other immoral recording companies can also make use of the gray area, to earn profits at the expense of the first producer’s efforts and hurts the morality of the music industry. This gray area should be clarified.

3.4.2 Article 41

The Article 41 is the same as the Article 39 of the old copyright law. In the new law, renting right and right to make the recording available to the public through information network are added. But the content of the Law in terms of rights of phonorecord producers are still too simple.55

Under the PRC copyright Law Article 41, which states the rights of sound recording producer, the right of machinery performance (機械表演權) is not protected.56 Protecting this right will become an international trend. In fact, according to the Berne Convention and international practices, users need to pay copyright owners for music used in public areas.57 The meaning of this right is to receive remuneration from music distribution or performance through machines or video recording. It is because after publication of the recording,

55 唐廣良. 日、中兩國著作權制度差異探究—兩國音樂著作權制度比較. 知識產權研究. 第十卷. 2000 年 12 月, P.150
56 曾憲義. 鄰接權. 以案說法—著作權法篇. 中國人民大學出版社. P.153
57 毛磊. 背景音樂. 不再享受“免費午餐”. 中國版權. 第 15 期. 2004 年 6 月. P.15
places such as shopping mall, airports, restaurants and pubs, can broadcast the songs to the public for profit making purposed directly or indirectly.\textsuperscript{58}

Cases, for example, background music broadcasting in public areas like shopping malls or restaurants, where physical existence or vehicle of the music cannot be seen or transferred, raises lots of arguments, some business people belief that if a restaurant has already bought the CD, i.e. the vehicle of music, they have also bought the right of using it. Why should they have to pay again?\textsuperscript{59}

Regarding this issue, it is submitted that it is necessary for the PRC government to revise the law, and include the right of machinery performance of sound recording makers in the content, because distribution can also be in other format if it can supply the original or reproduction of the work to the public. Due to technology advancement, music can be distributed through other ways such as video and CD players nowadays. Hence, as neighbouring rights protect works in broadcasting or distributing format,\textsuperscript{60} music distributing through machines should be protected according to the definition of neighbouring rights because the music is also in distributing format. The lack of machinery performance right in the law can lead

\textsuperscript{58} 曾憲義. 鄰接權. 以案說法—著作權法篇. 中國人民大學出版社. P.153
\textsuperscript{59} 毛磊. 背景音樂. 不再享受“免費午餐”中國版權. 第 15 期. 2004 年 6 月. P.16
\textsuperscript{60} 蔡良才. 著作鄰接權. 知識產權保護制度. 北京工業大學出版社. P.225
to arguments between users and copyright owners, for example background music.

For the case of background music, I have the following comments:

Firstly, it is submitted that when someone bought the physical existence of music e.g. CD, it does not mean he or she has the right to distribute it in public areas. It is because the action of buying the CD should be for self-use purpose only. Buyers do not enjoy the right of distribution of music. According to the PRC copyright law, the right of distribution solely belongs to copyright and neighbouring rights owners. Hence, it can be seen as an infringement of copyright.

Secondly, it is submitted that some restaurants use background music to attract customers, to make them feel more relaxing when dinning in the restaurants. In this sense, they are using the music for business purpose not for self-enjoyment.

After analyzing the content of the law on producers’ rights, my comment on the articles concerning music recordings producer’s rights, Article 39 – Article 41, is that, in spite of the modification on the old copyright law, the content of the new one is still too simple and superficial, conditions like the two mentioned above, are ignored. Unlike the copyright law in other countries, e.g. Japan, every detail is
listed in the law to prevent ambiguity. Hence, gray areas can still be found in the
law. Due to the ambiguity mentioned, regarding Article 39 and Article 41,
redraft of the law is recommended.

4. Recommendation On Redrafting The Law

4.1 Article 39

It is submitted that The paragraph of “A producer of sound recordings who exploits,
for making a sound recording, a musical work of which a lawful sound recording has
been made, may do without permission from the copyright owner” should be redrafted.

A producer can only allow exploiting others sound recording when it is distributed.
The new law should be like this “A producer of sound recordings who exploits, for
making a sound recording, a musical work of which a lawful sound recording has
been distributed to the public, may do without the permission from the copyright
owner.”

4.2 Article 41

It is submitted that the Law should also protect the machinery performance of
recording makers. “The producer of a sound recording shall enjoy the right to
authorize others’ reproducing, distributing or renting the sound recording or making it
available to the public through information network and to receive therefrom.” The law should be revised to “The producer of a sound recording shall enjoy the right to authorize others’ reproducing, distributing or renting the sound recording or making it available to the public through *machinery performances* and information network.”

To protect the music recording industry in China, it is submitted that apart from recognizing producers’ rights, preventing their rights from infringement and punishing the infringers are crucial. As a result, the following section will concentrate on the protection of music recording producers on right of distribution from infringement under the new Law.

### 5. Constitution Of An Infringement

#### 5.1 Criteria For Constituting An Infringement

The object of intellectual property is a kind of intangible moral right.⁶¹ Hence, the following criteria must be fulfilled for a copyright infringement in terms of civil liabilities:⁶²

1. The existence of the damage. Since civil liabilities are mainly compensated in

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⁶¹ 吳漢東. 知識產權保護論. 法學研究. 2000年第1期. P.68
⁶² 杜文娟. 著作權保護. 知識產權保護制度. 北京大學出版社. P.232-233
economical terms, the objective facts of damage must exist for calculation.63

2. The behaviour is illegal. The infringer’s behaviour must violate the illegal actions written in copyright law.64

3. There must be causality between facts of damage and its result, which means if damage65 is caused from an illegal infringement, no matter the damage is caused directly or indirectly by the infringer, he or she is still liable.

4. The wrong doings of infringer is the main criterion for civil liabilities. Wrong doings mean the mental condition or intention of infringer’s behaviour and its result, including negligence and deliberation. Due to the high possibility of infringement, even though one’s behaviour is not wrong, he or she is still liable if the action leads to damages. The criterion of wrong doings is used for deciding the extent of responsibility that the infringer has to bear.66

The criteria for constituting an infringement in terms of criminal liabilities are different from that of civil liabilities. Two criteria have to be fulfilled: First, the infringement must reach a certain business scale. Second, the infringer intentionally violates the law.67

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63 杜文娟. 著作權保護. 知識產權保護制度. 北京大學出版社. P.232
64 杜文娟. 著作權保護. 知識產權保護制度. 北京大學出版社. P.233
65 杜文娟. 著作權保護. 知識產權保護制度. 北京大學出版社. P.233
66 杜文娟. 著作權保護. 知識產權保護制度. 北京大學出版社. P.233
67 吳漢東. 知識產權保護論. 法學研究. 2000 年第 1 期, P.77
5.2 Actions Causing Infringement As Defined In The Law

In terms of sound recordings, the PRC copyright Law identifies the following acts an infringement of copyright: 68

1. Reproducing, distributing or making a product available to the public through information network, without the permission of the producer. 69

2. Intentionally circumventing or sabotaging a product without the producer’s permission. 70

3. Intentionally altering or removing any electronic rights management information attached to a copy of a product, without producer’s permission. 71

Although eighteen types of infringement are stated in the Copyright Law, only four of them are considered as criminal infringement including duplicating and distributing sound recordings without permission of the neighbouring rights’ owners i.e. recordings makers. 72

Among the actions of infringement, it is submitted that only the first one, that is “Reproducing, distributing or making a product available to the public through

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68 The PRC Copyright Law Article 47, refer to Appendix I, Article 47
69 The PRC Copyright Law Article 47, refer to Appendix I, Article 47
70 The PRC Copyright Law Article 47, refer to Appendix I, Article 47
71 The PRC Copyright Law Article 47, refer to Appendix I, Article 47
72 劉雅，著作權法實務與案例評析，中華工商出版社，P.281 – P.282
information network” is protecting the distribution right of sound recording makers.

6. Protection From Infringement

6.1 Protection By The Law

The new Copyright Law and new Implementing Regulations address civil and administrative enforcement of rights. Criminal enforcement is dealt with exclusively under China’s Criminal Law.73

Civil enforcement includes ceasing the infringement, elimination the bad effects of the act, making an apology or paying compensation for damages.74 Administrative enforcement means administrative department for copyright may order administrative punishment when serious infringement happened.75

Compared to the old Copyright Law, injunctions under, a means of remedy against copyright infringement, is available in the new Copyright Law as a kind of civil enforcement, to stop and preserve the property involved in the infringement before a

73 Joseph Simone & Winnie Yeung, Baker & Mckenzie, Implementing Regulations for the Copyright Law: Highlights and Questions, China Law & Practice October 2002, P.84
74 杜文娟, 著作權保護. 知識產權保護制度. 北京大工業大學出版社, P.236
75 杜文娟, 著作權保護. 知識產權保護制度. 北京大工業大學出版社, P.237. For Details, refer to Appendix I Article 47
lawsuit is filed. However, unlike most of the countries, China does not use “statutory damage”, which means asking the infringer to pay more than the damage cost as punishment through civil litigation. For Administrative measures, more threatening measures such as issuance of orders to stop infringement activities, confiscation of illegal income, confiscation and demolition of reproduction equipment, and imposition of fines are included, apart from the only two measures used in the past.

Finally, criminal enforcement pins on the very serious infringement, which is unable to stop by implementing civil and administrative enforcement only. Penalties are stated in the Criminal Law of China, Article 217, infringement on copyright, and 218, selling counterfeiting product.

Criminal punishment is used because civil and administrative enforcements are incapable to sanction the infringers. Criminal punishment did not come into effect until the amendment of Copyright Law in 1997, but still it was not obviously stated in

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76 Vincent Wang and Ron Cai, New Changes to Copyright Protection in China, China Law & Practice, December 2001/January 2002
77 庄秀峰, 保護知識產權應增设懲罰性賠償. 法學雜誌, 2002年 第 5 期, P.58, P.59
79 俞梅蓀, 買假啓示錄. 知識產權研究. 第十一卷. 2001年 8 月, P.70
80 杜文娟. 著作權保護. 知識產權保護制度. 北京大學出版社, P.238
the Copyright Law. Finally, the latest amendment chose to state clearly that some serious infringements on copyright are considered as criminal liabilities in Article 47. The using of Criminal punishment for more serious copyright infringement is complying with most of the countries in the world, in which Criminal punishment is used for serious infringement.

It is submitted that even though more threatening measures are added in the Law, in terms of protection of sound recording makers, the law does not dealt the protection of distribution right exclusively, which leads to the following insufficiencies when protecting recording producers’ right of distribution.

6.2 Insufficient Punishment To Protect Producers’ Distribution Right

Although criminal punishment is used and more threatening measures are added in the new Law, insufficiencies can still be found in protecting right of distribution of sound recording makers.

6.2.1 Insufficient Criminal Punishment

Regarding the new PRC Copyright Law, though criminal punishment is used, the
distribution right of sound recording makers is not well protected under criminal
punishment. It is because renting of illegal copied products is not stated in the PRC
Criminal Law.\textsuperscript{83}

Both renting and selling of illegal copied products, can lead to great economic return,
and will also hurt the legal rights of copyright owners, However, the PRC Criminal
Law only includes selling of illegal copied products.\textsuperscript{84} The renting of illegal copied
products, which cause the same level of harm to the society, is still uncertain in the
law.\textsuperscript{85}

It is submitted that renting of illegal copied products should be stated in Criminal Law.
The reasons are as follows:

Firstly, as mentioned in the part of “definition of Right of Distribution”, renting of the
work is one of the ways to distribute the product.\textsuperscript{86} Thus, simply from the definition,
if the sales of illegal recordings are under the protection of criminal law, to fully
protect recorders’ distribution right, renting of the product should also be included.

\textsuperscript{83} Criminal Law, Article 217 & 218
\textsuperscript{84} 田宏杰, 論我國知識產權的刑事法律保護. 中國法學, 2003 年第三期, P.148
\textsuperscript{85} 田宏杰, 論我國知識產權的刑事法律保護. 中國法學, 2003 年第三期, P.148
\textsuperscript{86} IP Protection in China 2nd edition – Practical Strategies, Asia Law & Practice, P.116
The PRC Copyright Law, Article 10
Secondly, since both actions hurt the legal rights, including distribution right, of copyright owners, the results caused by renting of pirated products are the same as selling them from sound recording makers’ point of view. Hence, in terms of the level of harm, both renting and selling of pirated products should be punished by criminal punishment.

Thirdly, the punishment of criminal enforcement is heavier than civil and administrative enforcement. Since the privacy rate in China remains high in the world, heavier penalty can prevent people from infringing the law.

6.2.2 Unprotected MP3

The PRC Copyright Law is incapable to protect intellectual property right related to high technology and to response to new problems aroused by high technology.\(^87\)

The development of new technology has increased the ways of distribution, which also means the neighbouring rights of sound recording makers are more exposed to infringement.\(^88\)

\(^{87}\) 李穎怡. 我國高技術產業知識產權法律制度探析. 中外法學. 1999 年第 6 期, P.73
\(^{88}\) 荀曉平. 淺議我國鄰接權立法的完善. 黑龍江社會科學. 2003 年第三期, P.71
Internet is a new way of broadcasting, namely the fourth media.\(^89\) The information network has the characteristics of high circulation and intangibility.\(^90\) Due to these characteristics and the natural relationship between copyrights and broadcasting, distribution through Internet raises many problems about the Copyright Law.\(^91\)

To cope with the increasing number of copyright infringement disputes in connection with the use of Internet, the State Council has proposed to amend the Copyright Law to extend the legal protection afforded under the Copyright Law to the Internet.\(^92\) The right of distribution through information network is added.\(^93\)

However, the Copyright Law provides for an almost exhaustive list of subjects of protection, but no explicit reference in the Internet was made in the latest revision.\(^94\) This makes questionable its applicability to new technologies, such as digital technologies and the Internet.\(^95\) Problem arises regarding the issue of MP3, because it is not stated in the list of protected work in the “Regulation of Copyright Law in terms

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\(^{89}\) 劉春田 金海軍. 2003 年知識權法學學術研究回顧. 法學家. 2004 年第 1 期. P.79  
\(^{90}\) 朱軍. 信息時代對著作權的新挑戰. 法學評論. 1998 年第 6 期. P.71  
\(^{91}\) 劉春田 金海軍. 2001 年知識權法學研究回顧與展望. 法學家. 2002 年第 1 期. P53  
\(^{92}\) Xiaohu Ma Robert Woll and Jun Deng Morrison & Foerster, Hong Kong, Initiatives in Online Copyright Enforcement, China Law & Practice, February 2001, P.55  
\(^{93}\) The PRC Copyright Law, Article 41  
\(^{94}\) Ju Deng, The Supreme People’s Court’s Take on Copyright Liabilities for ISPs, China Law & Practice, April 2004, P.18  
\(^{95}\) Ju Deng, The Supreme People’s Court’s Take on Copyright Liabilities for ISPs, China Law & Practice, April 2004, P.18
of digitalized product.”  

Nowadays, companies just like Sony Music Asia are in discussions to offer legal downloads in the republic. Although MP3 does not contain creation, producers do spend much efforts and time on it. According to the intellectual property protection of European Union, MP3 is protected under special rights protection.

It is submitted that conflict exists between recording producers’ distribution right and distribution through information network and protection, because, on one hand, the law given recording producers right of distribution through information network but it does not protect their product in terms of MP3 on the other hand.

In my opinion, the Copyright Law, just like any other type of digitalized products, should also protect MP3 made by recording producers under neighbouring rights.

Unlike copyright, neighbouring right protects works in distribution format. It is obvious that MP3 is also a kind of distribution but different from the traditional one.

96 楊珊 張利國. 《數位的版權問題研究》中國版權.
98 謝守分. 《侵犯錄音製品製作人著作權的法律問題探析》識產權
though MP3 contains no physical existence, at the time when the music is upload to the Internet, audiences can download it for listening. Computer as a means for listening can be treated as a fixation of the music. If the fixation exists, distribution occurs.

Moreover, legal downloads will soon become an international trend of the recording companies, against illegal downloads of MP3. At that time, protection of MP3 is important for the development of the whole music industry.

Regarding the problems mentioned about the protection of right of distribution, the following recommendation is suggested.

7. Recommendation On Protection

7.1 Criminal Punishment

It is submitted that, based on the definition of distribution, distribution means renting, selling or using ways that can provide the original work or its copy to the public. Since renting is a kind of distribution, it should also be included in criminal punishment just like the selling of pirated products.
Moreover, it is submitted that due to technology improvement, apart from those traditional distributions, new methods of distribution, for example through the Internet and machines, are invented. There is no doubt that these new methods of distribution will be widely used in the future. Hence, it is suggested that criminal punishment should be used for any type of distribution methods causing serious infringement.

7.2 Protect MP3 Produced By Sound Recording Producers

It is submitted that for the problem of unprotected MP3, the PRC government is advised to include MP3 in the list of protection in “Regulation of Copyright Law in terms of digitalized product” as soon as possible. It is because recording companies for distributing their products in the future may use MP3. Hence, to make sure that the rights of distribution of recording makers are well protected, apart from giving them the right, their products have to be protected in the law.

8. Conclusion

It is submitted that The PRC Copyright Law has been amended to comply with the international standard and has made a lot of improvement. However, regarding the issue of protecting the distribution right of sound recording makers, the Law Articles

related and protection from infringement are still insufficient. Since recording makers
are crucial for the whole music industry, protecting their rights of distribution would
also means protecting the distribution of music. Hence, improvement in the Copyright
Law and protection from infringement are needed and beneficial to the music industry
in China.
**Bibliography**

**Chinese Books**

1. 何山 俏水 編著, 中華人民共和國新釋, 中國法制出版社, 2001 年 11 月出版

2. 鄭成思, 版權法, 中國人民大學出版社, 1997 年

3. 李順德 周詳 著, 中華人民共和國著作權法修改導讀, 知識產權出版社, 2001 年 12 月

4. 曾憲義 郭和, 以案說法—著作權法篇, 中國人民大學出版社, 2002 年 5 月

5. 劉雅, 著作權法實務與案例評析, 中國工商出版社, 2003 年 8 月

6. 中華人民共和國著作權法律、法規 (中英文). 國家版權局編, 商務印書館

7. 蔡良才, 知識產權保護制度, 北京工業大學出版社

8. 吳東漢 曹新明 胡開忠 陳小君著, 中國區域著作權制度比較研究, 中國政大法學出版社

**English Books**


**Chinese Journals**

1. 孫秋寧, 論音樂作品的法定許可錄音, 北大法律評論(2002), 第五卷, P.192-P.208
2. 黃曉，《音樂製品著作權的特殊性與複雜性》中國民商法律網
3. 唐廣良，《中南兩國著作權制度差異探究—兩國音樂著作權制度比較》，知識產權研究，第十卷，2000年12月，P.116-P.163
4. 俞梅瑩，《假啟示錄》，知識產權研究，第十一卷，2001年8月，P.65-P.73
5. 劉春田，《金海軍》，2001年知識產權法學研究回顧與展望，法學家，2002年第1期，P.51-P.54
6. 劉春田，《金海軍》，2003年知識產權法學學術研究回顧，法學家，2004年第1期，P.75-P.79
7. 劉漢東，《知識產權保護論》，法學研究，2000年第1期，P.68-P.79
8. 杜瑞芳，《試析著作權侵犯刑事責任的歸屬條件》，法學評論，2003年第1期，P.129-P.133
9. 朱軍，《信息時代對著作權的新挑戰》，法學評論，1998年第6期，P.71-P.75
10. 田宏杰，《論我國知識產權的刑事法律保護》，中國法學，2003年第3期，P.143-P.154
11. 韋之，《歐盟著作權保護期指令評價》，中外法學，1999年第6期，P.86-P.90
12. 李潤怡，《我國高技術產業知識產權法律制度探析》，中外法學，1999年第6期，P.71-P.76
13. 肖永平，《論著作權中的發行權用盡規則》，湘潭工學院學報（社會科學版），第2卷第2期，2000年12月，P.50-P.53
14. 金勇軍，《發行權窮竭原則》，評福克斯公司訴音像大世界侵犯著作權糾紛案，中華法學，1999年第1期，P.57-P.60
English Journals


2. Xiaohu Ma Robert Woll and Jun Deng Morrison & Foerster, Hong Kong, Initiatives in Online Copyright Enforcement, China Law & Practice, February 2001, P.55-P.58

3. Ju Deng, The Supreme People’s Court’s Take on Copyright Liabilities for ISPs, China Law & Practice, April 2004, P.17-P.21


Chinese Magazines

1. 毛磊. 背景音樂: 不再享受“免費午餐”, 中國版權, 第 15 期, 2004 年 6 月,
2. 王瑞明. 光盘复制单位被告侵害著作权的现像及有关问题的思考. 中國版權. 2004年2月第1期, P.42-P.44

3. 庄秀峰. 保護知識產權應增設懲罰性賠償. 法學雜誌. 2002年第5期, P.58-P.59

4. 楊珊 張利國. ISO的版權問題研究. 轉載自中國版權.


Articles from the Internet

1. The recording Industry, Commercial 2004 piracy report, International Federation of the Phonographic Industry,


2. The recording Industry, Commercial Piracy Report 2003, International Federation of the Phonographic Industry,


Chapter IV
Publication, Performance, Sound Recording, Video Recording and Broadcasting

Section 3
Sound Recording and Video Recording

Article 39 A producer of sound recordings or video recordings who exploits, for making a sound recording or video recording, a work created by another person shall obtain permission from, and pay remuneration to, the copyright owner.
A producer of sound recordings or video recordings who exploits a work created by adaptation, translation, annotation or arrangement and the owner of the copyright in the preexisting work.
A producer of sound recordings who exploits, for making a sound recording, a musical work of which a lawful sound recording has been made, may do without permission from the copyright owner, but shall, in accordance with regulations, pay remuneration to the copyright owner; no such work may be exploited where the copyright owner declares that exploitation is not permitted.

Article 40 When making a sound recording or video recording of a performance, the producer shall conclude a contract with, and pay remuneration to, the performer.

Article 41 The producer of a sound recording or video recording shall enjoy the right to authorize others’ reproducing, distributing or renting the sound recording or video recording or making it available to the public through information network and to receive remuneration therefrom. The term of protection for such right shall be fifty years, expiring on December 31 of the fiftieth year after the first completion of the recording.
Anyone who is authorized reproducing or distributing a sound recording or video recording or making it available to the public through information network shall, in addition, obtain permission from, and pay remuneration to, both the copyright owner and the performer.
Appendix II

中華人民共和國刑法

第二百一十七條
以營利為目的，有下列侵犯著作權情形之一，違法所得數額較大或者有其他嚴重情節的，處三年以下有期徒刑或者拘役，併處或者單處罰金；違法所得數額巨大或者有其他特別嚴重情節的，處三年以上七年以下有期徒刑，併處罰金：
（一）未經著作權人許可，複製發行其文字作品、音樂、電影、電視、錄影作品、電腦軟體及其他作品的；
（二）出版他人享有專有出版權的圖書的；
（三）未經錄音錄影製作者許可，複製發行其製作的錄音錄影的；
（四）製作、出售假冒他人署名的美術作品的。

第二百一十八條
以營利為目的，銷售明知是本法第二百一十七條規定的侵權複製品，違法所得數額巨大的，處三年以下有期徒刑或者拘役，併處或者單處罰金。

第二百一十九條
有下列侵犯商業秘密行爲之一，給商業秘密的權利人造成重大損失的，處三年以下有期徒刑或者拘役，併處或者單處罰金；造成特別嚴重後果的，處三年以上七年以下有期徒刑，併處罰金：
（一）以盜竊、利誘、脅迫或者其他不正當手段獲取權利人的商業秘密的；
（二）披露、使用或者允許他人使用以前項手段獲取的權利人的商業秘密的；
（三）違反約定或者違反權利人有關保守商業秘密的要求，披露、使用或者允許他人使用其所掌握的商業秘密的。
明知或者應知前款所列行爲，獲取、使用或者披露他人的商業秘密的，以侵犯商業秘密論。
本條所稱商業秘密，是指不爲公衆所知悉，能爲權利人帶來經濟利益，具有實用性并經權利人采取保密措施的技術資訊和經營資訊。
本條所稱權利人，是指商業秘密的所有人和經商業秘密所有人許可的商業秘密使用人。

第二百二十條
單位犯本節第二百一十三條至第二百一十九條規定之罪的，對單位判處罰金，並對其直接負責的主管人員和其他直接責任人員，依照本節各該條的規定處罰。