Impact of Enforcement of Right of Communication through Information Network

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On 27 October 2001, the Standing Committee of the People's Congress reviewed and passed the Amendment to the Copyright Law of the People's Republic of China. In Article 10 of the amended Copyright Law as of 2001 has been incorporated a new subject matter under the copyright protection: the right of communication through information network, that is, the right to make a work available to the public by wire or by wireless means, so that people may have access to the work from a place and at a time individually chosen by them. This is the first time to have put the right of communication through information network in place in the law in China. But, the legislators did not make any specific provisions concerning this right in the Copyright Law.

After a long wait of five years, the Regulations for the Protection of the Right of Communication through Information Network was finally promulgated by the State Council on 18 May 2006, and has been in force since 1 July 2006. The Regulations for the Protection of the Right of Communication through Information Network set forth, in many aspects, the provisions on the issues relating to the right of communication through information network and copyright in the era of internet. Its promulgation and implementation will certainly have an important impact on the development of the internet and its related industry, and on the protection of the copyright.

I. Subject matter under the protection by the right of communication through information network

Directed to the characteristics of the right of communication through information network, the Regulations for the Protection of the Right of Communication through Information Network have mainly provided for these measures for the protection of the right of communication through information network:

1) Protecting the right of communication through information network. The Regulations for the Protection of the Right of Communication through Information Network provide that "any organisation or person that makes any other person's works, performances, sound recordings or video recordings available to the public through information network shall obtain permission from, and pay remuneration to, the right owner unless otherwise provided for in the laws or administrative regulations".

2) Protecting the technological measures adopted to protect the rightholders' right of communication through information network. The Regulations for the Protection of the Right of Communication through Information Network provide that "any organisation or person shall not intentionally circumvent or sabotage technological measures; nor shall it or he intentionally manufacture, import or offer to the public any device or parts used primarily for circumventing or sabotaging technological measures; nor shall it or he intentionally provide others with any technical service designed for circumventing or sabotaging technological measures.

3) Protecting the right management electronic information used to show the ownership of the right in works, or conditions for use of the works. The Regulations for the Protection of the Right of Communication through Information Network provide that "without the permission of the right owner, no organisation or person shall, without the authorisation of the rightholder, do the following: intentionally removing or altering the right management electronic information of the works, performances, sound recordings or video recordings made available to the public through information network, except removal or alteration unavoidable for technical reasons;

or making available to the public, through information network, the works, performances, sound recordings or video recordings which one knows or has reasonable grounds to know that the right management electronic information has been removed or altered, without the authorisation of the rightholder.

In fact, the Regulations for the Protection of the Right of Communication through Information Network do not strictly differentiate the concept of internet content provider (ICP) and that of pure internet service provider (ISP). According to the common understanding, unless it is otherwise provided in the Regulations for the Protection of the Right of Communication through Information Network, only when an ICP provides internet content is it necessary to obtain authorisation from, and pay remuneration to, the rightholder.

II. "Notification and deletion" procedure

Articles 14-16 of the Regulations for the Protection of the Right of Communication through Information Network have provided for a complete procedure of "notification and deletion". In other words, when a copyright owner believes that any product, performance, sound recording or video recording product involved in the service provided by an ISP infringes his/its right of communication through information network or his/its rights management electronic information is deleted or altered, the rightholder may notify the ISP in writing, requesting the ISP to delete the work, performance, sound recording or video recording product, or delink the program linked to said work, performance, sound recording or video recording product. Correspondingly, after receipt of the notification, the ISP should immediately delete the alleged infringing work, performance, sound recording or video recording product or delink the program linked to said work, performance, sound recording or video recording products, and meanwhile communicate the notification to those providing the work, performance, sound or video recording product. The "notification and deletion" procedure has been put in place exactly according to the commonly known "safe harbour doctrine".[1]

Articles 5-10 of the Measures for the Administrative Protection of Copyright on Internet are also related to the "safe harbour doctrine".

The Regulations for the Protection of the Right of Communication through Information Network provide that the corresponding notification shall include the following: (1) the name (appellation), means of contact and address of the rightholder; (2) the title and network address of the infringing work, performance, sound recording or video recording product which is requested to be removed or to which the link is requested to be disconnected; and (3) the primary proof of the infringement. But in the Measures for the Administrative Protection of Copyright on Internet, the contents relating to "notification" cover: (1) the proof of the ownership of the copyright infringed by the alleged infringing content; (2) the definite identification, address, and way of contact; (3) the location of the alleged infringing content on the information network; (4) the evidence of the copyright infringement; and (5) the declaration on the authenticity of the content of the notification.

The above comparison shows that the Regulations for the Protection of the Right of Communication through Information Network are less demanding on the contents of the notification. For example, the Regulations for the Protection of the Right of Communication through Information Network do not require a copyright owner to provide the proof of ownership of copyright, but merely require the provision of the primary proof of the infringement, without the need to provide all the relevant evidence.

The Regulations for the Protection of the Right of Communication through Information Network have made it possible for a rightholder to prepare the relevant proof or material and notify the ISP within a shorter period of time to stop an infringing act.

III. "Fair use" in the internet environment

Article 6 of the Regulations for the Protection of the Right of Communication through Information Network provides for eight circumstances of fair use, that is, under these eight circumstances in which an ISP may make a work available to the public without authorisation of, and payment of remuneration to, the copyright owner.

From the comparison of the provision with Article 22 of the Copyright Law on the circumstances of fair use, we have found the eight circumstances of fair use provided for in the Regulations for the Protection of the Right of Communication through Information Network do not include the circumstance of fair use provided for in Article 22 of the Copyright Law, namely "use of another person's published work for the purposes of the user's own personal study, research or appreci-

ation".

Now, we may see in many people's blog that the blog hosts use music works in which other people independently enjoy the copyright as the background music without the authorisation of the latter. Since the Regulations for the Protection of the Right of Communication through Information Network do not regard "use of another person's published work for the purposes of the user's own personal study, research or appreciation" as one of the circumstance of fair use, does this mean that their act of playing the music work on their blog is illegal? Does it mean that provision and use of another person's works on one's own blog are not acts of fair use? If so, it is necessary for the copyright owners to be paid the royalties for the use of the background music on the large number of blog websites or to delete these background music.

Also, Article 7 of the Regulations for the Protection of the Right of Communication through Information Network provides that "a library, archive, memorial hall, museum and art gallery may make available to their service recipients, through information network, on its premises a legitimately published digital work in their collection and any work reproduced according to law in a digital form for the purpose of display or preservation of the edition of the work, without the permission from, and without payment of remuneration to, the copyright owner. These institutions shall not seek any direct or indirect financial benefits from such activities, unless the parties concerned have agreed otherwise".

According to the preceding provision, fair use occurs within the premises. However, as for how to define what is "within the premise" means, there is no definite statutory standard. In addition, confining the fair use to the area of "within the premise" seems to have completely ruled out the possibility for digital library to fairly use digitised copyrighted works.

Articles 8 and 9 of the Regulations for the Protection of the Right of Communication through Information Network also set forth special provisions on the statutory licensing of the right of communication through information network under the special circumstances of distant education as a result of the nine-year compulsory education or the National educational program, and poverty alleviation.

IV. Circumstance of exemption of ISP and impact of the exemption

The Regulations for the Protection of the Right of Communication through Information Network set forth altogether four circumstances of exemption. Any ISP that operates strictly under these four circumstances, it is exempted from the corresponding liability for the possible acts of copyright infringement.

1. Circumstance of exemption of ISPs providing access and automatic transmission services

Article 20 of the Regulations for the Protection of the Right of Communication through Information Network provides that "a network service provider that provides network automatic access service at the direction of its subscribers, or provides automatic transmission service to works, performances, sound recordings or video recordings provided by its subscribers, and meets the following conditions shall not be liable for damages: the network service provider neither chooses, nor alters the transmitted works, performances, sound recordings or video recordings; and the network service provider makes available the works, performances, sound recordings or video recordings to the designated recipients, and prevents those other than the designated recipients from receiving them".

Under this provision, the ISP that provides network automatic access service, such as the Gehua Cable, should only provide service of automatic access service and automatic transmission service, and should do so only at the direction of their subscribers. They should not alter the works they transmit, nor transmit works to any one other than the prescribed subscribers. In fact, only the ISP that provides network automatic access service, such as the Gehua Cable, to date, stick to this mode of business operation. The issuance of the Regulations for the Protection of the Right of Communication through Information Network has little impact on them.

Article 21 of the Regulations for the Protection of the Right of Communication through Information Network provides that "a network service provider that provides the service of automatic storage for works, performances, sound recordings or video recordings obtained from another network service provider in order to improve the efficiency of network transmission, and automatically provides them to its subscribers according to the technological arrangement, and meets the following conditions shall not be liable for damages: it does not alter the automatically stored works, performances, sound recordings or video recordings; such storage does not affect the access of the initial network ser-

vice provider that provides the works, performances, sound recordings or video recordings to the information on the subscribers' access to the works, performances, sound recordings or video recordings; it alters, removes, or disables the access to, the works, performances, sound recordings and video recordings according to the technological arrangement when the initial network service provider alters, removes, or disables the access to them."

According to this provision, any ISP that provides automatic transmission service should not alter works stored with it, nor affect the monitoring of use of these works by the website providing the works. It, however, may take action in response to the way the website deals with the work.

2. Circumstance of exemption of network service provider that provides the service of automatic storage space

Article 22 of the Regulations for the Protection of the Right of Communication through Information Network provides that "a network service provider that provides its subscribers with network storage space for them to make available works, performances, sound recordings or video recordings to the public, and meets the following conditions shall not be liable for damages: (1) it clearly indicates that the network storage space is provided to its subscribers and discloses the name, person to contact, and network address of the network service provider; (2) it does not alter the works, performances, sound recordings or video recordings provided by its subscribers; 3) it does not know or has no reasonable grounds to know that the works, performances, sound recordings or video recordings provided by its subscribers infringe any other persons' rights; (4) it does not seek financial benefits directly from the works, performances, sound recordings or video recordings provided by its subscribers; (5) it promptly removes, according to these Regulations, the works, performances, sound recordings or video recordings alleged of infringement by the right owner upon receipt of notification".

According to this provision, any network service provider that provides its subscribers with network storage space, typically those that provide free blog space, should make it clear that they provide internet storage space service only, and that they should not alter works stored by others, they do not clearly know or have no reason to know that the stored works are infringing works, and they do not make any profit directly from any other person's infringing act. Also, the ISP should immediately delete an infringing work upon being notified of the infringement by the work.

Generally, the ISPs that provides their subscribers with network storage space are not obliged to comprehensively examine the documents others store with them. Unlike the ISPs providing access and automatic transmission service, the ISPs that provides their subscribers with network storage space are subject to the regulation under the "safe harbour doctrine" having the "notification and deletion as its core.

3. Circumstance of exemption of ISP providing search engine or link service

Article 23 of the Regulations for the Protection of the Right of Communication through Information Network provides that "where a network service provider that provides searching or linking service to its subscribers, disconnects the link to the infringing works, performances, sound recordings or video recordings upon receipt of the right owner's notification according to these Regulations, it shall not be liable for damages; where it knows or has the reason to know that the linked works, performances, sound recordings or video recordings infringe another person's right, it shall be jointly liable for the infringement".

According to this provision, any ISP that provides search engine or link service may also be protected by the "safe harbour doctrine" having the "notification and deletion as its core.

After the issuance of Regulations for the Protection of the Right of Communication through Information Network, the ISPs that provides search engine, like Baidu, expressed their satisfaction with the protection under the "safe harbour doctrine". From the wording of the Regulations for the Protection of the Right of Communication through Information Network, however, we may see that there are exceptions to the circumstance of exemption of "clearly know" and/or "have reason to known" in the Regulations for the Protection of the Right of Communication through Information Network. ISPs that provide search engine or link service are not completely innocent neutral party. They still need to make some judgement on, and analysis of, the works they provide the link service to.

But, in the judicial practice, how to define "clearly know" and/or "have reason to known" has again evolved into a very delicate technical issue. In the famous case Bushen v. Baidu[2], the court of first instance does not expressly address the issue of "clearly know" and/or "have reason to known". After hearing the case, the court of first instance believes that in the course of downloading, it is indicated in the automatically prompted loading frame that the relevant song file is

from Baidu. What Baidu has done goes beyond the scope of search engine service, and "in the absence of express specification of the legitimate source of an MP3 file and without the consent of the plaintiff, such an act has inhibited the plaintiff from making its sound-recording products available on the internet".

After the court hearing of first instance, Baidu appealed to the second-instance court, and the case is now pending. Baidu has revised the wording relevant to specific content of the MP3 downloading web-page.

To date, Baidu still has, on its website, the special "MP3" colume, on the page of which there are such sub-columns as "TOP 100 New Songs", "TOP 100 Songs" "TOP 200 Singers" and "Singers List". A user may enter these song lists upon clicking any one of the sub-column titles. For example, after one clicks the "Singers List", the names of the singers are shown in an alphabetic order. When one clicks the name of a particular singer, on the web-page will be shown the link to the songs of said singer at a speed at which a user may download and store it, on his HD, at the address of said link with one click of any one of the links.

With the Baidu's present download mode, Baidu edits, and arranges in order, the corresponding links. Then, is it possible that Baidu's editing and arrangement of the links *per se* can prove that it "clearly knows" or "has reason to known" that the linked contents infringe another person's copyright? Now, the case is still pending in its second instance, and we do not know the hearing of the case will involve the issue of "clearly know" and/or "have reason to known". So far, the standards for defining "clearly know" and/or "have reason to known" are absent in the legislative and judicial practice. How to determine the scope of "clearly know" and/or "have reason to known" remains unclarified.

V. Conclusion

The Regulations for the Protection of the Right of Communication through Information Network expressly provides that "the right of communication through information network" means a right of communicating a work, performance, sound recording or video recording to the public, by wire or by wireless means in such a way that members of the public may access to these works from a place and at a time individually chosen by them". Accordingly, the Regulations for the Protection of the Right of Communication through Information Network also apply to the SP or WAP websites on the wireless network. In fact, on these wireless websites also exist contents of non-authorised network information, and it is by no means less possible for infringement of the right of communication through information network to arise on the wireless websites than on the internet. For that matter, the copyright owners cannot afford paying attention only to the protection of the right of communication through information network on the internet, but not on the wireless network.

Additionally, Articles 18 and 19 of the Regulations for the Protection of the Right of Communication through Information Network only provide for the maximum amount of the administrative penalty imposed on acts of infringement of another person's right of communication through information network. They are not related to the matter of the amount of civil damages or the matter of the way for calculating the damages.

However, in cases of dispute arising from infringement of the right of communication through information network, rightholders, as a rule, seldom resort to the administrative mechanism by filing complaint with the National Copyright Administration. Instead, they choose to directly resort to the judicial mechanism to have their disputes settled by the people's court. In the legal procedure, how to calculate the amount of damages for infringement of the right of communication through information network has long been a difficulty issue besetting the judges and lawyers. The issuance of the Regulations for the Protection of the Right of Communication through Information Network does not effect a substantial breakthrough in addressing the issue. ■

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[1] The "safe harbour doctrine" has originated from the US Millennium Digital Copyright Act. Similar provision has been set forth in Article 12 of the Measures for the Protection Copyright on Internet of China: "where there is evidence showing that an ISP clearly knows about the existence of the fact of infringement or where the ISP takes measures to remove or delete the relevant content after ISP is notified of the infringement by the copyright owner, the ISP shall not bear the administrative legal liability.

[2] For the detail of the case, see http://bjgy.chinacourt.org/public/detail.php?id =23967&k_title = 步 升 &k_content = 步 升 &k_author=.