CHAPTER TWO

THE JUDICIAL PROTECTION OF COPYRIGHT ON THE INTERNET IN THE PEOPLE'S REPUBLIC OF CHINA

Zhipei Jiang CJ

INTRODUCTION

The legal system for copyright protection on the Internet has been established for years, although the *Regulation on the Protection of the Right of Communication through Information Networks* (*Communication Right Regulation*) was only issued in 2006.[1] Since the late 1990s we have gained approximately ten years experience in dealing with cases involving Internet intellectual property disputes. In this chapter, I would like to briefly introduce and then discuss the development of judicial protection for Internet digital copyright in China.

THE ESTABLISHMENT OF THE DIGITAL COPYRIGHT PROTECTION SYSTEM IN CHINESE COURTS

The Internet and Copyright Judicial Protection

The development of the Internet industries has brought opportunities for the copyright industry as well as new challenges for the judicial protection for copyright

The Internet information industries became popular in the early 1990s, and gave rise to a variety of institutional problems in the mid 1990s. The

[1] It was made by the State Council as Decree No 468 and took effect on 1 July 2006.

issue of copyright protection on the Internet is a prominent one. It is an opportunity for, as well as a challenge to, the judicial practices of the Chinese courts. For instance, after several writers' works had been uploaded and disseminated over the Internet, they commenced a legal action for remedies;[2] however, there was no statutory provision the writers could rely on to bring the action.

The Increase of Cases Involving Internet Copyright Disputes since the Mid 1990s

Since the mid 1990s the Internet copyright issue has become extremely serious, with numerous disputes, brought about by the growing information industry in China, flooding the courts. Fortunately, due to the tremendous efforts of our experts and international communications, digital copyright theories have gradually been established. The research on ISP liability, the communication right, Internet copyright, exploitation of digital copyright and debates on the European Union or the United States approaches have paved the way for the development and establishment of Internet copyright theories, and served as the theoretical basis for the courts to deal with the relevant disputes.

The Development and Establishment of Internet Copyright Theories has Laid the Foundation for Legislation and Judicial Practices

The Supreme Court has paid close attention to the judicial practices of intermediary courts and district courts, in regards to their digital copyright dispute cases. From 1997 to 1999, the Supreme Court sent various judges overseas for study and research purposes: I was sent to visit the John Marshall Law School in Chicago to conduct research on the United States digital copyright laws.

It is unrealistic to expect the People's Republic of China's *Copyright Law*, which was issued in 1990, to provide all the answers to the digital copyright challenge. However, on the other hand, our endeavour to find

[2] *Wang Meng and ors v Beijing Cenpok Intercom Technology Co Ltd*. See the Civil Judgment *(1999) Hai Zhi Chu Zi No 57*, made by the Beijing Haidian District People's Court.

solutions through judicial interpretation, has, at times, been rather controversial.

In fact, exploitation through the Internet is just a new way to use copyright. It is quite controversial to regard the reproduction of copyright works on the Internet, as an act infringing on copyright; however the common ground, that copyright needs protection even on the Internet, has been reached. The Supreme Court made this clear in the late 1990s, through the publication of relevant judgments in the *Bulletin of the Supreme People's Court of PRC*.

The Release and Enforcement of the Judicial Interpretation Regarding Various Issues on the Application of Laws While Adjudicating Disputes Relating to Computer Networks

In December 2000, two years after the United States *Digital Millennium Copyright Act* came into effect, the Supreme Court issued the *Judicial Interpretation Regarding Various Issues on the Application of Laws While Adjudicating Disputes relating to Computer Networks Copyright* (*Networks Copyright Interpretation*).[3] At that time, the *Copyright Law* had not yet been amended.[4]

The *Networks Copyright Interpretation* resolves issues such as jurisdiction, the copyright owner's communication right,[5] on-line republishing and excerpting, and ISP liability. The *Networks Copyright Interpretation* initially granted newspaper publishers increased freedom by deciding that newspaper republishing and excerpting exceptions applied to the Internet,[6] while also stating that copyright law will apply to the Internet.

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[3] It was passed by the Adjudication Committee of the Supreme People's Court on 22 November 2000, and amended on 23 December 2003 and 20 November 2006.

[4] The current *Copyright Law 1990 of PRC* was issued in 1990 and amended in 2001.

[5] The copyright still belongs to the copyright owner of the original work after the work has been digitised. It will be regarded as copyright infringement if anyone uploads, spreads or reproduces the work without permission. The infringed party can either commence litigation or seek an injunction.

[6] The newspaper republishing and excerpting exceptions were initially provided by the *Copyright Law of PRC 1990* (Amended 2001) article 22 which states: 'In the following cases, a work may be exploited without permission from, and without payment of remuneration to, the copyright owner, provided that the name of the author and the title of the work shall be mentioned and the other rights enjoyed by the copyright owner by virtue of this Law shall not be prejudiced: … (4) reprinting by newspapers or periodicals, or

However the rules in relation to on-line republishing and excerpting have been changed in the second amendment of the *Networks Copyright Interpretation* and will be detailed below.

THE AMENDMENT OF THE *COPYRIGHT LAW* AND THE *NETWORKS COPYRIGHT INTERPRETATION*

The *Networks Copyright Interpretation*, issued in 2000, contains 10 provisions. In addition to a series of significant issues mentioned above, it provides that in cases where the actual amount of damages is indeterminable, the scope of compensation for infringing copyright on the Internet will range from RMB 500 to RMB 500 000.

China amended the *Copyright Law* in 2001 and introduced the "right of communication via information networks" as a new exclusive right for copyright owners. This new right acknowledges that communication via networks is a new way of exploiting copyright, and authorises the State Council to articulate specific regulations.

However, the amendment only contains three general provisions on Internet copyright and does not provide guidance for the courts on issues of applying the law to Internet copyright disputes. Among the three provisions, Article 58 provides that "[r]egulations for the protection of computer software and the right of communication of information on [a] network shall be established separately by the State Council."

Based on the amended *Copyright Law* and judicial practices, the Supreme Court made "the decision on amending '*the Judicial Interpretation Regarding Various Issues on the Application of Laws While Adjudicating Disputes relating to Computer Networks Copyright*'" in December 2003. This involved re-issuing the *Networks Copyright Interpretation* and completing the judicial protection system for Internet copyright. However, the amended *Networks Copyright*

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rebroadcasting by radio stations, television stations, or any other media, of articles on current issues relating to politics, economics or religion published by other newspapers, periodicals, or broadcast by other radio stations, television stations or any other media except where the author has declared that the reprinting and rebroadcasting is not permitted'.

Interpretation only stipulates that the maximum amount of compensation available for copyright infringement is RMB 500 000 and deletes the minimum compensation requirements. Moreover, it also provides civil liability for circumventing Technological Protection Measures (TPMs). As a result, after provisions that have been covered by the *Copyright Law* have been deleted, the *Networks Copyright Interpretation* covers nine issues.

In December 2004, the Supreme People's Court and the Supreme People's Procuratorate jointly released the *Interpretations on Several Specific Issues Concerning the Applicable Laws for Handling Criminal Cases relating to Copyright Infringement* (*Criminal Cases Interpretations*). The *Criminal Cases Interpretations* has broadened the range of copyright infringements that result in criminal punishment, by providing that the communication of copyrighted works via the Internet shall be regarded as "Illegal Publishing and Distributing", as stipulated by Article 217 of the *Criminal Code of PRC*. At that time the communication right was not protected by the *Criminal Code*, because it did not contain provisions on the "Crime of Network Dissemination".

Although the communication right had been established by the *Copyright Law* as a new exclusive right, and a new way of exploiting copyrighted works, there was no corresponding provision in the *Criminal Code*. Accordingly, we treated the unauthorised dissemination of copyright materials as "illegal publishing and distributing" which is punishable under the "Crime of Illegal Publishing and Distributing" provisions. This was a compromise due to the specific background of that era; however, whether it complies with the spirit of "legally prescribed punishment for a specified crime" remains controversial. Criminal punishment for infringing on the communication right should be further researched, before deciding whether the *Criminal Code* should be modified. However, since the release of the *Criminal Cases Interpretations*, in judicial practice infringement on the Communication Right can now be criminally punished.

THE 2ND AMENDMENT OF THE *"NETWORKS COPYRIGHT INTERPRETATION"* UPON THE RELEASE OF THE *"COMMUNICATION RIGHT REGULATION"*

The second modification of the *Networks Copyright Interpretation* focused on the statutory licensing of "online republishing of works that have been published by previous newspapers and periodicals".[7] As a result, the provisions on "online republishing" was deleted.

The previous provisions of the *Networks Copyright Interpretation* provided that: "[w]orks that are in compliance with the re-publishing rules[8] of the *Copyright Law* can be republished/reprinted by any other paper-based newspapers and periodicals, or Internet-based Web Pages without permission from copyright owners provided remuneration has been paid, unless the copyright owners require otherwise." However, the *Communication Right Regulation* does not make the statutory licensing applicable to communication through networks. The Supreme Court was considering whether to delete the provisions on "online republishing" and sought advice from the relevant department of the National People's Congress (NPC). However the Legal Committee of the NPC was silent on the conflict between the administrative and judicial organs.

As a result, the Supreme Court deleted the previous provisions on "online republishing" after investigating whether the "Regulations" were authorised by the *Constitution* and the *Copyright Law*. Since the "Regulations" have provided a clear answer to the "online republishing" issues, the *Judicial Interpretation*" had to be changed correspondingly. The application of law by the Supreme Court has been strictly in compliance with the *Constitution* and the *Law of Legislation*.

According to the amended *Networks Copyright Interpretation*, online republishing and excerpting of works (excluding software, films and

[7] "Except where the copyright owner has declared that reprinting or excerpting is not permitted, other newspaper or periodical publishers may, after the publication of the work by a newspaper or periodical, reprint the work or print an abstract of it or print it as reference material, but such other publishers shall pay remuneration to the copyright owner as prescribed in regulations." See Article 32 of *Copyright Law of PRC*.
[8] Ibid.

novels), before 1 July 2006, shall not be regarded as copyright infringement, provided remuneration has been paid and the author's name and the origin of the works has been indicated. However, after 1 July 2006, online republishing and excerpting without the permission of copyright owners will amount to an infringement, even if remuneration is paid.

THE APPLICATION OF LAW INVOLVING NETWORK COPYRIGHT PROTECTION AFTER THE *COMMUNICATION RIGHT REGULATION*

It is clear in the rules made by the Supreme Court, that the explicit provisions addressed by the *Communication Right Regulation* shall be strictly applied to any Internet copyright disputes. This is because the *Communication Right Regulation* contains specific provisions on Internet copyright, such as the liability of search engines and linking services. However, the *Communication Right Regulation* is too specific to cover all issues arising from a given complicated case.

Given the fact that not all issues are fully covered by the *Communication Right Regulation*, the amended *Networks Copyright Interpretation* and other relevant judicial interpretations should be applied to those remaining issues, including for instance, jurisdiction, aspects of ISP liability and the various forms of civil liability. The term "ISP" in this context refers to all service providers such as Internet Connection Service Providers and Internet Content Providers. The issues concerning service providers are rather complex and one issue is whether service providers should be categorised on the basis of the services they provide, or, on the entities themselves.

The Extensive Internet Torts and Application of Law

While making the *Copyright Law* and the judicial interpretations, the copyright owners' 'Communication Right' was given a very specific meaning to comply with the international treaties to which China is a party. Article 9(12) provides, that the "[r]ight of Communication via Networks 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". As

a result, we have not adopted the United States concept of "reproduction and distribution", nor have we completely accepted the European Union's stance either. The connotation of "infringement on the communication right" is based on the above mentioned concept.

However, to make the concept of initial infringement on the communication right so extensive that it includes linking and searching as communication via networks, is inconsistent with the original concept of the "communication right". The essential element of acts that amount to copyright infringement is "copy", and this concept is broadened when "linking and searching" is incorporated into "communicating via networks". However, the acts of providing "linking and searching" are punishable, provided certain other factors are made out. That is to say, that such acts, together with the primary copyright infringement acts, would constitute joint torts. Relevant factors include whether the infringer knew, or should have known, that the copyright infringement was occurring. This is viewed by legislatures and judiciaries internationally, in relation to Internet copyright infringement, as commonsense.

Determination of Infringement and Relevant Factors

Under Article 3 of the new *Networks Copyright Interpretation*, acts of an ISP, such as participating in someone else's copyright infringement, or aiding or abetting someone else to commit copyright infringement through networks, shall be made liable for joint torts together with the primary infringer, according to Article 130 of the *General Principles of the Civil Law of the People's Republic of China.*

Therefore, it is irrelevant that limiting the primary infringement to "communication via networks" would allow for some types of acts to escape liability. As the *Networks Copyright Interpretation* has clearly stated, any acts of participating in torts through information networks shall be regarded as "to have known or should have known of the infringing acts." It is immaterial whether the person involved is an Internet Connection Service Provider, or an Internet Content Service Provider, anyone who is involved in committing an infringement through information networks, and who knows or should know of the infringement, should be liable. This principle complies with the general

civil law theory and also acts as a limitation on establishing Internet copyright infringement and the scope of its liability.

For instance, issues including p2p liability (which has been discussed in Europe and the United States), search engine liability and deep link liability are all covered by the *Networks Copyright Interpretation*. In cases where a domestic infringer has committed acts against a website located outside of China, this will be actionable under the current *Networks Copyright Interpretation*, even though there is no apparent connection with the website. The approach adopted by the *Networks Copyright Interpretation* is to determine all cases involving Internet copyright disputes.

SOME SPECIFIC ISSUES ON THE APPLICATION OF LAWS

ISPs' Liability

Taking the liability of Internet Facility Providers as an example: should hardware providers be liable for copyright infringement? Or should Internet Connection Providers be liable? In the case of *Music Copyright Society of China v Guangzhou Netease Computer System Inc and China Mobile Inc (Beijing)*,[9] a Beijing court made a judgment in favour of the defendant on the grounds that the defendant merely provided facilities and a platform for transmitting and receiving information, and was unable to control the content transmitted. This case illustrates that Internet Facility Providers are not responsible for content transmitted, unless the content is provided by them or their affiliated operators.

Liability of Internet Search Engine Providers

In 2001, Sohu.com was sued by a writer for copyright infringement.[10] The defendant, a search engine provider, disconnected the two links the

[9] See Beijing No. 2 Intermediary People's Court, Civil Judgment *(2002) Er Zhong Min Chu No. 03119*, issued on 20 September 2002.

[10] *Ye Yanbin v. Sohu Aitexin Information Technology Ltd., Inc. (Beijing)* (Sohu.com Inc.) (2001); the first trial court was Beijing Haidian District People's Court and the appellate court was Beijing No. 2 People's Court. See the case summary written by Wanbin, the lawyer representing the defendant's, at <http://www.shouxinlvshi.com/shownews.asp?id=60> at 25 January 2008.

plaintiff complained of, and thus avoided further copyright infringement occurring on other websites. The court held that the defendant had fulfilled all of its obligations by not incurring other liability. The court's ruling in this case has been adopted as a rule by the *Communication Right Regulation*. That is, taking down a link, after receiving a notice of the link is the only thing the law requires, provided the links were not deliberately offered by the defendant.

In another case, an E-commerce company sued Yahoo Music for copyright infringement. [11] As the plaintiff's "notice" did not contain specific information on the URLs, the defendant had no way of knowing which links to disconnect. Due to this the court held that the defendant was not liable for copyright infringement.

Deep Link Issues

A network company sued a software company regarding foreign exchange trends software. [12] The plaintiff claimed that because the defendant had linked directly to the plaintiff's trend graph, instead of the plaintiff's front page, this was a deep link and should be regarded as a copyright infringement.

The court held that, while the defendant had not committed a copyright infringement, the deep link should be regarded as unfair competition since it undermined the potential benefit of the plaintiff's front page advertisement. Issues regarding deep linking are comparatively complicated because they are relevant to the commercial benefits generated from advertisements, but are irrelevant to copyright infringement. There is no direct causation between deep linking and copyright infringement. The *Robots Exclusion Protocol* can prohibit search engines from capturing certain pages and the plaintiff can use the *Protocol* to prevent its page from being linked.

[11] See Beijing No. 2 Intermediary People's Court, *Civil Judgement (2006) Er Zhong Chu Zi No. 07905*, issued on 15 December 2006.

[12] *Beijing Financial City Network Company v. Chengcai Caizhi Software Co. Limited*;, see further, Shen Rengan, '*Digital Technology and Copyright*' (2004, Law Press, China).

Issues Regarding P2P

Shanghai Push Sound Music & Entertainment Co Ltd sued Beijing Feixing Music Software Co Ltd in October 2005.[13] The defendant was accused of authorising the dissemination of music files, as a result of providing selected links to music files, and enabling users to search, download, and even burn music onto CDs or DVDs. The court found that the defendant had facilitated the users' copyright infringement, and along with the primary infringers, should be held jointly liable for the copyright infringement.

Issues Regarding Website Name

Sinoprojects.net complained that another website used a website name similar to its own.[14] The court held that only renowned names could be protected, and there was no evidence that the two website names were similar enough to cause confusion. As a result, the behaviour of the other site could not be regarded as unfair competition.

However, there have been cases where the courts have held that unfair competition has occurred. These cases have involved an unauthorised modification of "Windows registration information" for an end-user's computer and malicious software.

CONCLUSION

This overview highlights the growing complexity of copyright law in China as it adapts to meet the challenges of the digital environment.

[13] See Beijing No. 2 Intermediary People's Court, Civil Judgment *(2005) Er Zhong Min Chu No. 13739*, issued on 19 December 2006.
[14] See Beijing High People's Court, Civil Judgement *(2001) Gao Zhi Zhong Zi No. 109*.