



LEGAL UPDATE

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Further Protection from Online Infringement of Copyright Works is Offered by the Supreme People's Court, the Supreme People's Procuratorate and the Ministry of Public Security.

On 10th January, 2011, the Opinions on Certain Issues Concerning the Application of Laws for Handling Criminal Cases of Infringement of Intellectual Property Rights, jointly promulgated by the Supreme People's Court, the Supreme People's Procuratorate and the Ministry of Public Security (the “**Opinions**”), came into effect. Comprising 16 articles, the Opinions provide further guidelines for establishing criminal prosecution for infringing intellectual property rights (“**IPR**”) in particular in relation to online infringement of copyright works.

The key provisions of the Opinions are as follows:-

Location of the Crime

In providing further guidance on the determination of the jurisdiction of criminal cases of IPR infringement, the Opinions state that the place where a crime is deemed to have been committed shall include, for the purposes of online infringement, the location of the server of the website which distributes and sells the infringing product; the place of internet access; the place where the founder or manager of the website is located; or the place where the IPR owner suffered from the crime. The police department where the crime is committed is responsible for investigation of the IP right infringement crime.

Components of a Copyright Infringement Crime

The Opinions detail the components which must exist in order for a crime of copyright infringement to have been committed. These are:-

- a) the fact that the act was completed “*for the purpose of making profits*”, which is stated to be any circumstance where:-
 - fees are charged, either directly or indirectly, through methods publishing paid advertisements or linking a third party's work with another party's;

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- fees are charged, either directly or indirectly, through disseminating the work of others through the information network or through providing services of publishing paid advertisements on websites using the infringing works which have been uploaded by others;
 - a membership fee is charged for disseminating the work of others through the information network; or
 - any other circumstances that enable a profit to be made through the use of another's work;
- b) that the act was completed "*without the permission of the copyright owner*". In the event that there is evidence to suggest that the works were published or reproduced illegally and neither the publisher nor the reproducer is able to provide evidence proving they have obtained the permission of the IPR owner, the IPR owner has waived their rights or the works are not protected by copyright law, it will be presumed that the act was completed "*without the permission of the copyright owner*";

and

- c) that the goods were "*distributed*". The Opinions provides further clarity as to the meaning of "*distribution*", as used in Article 217 of the Criminal Law, stating that this includes transmission through the internet, rental, exhibition and sales.

Clarification of Terminology of Article 213 of the Criminal Law

The Opinions also clarify Article 213 of the Criminal Law of the PRC, which states that "*Whoever, without permission from the owner of a registered trademark, uses a trademark which is identical with the registered trademark on the same kind of commodities shall, if the circumstances are serious, be sentenced to fixed-term imprisonment*", by providing further guidance as to the determination of the terms "*same kind of commodities*" and the "*trademark which is identical to the registered trademark*".

Accordingly, products which have the same name or products which have different names but refer to the same item shall be deemed to be the "*same kind of commodities*". Further, in the event of a registered trademark being

altered in terms of its size, colour, font, spacing, etc, such altered mark shall be viewed as being a *"trademark which is identical to the registered trademark"*.

Standard of Conviction and Punishment through Information Networks

Under Article 217 of the Criminal Law, a person who commits an act of copyright infringement and who gains considerable income as a result or where there are *"other serious circumstances"* shall be penalised. The Opinions provide further guidance by stating that *"other serious circumstances"* may include any act of *"disseminating the written works, music, films, televisions, arts, photographs, videos, audio and video products, computer software and other works of others through the information network"* which results in revenue exceeding RMB50,000, the number of works disseminated exceeding five hundred, the number of clicks on the disseminated works exceeding fifty thousand etc.

By indicating that the minimum threshold to support criminal prosecution for the dissemination of infringing copyright works include where the aggregate amount of works of others being transmitted is no less than five hundred; where the number of web hits of the infringing works is no less than fifty thousand, etc, the Opinions circumvent the frequent difficulties of placing a monetary value on such online infringement.

Accomplices of IPR Infringement Crimes

Under the Opinions, those who assist in IPR infringement may also be charged and convicted as accomplices of the crime of infringing intellectual property. Such assistance could include, in the case of online infringement, providing services such as internet connection, server hosting, network storage or communication transmission channels.

The internet has posed many challenges with respect to how to handle criminal prosecution, and the value of, online infringement of intellectual property rights. As such, the Opinions, which offer clearer guidelines, are deemed to be of great significance in raising the level of criminal judicial protection of IPR in the People's Republic of China.

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