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Liabilities of Intermediary Service Providers for Online Copyright Piracy in China - A comparative review with EU's approach

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In a net-based transaction, the primary players include the information originator and the recipient. But other role players along the transmission path are essential including transmission/resource host, Internet service provider and directory service provider (including web crawler such as Google). It is in this sense that the concept of "intermediary service providers" (ISP) is defined and used throughout this issue of *CHINAjournal*.

In the same fate as all the other technologies, the Internet could be misused for illegitimate purposes. As one example of the wrongdoings, copyright piracy abounds in the Internet. Creative works in digital forms are uploaded, distributed and consumed through the network without the consent of the rightholders. Although copyright piracy pre-exists the Internet, its potential damage becomes daunting for the industry in the information society with the speed, ease and reach of data transmission promised by the Internet. While the direct infringers may be intractable for they are anonymous, sitting in a remote jurisdiction, or possessing little valuables worth of pursuing, ISPs represent easy targets for rightholders to claim for their damages. After all, the ISPs, with or without their own knowledge/intention, did facilitate the piracy transaction and potentially spill the adverse consequences over to a global dimension.

The question thus arises on whether the ISPs should be held liable for the copyright infringements that are conducted in the infrastructures and facilities that they operate, and if so, to which extent defences could be inferred so that such liability is limited? Answers to these questions should take into consideration the policy objectives from two perspectives. On the one hand, the interests of rightholders should be conferred appro-

appropriate protection in the Internet age by holding ISPs accountable for their negligent or irresponsible activities. On the other hand, in the name of function efficiency and free flow of information in the network, ISPs need sufficient latitude in the transposition of conventional copyright principles to accommodate the technique and business uniqueness in the digital environment, in particular the application of the concept "reproduction" to the functions and activities that are in an automatic, transient and incidental manner but nonetheless are essential for the terminal operation and transmission process.

This issue of *CHINAjournal* purports to give a brief review on China's legal regime on ISPs' liabilities of copyright infringement. It makes reference to the recently promulgated statutes, judicial interpretation and reported cases in the field of online copyright infringement. To place the analysis in the context of international trend and development, the approach that the European Union has taken in its related directives will be referred to in order for a legal comparison.

China's Regime on ISPs Liability for Copyright Infringement

In the 2001 revision of the Copyright Law, a new right of "information dissemination through network" is inserted in the bundle of the exclusive rights.¹ The right is defined as "the right to provide the public with works, by wire or wireless means, so that the members of the public may access them from a place and at a time individually chosen by them"². The

¹ Article 10.12, the Copyright Law of the People's Republic of China, promulgated by the Standing Committee of the National People's Congress on September 7, 1990 and revised on October 2, 2001 and effective as of June 1, 1991 (the "Copyright Law").

² Id.

definition resembles the “right of communication to the public” as provided in Article 3 of the EU Information Society Directive³. The right is accorded to authors of copyrighted works, performers and producers of phonogram and visual recordings⁴.

It is until 2006 that a detailed regulation⁵ by the State Council was promulgated to flesh out the generally defined “network information dissemination right” in the Copyright Law. As regard ISPs’ liability, the Network Dissemination Right Regulation provides liability exemptions for ISPs’ mere conduit, caching and hosting services⁶, the principles and conditions of which are similar with those prescribed in the E-Commerce Directive⁷.

China’s ISPs Liability in Comparison With EU Regime

The E-Commerce Directive provides for a system of specific liability exemptions, which acquits the ISPs in performing certain specific services provided that they comply with pre-specified conditions⁸. The activities that are covered by the exemption include the “mere conduit”, “caching” and “hosting”.

Mere conduit exemption⁹ discharges two types of activities. The first “consists of the transmission in a communication network of information”¹⁰, where the ISP is playing a passive role and acting as a mere “carrier” of data passing through his facilities. The second refers to the provision of network access, commonly known as Internet access service. Mere conduit

activities are exempted by objective criteria where they “include the automatic, intermediate and transient storage of the information ... in so far as this takes place for the sole purpose of carrying out the transmission in the communication networks ...”¹¹ It caters to neutralize the activities that are prerequisites or results of the ordinary operation of technology and has no material impact on the content and usage of the information transmitted. Provided that the ISP is not the initiator of the transmission, doesn’t select the receiver of the transmission and select or modify the contents¹², i.e., he does not have the control on the data flowing through the networks, he should not be held liable for the information transmitted.

Caching refers to the technology for the host to store a copy of a constantly requested resources on its own server and to meet users requests by providing a copy of that copy, so as to avoid saturating the Internet with the repetitive demand on specific material and enhance the efficiency of the network transmission. The decision to cache a resource is automatically made by software without the conscious intervention of the host operator. Therefore, the E-Commerce Directive sets forth the exemption for ISPs’ caching activity in automatic, intermediate and temporary storage of information for the sole purpose of making more efficient the information’s onward transmission. The conditions for ISPs to infer caching exemption, besides those being subject to under the title mere conduit, also include keeping information updated as well as acting expeditiously to remove or to disable access to the information upon the actual knowledge of the removal of original source, disabled access at original source, or removal or disablement of such access by court or authority order¹³. With satisfaction of all these conditions, ISPs should not be held liable for the caching activities.

Hosting is defined as the service that ISPs offer to the users to rent space and post any kind of data on the space. One key to the success of Internet is the ability of individual person leveraging on the hosting service to publish and share information

³ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.

⁴ Article 10.12, 37.6, and 41, *Id.*

⁵ The Regulation on Protection of the Right of Information Dissemination through Network, promulgated by the State Council on May 10, 2006 and effective as of July 1, 2006 (the “**Network Dissemination Right Regulation**”).

⁶ Article 20, 21 and 22, *Id.*

⁷ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, Official Journal L 178, 17/07/2000.

⁸ Article 12-14, the E-Commerce Directive.

⁹ Article 12, the E-Commerce Directive.

¹⁰ *Id.*

¹¹ Article 12.2, the E-Commerce Directive.

¹² Article 12.1, *Id.*

¹³ Article 13.1 (a) – (e), *Id.*

to the public at large at any time and place that they choose. An ISP is not liable for the information stored at the request of a user as far as he does not have actual knowledge of any illegality pertaining to the information, and upon such knowledge, he acts expeditiously to remove or disable the access to the information¹⁴.

The Network Dissemination Right Regulation is aligned with these EU rules in exempting the liabilities for ISPs' mere conduit, caching and hosting activities¹⁵.

In two aspects, however, the Network Dissemination Right Regulation presents significant variation from the EU's approach. Firstly, the Regulation provides exemptions for ISPs' liability in their hyperlinking and search engine operation, provided that they act expeditiously to disconnect the links upon obtaining the knowledge of the illegality of the linked contents¹⁶. The E-Commerce Directive's failure to cover the hyperlink and search engine activities is criticized as creating a regulation loophole. The Commission has taken notice on such concern and endorsed the Member States' respective practices to extend the limitations of liabilities to the providers of hyperlinks and search engines.

Secondly, to provide legal certainty for rightholders, ISPs and Web creators alike, the Regulation encloses a notice and take down procedure to guide the parties on how they should react when confronted with claim or counterclaim with regard to infringing contents or the concerned links and to provide them with legal certainty on the expectable consequence of their behaviours. Accordingly, rightholders may request the hosting, hyperlink or search engine service providers to delete infringing contents or disconnect the access or link to such contents by producing requested notification¹⁷. The notified ISPs should immediately delete the alleged contents or links and notify such to the customers who provide contents in question¹⁸. The customers are entitled to render counter-claims to reiterate

the legality of their activities, upon which the ISPs should resume the deleted contents or links¹⁹. Any damages incurred by the service receivers due to ill-founded deletion of the contents or disconnect of links shall be compensated by the rightholder who gives such deletion or disconnection notice²⁰.

The missing of a clear notice and take down procedure is another shortfall of the E-Commerce Directive. The "actual knowledge or awareness" of illegal activities, which will deprive the ISPs from relying on the caching and hosting exemptions, is not further defined. Without a prescribed notice and take down procedure, the ISPs are left uncertain whether they are properly informed, whether they should shut down webpage or hyperlink in dispute and when they do so, whether they would face potential liabilities towards the web creator, or what if they do not do so, whether they might face claims from rightholders. Indeed, a clearly set procedure, as provided in the Network Dissemination Right Regulation, helps to straighten out these baffled situations and provides the ISPs to certain extend with rule of conduct and legal security.

Reflection on the Leading Cases on ISPs' Liabilities

The reported Chinese cases in relation to ISPs' liability for copyright infringement are concerned almost solely with Internet portals or search engines. There are observed inconsistencies among the given verdicts from Chinese courts, reflecting the nascent nature of the industry and legal practices. Naturally, such inconsistencies create legal uncertainty for risk control purpose.

In *China Music Copyright Association vs. Netease*²¹, the defendant (an Internet portal) put the disputed song, which was authorised to the management of the plaintiff, on its own server and offered to the public for download. With the cooperation of a wireless carrier, the second defendant of this case, the service could enable the consumers download the

¹⁴ Article 14.1, the E-Commerce Directives.

¹⁵ Supra Footnote 6.

¹⁶ Article 23, the E-Commerce Directives.

¹⁷ Article 14, the Network Dissemination Right Regulation.

¹⁸ Article 15, Id.

¹⁹ Article 16-17, Id.

²⁰ Article 23, Id.

²¹ Netease is the third largest portal service in China behind Sina and Sohu. The case was in trial by Beijing 2nd Intermediary People's Court which gave its verdict on September 20, 2002.

song directly on their mobile phones so as to play as the ringing tone. Notably, the case was on trial after the Copyright Law had newly added the right of “information dissemination through network”. The court upheld the pecuniary part of the claims on the ground that the defendant did infringe such exclusive right. The court however discharged the wireless carrier from any liability on the grounds that the carrier was a mere conduit, in which it did not select and initiate the transmitted information and it had no obligation to monitor the content.

In *Liu Jingsheng vs. Sohu*²², the defendant, in conduction of its search engine service, provided links to the websites where a translation work of the plaintiff was published without authorization. The defendant did not directly put the infringing materials on its own server. The court held that linking and search engine activities themselves did not constitute reproduction or dissemination of work. Neither should search engines bear the obligation to monitor the legality of the linked information. However, in the event that the rightholder gave notice that the linked contents infringed his copyright, search engine was obligated to disconnect the links to avoid the continuance and expansion of the damage. Failing to do so would incur civil liabilities.

Above two cases paved out in judicial practices the basic principles that the general liability exemption for linking and search engine and mere conduit services. ISPs’ liability was clearly associated to their ill will or negligence. These were largely in line with what the more detailed Network Dissemination Right Regulation will have laid down. However, a case in 2005 to certain extent reversed these principles and caused temporary uncertainty for search engines’ liability.

In *Shanghai Push Sound vs. Baidu*²³, the defendant provided links to the websites where MP3-encoded 46 songs under the

management of the plaintiff were offered to download without rightholders’ authorisation. One important fact of the case was the defendant’s deep linking feature. As such, any person, by pointing the cursor on the search results provided by the defendant, clicking the right mouse button and activating the “save as” option, could directly download the target files without being actually directed to any websites. During the download process, a downloading frame would automatically pop up, identifying that the targeted MP3 file was sourced from mp3.baidu.com. The court held that what Baidu engaged in the described operation had exceeded the normal scope of search engine service and amounted to making direct profits through MP3 downloading. On this ground, Baidu was charged as having infringed the copyright of the plaintiff and was ordered to stop the linking service for the disputed songs. This case presented a clear deviation from the established rules on search engine’s liability. Out of the concern of the potential consequence of this case, Netease suspended its MP3 searching service similar to that of Baidu’s.

Search engines could breathe a sigh of relieve after another case involving Baidu in 2006. In the trial jointly brought by seven record labels²⁴ against Baidu’s MP3 directory service, the Beijing 1st Intermediary People’s Court ruled in favour of Baidu to dismiss the charges by the record labels on the grounds of the intermediary status of Baidu, its lack of knowledge of infringement and the failure of the record labels to give notice. This case restored the confidence of search engines in the aftermaths of Baidu’s loss in the 2005 trial. The court’s emphasis on the ISPs’ knowledge and rightholders’ notice highlighted the newly established notice and take down procedures in the Network Dissemination Right Regulation. It is therefore to be expected that the future legal fight between the rightholders and search engines regarding the online copyright infringement will be based upon the detailed rules of the Regulation. The inconsistency of the judicial verdicts on ISPs’ liability is likely diminished in the near future.

²² The case was in trial by Beijing 2nd Intermediary People’s Court which gave its verdict on December 19, 2000.

²³ Baidu is the largest search engine in China and often referred to as the Google of China. First trial by the Haidian People’s Court and verdict given under the serial number (2005) Hai Min Chu Zi No. 14665.

²⁴ Among them include Sony BMG, Warner, Universal and EMI etc.

However, the situation was complicated in the most recent case involving Yahoo China's similar MP3 location service²⁵. The Beijing 2nd Intermediary People's Court ruled on April 23, 2007 that search engine like Yahoo China should not in general be held liable for its linking activities merely because the linked website is engaging in copyright piracy. However, the court deemed that it is insufficient that Yahoo China only disconnects those links that the plaintiffs have notified it with detail URL addresses. Yahoo China should also be responsible to cut off other similar links to the concerned 220 songs of the plaintiffs, irrespective of whether their URL addresses are provided or not. Failing to do so renders contributory liability for the infringement. It appears that the court is inclined to impose a general monitor obligation on the search engine regarding the legalities of all the linked contents. This substantially constrains the scope of exemption that the ISPs could have inferred and takes a more hostile position against ISPs in respect of interpreting whether he has the actual/constructive knowledge of the infringement under the Regulation.

Both Baidu and Yahoo cases are still under appealing procedure. Certainly, the final ruling of the cases will help to set the standard of ISPs' liabilities and their limitation in applying the Regulation and will have direct impact on the business model and risk management of online operators.

Conclusion

China's legal regime on ISPs' liability for copyright infringement bears stark similarity to the EU regulations. It provides the general exemption for mere conduit, caching and hosting services under the similar conditions with those under the EU directive. The major difference lies in the exemption for linking and search engine service providers and the notice and take down procedure that are explicitly set forth in China's regulation. The inconsistency of Chinese court decisions on search engines liability is to be constrained, given that the clear-cut

notice and take down procedure provides a common rule of conduct for ISPs and rightholders to settle their disputes on copyrighted works disseminated in the Internet.

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²⁵ The plaintiffs are 11 renowned international record brands such as EMI, Sony BMG Music Entertainment, Warner Music and Universal Music under the leadership of IFPI.

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