

How to fight MP3 piracy in Taiwan

Christopher M. Neumeyer in Taipei exposes the problems of protecting copyrighted works online

About one-third of Taiwan's \$300 million annual music sales are of illegally produced CDs, according to the International Federation of the Phonographic Industry (IFPI). Of those illegal CDs, IFPI estimates that 20% are created by downloading MP3 music files from the internet. The US Trade Representative Office agrees that there's a problem. In this year's Special 301 Report, that office claims, 'MP3 piracy is thriving [in Taiwan], particularly in schools.'

While a number of actions have been taken in Taiwan against owners and users of MP3 websites, the legality of such sites and how best to deal with them is not immediately clear.

The music.com case

In July of last year a Taiwan businessman launched music.com.tw, purportedly the world's first Chinese-language website where visitors could search for songs or artists by their Mandarin names before downloading MP3 music files for free. In its first week, the site logged more than 12,000 users. By October the site's owner was a defendant in Taiwan's first MP3 copyright infringement lawsuit.

Taiwan's *Copyright Law* permits a victim of infringement to sue as either a civil or a criminal matter. The music.com case, officially *Juan-lin Enterprises Co., Ltd. v. Lin Wei-jean*, was a privately filed criminal action. The prosecutor was a Taiwan record producer/distribu-

tor who alleged that the defendant's website offered downloads of music whose exclusive distribution rights the prosecutor had purchased from a Beijing record company.

The website's owner claimed that he too had purchased distribution rights to the music, through an oral agreement. Although the evidence was implausible, the judge bought it: the accused were acquitted on the grounds that the record company purportedly consented to the online distribution. Because the court found consent, the legality of unauthorized distribution of MP3 files was not relevant.

Campaign against internet crime

Throughout April of this year the Taipei Prosecutors Office waged a campaign against internet crimes, shutting down 37 websites and arresting 32 people. Although many of the closed sites distributed purportedly illegal pornography, 17 were commercial sites that distributed MP3 music files.

One suspect was arrested for operating eight different sites selling MP3 music. Another was arrested twice before for operating MP3 websites. To date, however, none of the arrests has culminated in a trial that would reveal whether MP3 distribution truly is illegal in Taiwan.

While most of the raids drew little attention, one grabbed front-page headlines. On April 11, prosecu-

tors acting without a search warrant, ransacked dorm rooms at National Chengkung University, seized 14 computers allegedly containing MP3 files, and vowed to vigorously prosecute the owners of the computers. Though the raid was based on an anonymous tip, IFPI spokesman Li Jui-bin later indicated that his organization was behind the action.

Not surprisingly, many were outraged at the raid. Taiwan's Minister of Education, Ovid Tseng, swore he would fight for the rights of the students. Taiwan's High Court announced that the prosecutors' office 'violated internal regulations' during the raid, and a subsequent reshuffle of 21 chief prosecutors was widely blamed on the incident.

In response to public pressure, the enforcement eased up. IFPI official Robin Lee said that, 'only when we know whether the downloaded files are the property of our member record labels will we decide whether we'll take any action.' Eventually all suspects were let off the hook except one. In May 2001, the IFPI filed an action against one student for allegedly creating a website that distributed MP3 files. That matter was settled in August 2001.

Taiwanese copyright law

Apparently, the only MP3 copyright infringement case that has gone to trial in Taiwan was the music.com case. But the judgment in that case was based on consent, not the legality of unauthorized MP3 distribution. Moreover, the case is presently on appeal, and the opinion is not binding because it has not been declared precedential. Nonetheless, the court explained, in dicta, its view that creation of MP3 files entails reproduction of a work under Taiwan's *Copyright Law*.

A contrary opinion is expressed in this year's Special 301 report states, 'Article 3.5 of the Taiwan *Copyright Law* is unclear as to whether temporary or permanent storage of works in digital form is considered reproduction.'

Article 3.5 of the *Copyright Law* defines a 'reproduction' as 'a tangible copy of a work made by means of printing, reprography, sound recording, video recording, photography, hand-written notes, or otherwise.' Because that definition includes the all-inclusive words 'or otherwise', a reproduction is therefore simply any tangible copy of a work.

It is unclear why the Special 301 Report finds fault with that definition. The US *Copyright Act* does not even define 'reproduction'. If the purported lack of clarity lies in use of the word 'tangible', such objection lacks merit. Nothing in Taiwan's law would suggest that an MP3 file is not tangible.

As for US law, subject matter must be fixed in a 'tangi-

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ble medium of expression' in order to receive copyright protection. Protection is routinely granted to computer programs and other forms of expression less tangible than MP3 files.

Notwithstanding the skepticism of the Special 301 Report, there can be no reasonable doubt that an MP3 file is a 'reproduction' under Taiwan's *Copyright Law*. And, of course, article 22 of Taiwan's *Copyright Law* provides that 'authors have the exclusive right to reproduce their works'. Although Taiwan's *Copyright Law* is murky regarding distribution rights, both the uploading and downloading of MP3 files unquestionably involve reproduction. So, as in the Napster case, it all boils down to fair use.

When determining whether exploitation qualifies as fair use, Article 65 of Taiwan's *Copyright Law* requires courts to consider four factors:

- a) purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes;
- b) nature of the copyrighted work;
- c) amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- d) effect of the use upon the potential market for or value of the copyrighted work.

If those factors look familiar, that's because they are taken verbatim from the fair use factors of US copyright law.

Applying those factors, the Ninth Circuit concluded without hesitation that Napster's unauthorized distribution of MP3 files was not fair use. Judge Rakoff had no trouble reaching the same conclusion in *UMG Recordings, Inc. v. MP3.com, Inc.* (S.D.N.Y. 2000). Assuming Taiwan's courts apply the same logic, unauthorized reproduction and distribution of MP3 files in Taiwan should not qualify as fair use.

Infringement remedies

If one prevails in an MP3 copyright infringement lawsuit, what remedies can one hope to achieve? In addition to injunctive relief, article 88 of Taiwan's *Copyright Law* authorizes damages based on either plaintiff's losses or defendant's wrongful gain. If those are too hard to establish, article 88 provides for statutory damages in an amount up to NT\$500,000 (\$14,285) or in serious cases involving intentional infringement up to NT\$1,000,000 (\$28,571).

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The law fails to specify whether statutory damages are awarded for each act of infringement or not. That would be the logical interpretation, and Taiwan's judges tend to read provisions in that manner. But damages have not yet been awarded in an MP3 copyright infringement case, and other types of cases rarely involve so many acts of infringement.

US law provides statutory damages of up to \$150,000 per act of infringement. In *UMG v. MP3.com*, the defendant was ordered to pay \$25,000 for each of the almost 5,000 CDs infringed. Although the case eventually settled, damages would have totalled more than \$100 million. In Taiwan however, such a large judgment seems unlikely. Moreover, few Taiwanese defendants have the venture capital of a Napster or an MP3.com to pay such a judgment.

As mentioned earlier, Taiwan's *Copyright Law* also authorizes private criminal prosecutions. In fact, the government will prosecute crimes of copyright infringement only upon receipt of a private complaint. For criminal infringement, one may be sentenced to up to one year in prison and fined up to NT\$200,000 (\$5,714). For infringing with intent to sell, five years in prison and a fine of up to NT\$300,000 (\$8,571) are possible.

One site at a time

Regardless of whether Taiwan's courts will ultimately deem unauthorized distribution of MP3 files illegal, as

the law seems to require, the issue will remain vexing to legitimate sellers and producers of music. Damages are difficult to prove, statutory damages may be inadequate or uncollectable, and pirate websites are almost as common as counterfeit handbags on the sidewalks of Taipei. Litigation is clearly not an efficient or effective solution.

Ideally, the major record labels will eventually agree upon a common scrambling system that will limit the number of copies that can be made from a digital music file, and will offer their own online distribution systems. Sony launched a bilingual website (PlanetMG.com) in Taiwan in March 2001, where users could sample songs for free before downloading them using Sony's ATRAC3 compression technology. The site, however, is less than perfect.

Songs can be replayed only on ATRAC3 compatible MP3 players (mostly made by Sony). More importantly, the site opened with a pitiful 400-odd songs mostly by Sony's artists, and it charges an exorbitant \$1.99 per downloaded song.

Until the industry does better than that, the best recourse for musicians and record companies who wish to battle MP3 piracy may be to periodically patrol the internet for infringing websites and attempt to close them down, one at a time. If notified, internet service providers should be willing to close down sites that distribute MP3 files without consent. Otherwise, IFPI may be willing to help (find them at www.ifpi.com or ifpi.com/tw in Chinese). One can also file complaints with the Taipei prosecutor's office and hope for the best. For those determined to litigate, one can take small comfort in the fact that the law, at least, seems to be on your side.

Christopher M. Neumeyer is a Californian attorney living in Taipei

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**Please contact: Sed Crest
screst@euromoneyplc.com**