

How to Determine Direct Infringement with Deep-level Link:

Following the user standards as guiding principle and taking technical standards as exception

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Not all link services are internet service provision susceptible to the safe harbour protection under Rule 23 of the Regulations for the Protection of Right of Communication Through Information Network (the Regulations). Whether a specific link service is an act to directly communicate information on the internet or one of internet service provision should not be determined on account of whether the content communicated resides in the server of the website. If content in the linked website is directly available to a user directly on the homepage of the website, it should then be determined, in principle, that one has directly performed the act of internet service provision unless said website can prove that it had passively provided the internet technology service, and had done no manual intervention, and meanwhile, the form of the webpage which it has made accessible to internet users to present specific content is determined by the linked website.

In a case involving link and search services heard by the Beijing Haidian District People's Court in 2008, the court did not accord the defendant the safe harbour protection prescribed in Rule 23 of the Regulations. It, in stead, determined that the act was one of direct communication through information network. In the case, the Beijing Hengzhun Science and Technology Corporation (Hengzhun) was accused of providing, on its website without authorisation, the link service for video broadcast of the TV episodes Solders' Break-through, which infringed the right of communication through information network held by the China Sanhuan Audio-video Publishing House (Sanhuan) in the TV episodes. Hengzhun provided link on its website to the video-recording of each episode of the Solders' Break-through, and a user could click to play it online. During the play, the website address of the user's terminal appeared throughout under Hengzhun's website "ezhun.com", but the video-recording was not stored in

said website. Sanhuan alleged that Hengzhun had infringed its right of communication through information network. But Hengzhun defended that "ezhun.com" provided the search engine service using inbeded link, without directly providing the content; hence its act did not infringe Sanhuan's right. The court held that when one clicked an episode of the Solders' Break-through on the "ezhun.com", the webpage address remained under the ezhun.com, which was not the mode of provision of a search engine service. Rather, it was the video content the Hengzhun website had directly provided for users to browse, and one the "ezhun.com" website obtained from other websites. What "ezhun.com" website had done should be determined as an act of direct communication, and had infringed the plaintiff's right of communication through information network; hence it was civilly liable for ceasing the infringement and paying for the damages.¹

This case involves the concept and character of deep-

level link service and the relevant standards for determining the infringement. Varied views and practices are found in the judicial practice, and it is necessary to make a further in-depth analysis of the matter.

I. Fundamental concept

By deep-level link service is meant that the link service provided by a linking website enables a user to obtain content on the linked website without disconnecting the linking website. Then what is displayed in the address of the website is the web address of the linking website, not the linked website. Said content, however, is not stored in the linking website, but in the linked website.

To date, the deep-level link service takes two forms: one, it is impossible to find, on the webpage of a linking website, the source website on which a user obtains content. That is, it is impossible to see the search link service of the website merely on the webpage thereof; the other, on the webpage is clearly shown the source website of the linked content, i.e. it is possible to see the search link service of the website.

II. Varied determination of the character of acts of deep-level link service in judicial practice

1. Following the user standard to determine that an act of the deep-level link service, without authorisation of the rightholder, constitutes a direct infringement

For this approach, whether an act is one of direct communication through information network or one of internet service provision is determined not by considering whether the communicated subject matter resides in the server of the website, but by considering an internet user's understanding of the outer form or whether a user can directly obtain the content on the website. If the outer form enables him to think that the website is providing the information, or while he is aware that the website is providing link service, he can obtain the content directly on the website, then, its act should be held to be one of direct communication through information network no matter whether said information exists in its server, and it infringes the right of communication through information network in the absence of authorization of the rightholder, or, conversely, the act is merely one of internet service provision susceptible to the safe harbour protection,

and the actor is held liable for indirect infringement when he or it knows or has the reason to know the searched linked content constitutes an infringement.

In the present case, while it was not specified in the judgment, the court applied the user standards to have determined, according to the fact that a user could obtain the linked content directly on the webpage of the defendant's website, that the defendant's way of linking is different from the way the search and link services were provided as provided for in Rule 23 of the Regulations, and thus held that its act was a direct infringement.

2. Following the server standard to determine that a deep-level link service provider knowingly acts in infringing in an indirect manner.

For this approach, whether an act is one of direct communication through information network or one of internet service provision is determined by considering whether information communicated by an actor resides in the server of his website. Specifically speaking, if the content exists in an actor's server, his act is one of direct communication through information network. Without authorisation, he or his act infringes the right of communication through information network. If, however, the content does not reside in his server, his act is one of internet service provision susceptible to the safe harbour protection; he or it is held liable for indirect infringement only when he or it knows or has the reason to know the searched linked content constitutes an infringement. In practice, many cases are treated this way, such as the series of cases involving Yahoo's MP3 searching², and the case involving Sina's MP3 searching³.

III. Cause of difference in the server standards and user standards

The two different standards came from the different understanding of the right of communication through information network. It is provided in the Chinese Copyright Law that the right of communication through information network refers to 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. The difference between the two standards essentially lies in how to understand the provision "to make a work available to the public".

For the view supporting the server standards, the Chinese term is a translation of the English phrase "making

available” used in Article 8 of the WIPO Copyright Treaty (WCT), which means the possibility for a work to be made available to the public. Only the website that uploads, or otherwise puts a work in a server would make the work available to the public. If a linked website deletes it or turns off the server, even if the website setting up the link or a linking website retains the former link, it is impossible for the public to click to access the work. Conversely, even if a linking website removes the former link, the public may still visit the former linked website to access the relevant work. Obviously, it is a linked website, not a linking website, that determines the possible availability of some content to the public⁴. Given this, only the former performs an act of communication through information network. Accordingly, this view would lead to the conclusion that given that the link service provider does not reproduce or copy the relevant content in his or its server, the link service that the provider provides inevitably falls into the circumstance as provided for in Rule 23 of the Regulations. Indirect infringement is constituted only under the circumstance where one subjectively have or should have the knowledge.

For the view supporting the user standards, the act of making a work available should not be narrowly construed as one requiring the presence of the work in a server. What decides the availability of a work to the public is the server of a third party’s website where the work is stored, not one of a linking website, but it is no denying that within the time from a work is communicated on a third party’s website to the time when it is deleted, what the linking website does would also make the work available to the public. It is not expressly specified in the law that presence of a work in the server should be taken as the premise, and the act of making a work available may be construed merely as one to communicate a work, and acts of the nature should also include acts of the circumstance. Based on this, the view is that not all who provide services using link technologies are link service providers as mentioned in Rule 23 of the Regulations. A technical concept is by no means equivalent to a legal concept: even if a service provider uses a link technology in the course of its service provision and content is not copied in its server, what he acts should be determined as one of directly communicating information, so far as its service provision makes a user believe that the service provider is communicating information, and his act constitutes direct infringement without authorisation from a rightholder.

VI. Determination should be made with user standards as the principle and technical standard as exception

For the writer, relatively, the user standards is more conducive to safeguarding the interests of rightholders. For this reason, he is for the determination made by the court. Theoretically speaking, however, application of the server standards or user standards in absolute terms is likely to injure the legitimate rights and interests of the rightholders and content communicators. Therefore, the relatively reasonable practice is to apply the user standards in principle, with the technical standards applied under specific circumstances.

1. Specific meaning of “with user standards as the principle and technical standard as exception”

By “with user standards as the principle” is meant that if a rightholder proves that a user has access to some content on a linked website without disconnecting the webpage of a linking website, it should be preliminarily determined that the service provided by said website is content provision service, and the act is one of direct communication of information on the network.

By the “with technical standards as exception” is meant that if a linking website proves that its user has access to content on a linked website without disconnecting the webpage of a linking website entirely and only with the linking technology of the website and without human intervention, then, under this circumstance, it may be determined that the linking website has performed the act of linking service, to which Rule 23 of the Regulation applies.

Compliance with the technical standards is determined depends on whether the webpage on which a linking website displays a work to its user is completely by using link technology of said linking website. If it is, it should be determined that the linking website only provides the link service without human intervention and in compliance with the technical standards. If not, it should be determined that the linking website performs human intervention, violating of the requirements of the technical standards.

For example, the high-level search service Baidu and Google provide in a special format (e.g. “doc” or “ppt” files) are deep-level link services satisfying the technical standards. Take for example, the high-level search of “.doc” files, when a user inputs, at the search frame, the words “regulations for the protection of the right of communication through

information network”, and then clicks any one of search findings, he may obtain the window for downloading or opening the “Regulations for the Protection of the Right of Communication Through Information Network” to download or open it in the “doc” file, without the need to enter the linked website. But, the user has access to the website without the need to enter the linked website not because Baidu and Google have performed human intervention while using the link technology. Rather, the user does so because the linking website *per se* has provided said webpage. If a user inputs the absolute address of the document in the web address column in the browser, he would find that he has got the same “download” or “open” window. Under this circumstance, it should be determined that the acts performed by Baidu and Google are the search and link service provision as mentioned in Article 23 of the Regulations.

With the present case determined this way, if the accused website can prove that it is able to make available the video play on its webpage entirely because of the linking website, then it may be determined that the safe harbour protection provision of Rule 23 of the Regulations is applicable. As the state of the art regarding the network technology shows, the form of deep-level link of video content is substantially not decided by a linked website, but made available by a linking website applying some technological measures. Therefore, with the principle being applicable, the defendant is substantially precluded from the safe harbour protection under Rule 23 of the Regulations.

2. Determination made “with user standards as the principle and technical standards as exception” complies with the provision of the Copyright Law concerning acts of communication through information network

Given that making the determination this way would lead to the fact that under some circumstances, an act of deep-level link is determined as constituting a direct act of communication through information network, its practical meaning is that an act of communication not based on the premise of reproduction or copying constitutes a direct act of communication through information network. Therefore, the primary premise for the tenability of the determination made this way is: under the provisions of the Chinese Copyright Law, whether the act of communication through information network does not naturally take an act of direct copying (uploading) as its premise and whether such acts also include acts of identical communication without uploading (e.g. acts of search and link).

Following is an analysis made in line with the provisions of the Copyright Law. It is provided in the Chinese Copyright Law that the right of communication through information network refers to 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. Given the fact that the expression “to make a work available to the public” is used in the Law and it does not provide that the act of making available must be uploading first and then making available, the writer argues that the provision may be construed as meaning that any act of making a work possibly available to the public confirms to the provision, without the need to take “uploading (copying)” as the condition.

For this writer, under the server standards, that constitution of the act of direct communication through information network requires uploading (copying). This is a one-sided understanding. While the definition of the right of communication through information network of the Chinese Copyright Law is originated from Article 8 of the WCT, this writer agrees that it was then intended to address the acts of uploading and communication. But this writer also believes that the circumstance arose merely because there had not emerged the technologies, such as the deep-level link; the provision does not necessarily mean that it is naturally believed to be applied only to the regulation of infringing acts as caused by the technology existing at the time, of course excluding acts of communication resulting from the new technology that has emerged thereafter.

3. Determination made “with user standards as the principle and technical standards as exception” complies with the safe harbour provision of the Regulations

Given that Rule 23 of the Regulations has provided for the legal liabilities for link service, whether the determination made in the above way is justifiable or not should be judged depending on whether it conforms to the provision of Rule 23 of the Regulations.

The provision of the safe harbour protection relative to search and link service under Rule 23 of the Regulations does not specify what technology is the search and link service technology mentioned in the Rule. But Rules 2 and 22 on the safe harbour protection of the Regulations have clearly provided for the conditions for the liability exemption. As these provisions show, these provisions of the Regulations have offered the corresponding legal space for the developments of the technology. But protection of network technology is con-

ditional under the Regulations, namely, only passive internet services and those without human intervention are susceptible to the safe harbour protection. Given that the standards of the provisions on the protection of technology are consistent, the safe harbour protection of search and link service technologies under Rule 23 of the Regulations should naturally be construed as protection of pure search and link service without human intervention.

In this situation, we need to judge what link service is one of pure link technology. In practice, link-related technologies, quite varied, are under rapid development. Many different link technologies have the function to provide access to content of a linked website without copying. But some technologies take users to relevant webpage of a linked website to obtain content, while others enable them to obtain content of a linked website directly on the linking website (namely, the deep-level link as referred to in this article). Then, are technologies having link function all taken as the pure link technologies protected under the Regulations? For the writer, the answer is negative. A link technology on the technical level and link service on the legal level are not the same concepts.

For the writer, to judge whether a technology is a pure link technology, we should go back to analyse the legislative aim of the technical protection under the Regulations. The fundamental purpose to protect link technology service under the Regulations is to protect the exchange of and users' easy access to the internet information. But the protection of the nature is by no means unlimited. The link protected for this purpose should be able to show how one website is related to another. Therefore, in essence, the requirement of a pure link are that not only a link website may essentially make contents on a linked website available to users by way of its link service provision, but also, in form, should enable users to believe that the contents are from a linked website, not a linking website. If the essential requirements are not met, it should reasonably be presumed that the linking website has exercised human intervention, while using a link technology, by using some other technology as well. Of course, with the technological developments, there are inevitably exceptions to this requirement. But the linking website is required to prove, with evidence that the exception, i.e. the appearance of the circumstance, is for some technical reasons, not results from human intervention. Take the high-level search of Baidu and Google for instance, the fundamental reason that content is searched on linking website, not on a linked website, is that relative to the files in the corresponding format, the interface

of the browser now in use is not compatible with it; hence, the corresponding file is not made directly available even on the webpage of the linked website. Under this circumstance, while a deep-level link service provider makes the content available to a user who does not enter the linked website, it should be determined that what he or it provides is a pure link service.

As the preceding analysis shows, the determination made "with user standards as the principle and technical standards as exception" as supported by the writer is obviously in conformity with the legislative aim of the Regulations to protect technology. But adoption of the server standards would bring all services having link function under the protection of Rule 23 of the Regulations, which is, obviously, a too broad a construction of the provision, and contrary to the intended aim to provide the technical protection.

4. Determination made "with user standards as the principle and technical standards as exception" is in line with the doctrine of balance of interests

Relative to the absolute server standards and absolute user standards, determination made "with user standards as the principle and technical standards as exception" proposed in this article can maximally keep a balance between the interests of rightholders and those of link service providers, and would not adversely affect the interests of internet users.

For the writer, adoption of the absolute server standards would greatly dampen rightholders' enthusiasm to invent, and does harm to the balance of interests protected under the Copyright Law. The unreasonable consequences thereof are mainly as follows:

First, relative to direct content provision, the act of deep-level link would cause more injury to rightholders, and, correspondingly, bring more benefits to deep-level link service providers.

Limited by the technological development in the early days of the internet development, a rightholder's interests are prejudiced mainly by the acts of direct uploading and communicating works by internet service providers. But, with the development of technology, the deep-level search and link service technologies are widely applied. Now, services that indeed make works available to many internet users are virtually not those of websites that upload works, but those of websites providing the link and search services, especially by the websites providing the deep-level link and search services. Since specific contents are not stored in the servers of

these websites, what they have made available to users are by far more extensive than what the websites of content providers can possibly provide. As a result, they cause more injury to the rightholders.

Meanwhile, since the internet economy is virtually an eyeball economy, and the visual perception the deep-level link services give users is the same as a content providing website; given that a deep-level link service provider *per se* does not store content, it differs from a direct content provider in that it does not have to bear the cost for servers; we can thus reasonably assume that, under the same circumstances, a deep-level link website can benefit from users no less, but even more, than a content providing website.

Then, while, relative to a direct content provider, a deep-level link service provider would make more profits, and inflict more injury to rightholders. With the server standards adopted, however, it or he would bear much less obligation than a direct content provider.

With the server standards adopted, a deep-level link service provider does not have to be authorised by a proprietor of copyright (or neighbouring right) in the content linked, and is liable for damages only when it subjectively knows or has reason to know that the linked website infringes the relevant copyright. Adoption of the standards would inflict damage to rightholders (especially to holders of the right in literary works, photographic works and works of art with non-obvious state of proprietary right) merely because a link service provider is not subjectively able to identify whether a linked website infringes a copyright, so he or it does not have to be held liable. Conversely, a website that indeed uploads content with prejudicious consequence substantially identical with or lighter than, but benefits not so much as that of deep-level link service websites has to secure authorisation of a proprietor of copyright (or neighbouring right) on its own initiative, otherwise, it would be held subjectively faulty, and liable therefor. This is obviously unfair, and would inflict huge damage to rightholders, and make it possible for such link service providers to make profits that they are not entitled to.

Relatively speaking, adoption of the user standard would rectify the above flaw of the server standards since user standards hold the act of the deep-level link service provision one of direct communication through information network, and a website setting up such link is exempted from liability only when it is authorised by the holder of the right in the linked content. This practice is obviously good for protecting the interests of the rightholders. But the absolute application

of the standards has its own problem, since it would render the users of deep-level link technology and websites directly providing content equally liable, and the former correspondingly liable for direct infringement merely because their provision of service in terms of pure link technology. This liability determination principle would leave no room for the link technology to be protected under law, with the inevitable consequence of impeding, to an extent, the developments of the internet technology.

Determination made “with user standards as the principle and technical standards as exception” would make it possible for a service provider using such technology to be indirectly liable for damages only when he or it clearly knows or has reason to know that some linked content is infringing content by protecting pure link service provision without human intervention and free from liability for direct infringement so that some room is left for pure technologies to develop. Where a deep-level link service provider exercises human intervention, holding it directly liable for infringement would maximally protect the interests of rightholders, and, as well, strike a balance between the protection of the interests of rightholders and promotion of the development of the internet technology. Adoption of the way for making the determination will win recognition of the legitimacy for the pure deep-level link technology, and leave a reasonable room for its development, and make it possible for the internet users to continue to benefit from the convenience brought by the technology. ■

The author: Judge of the IP Tribunal of the Beijing Municipal No.1 Intermediate People's Court

1 See the Beijing Haidian District People's Court's Civil Judgment No. Haiminchuzi 22561/2008.

2 See the Beijing Municipal No.2 Intermediate People's Court's Civil Judgment No. Erzhongminchuzi 02628/2007.

3 See the Beijing Haidian District People's Court's Civil Judgment No. Haiminchuzi 9276/2007.

4 Wang Qian, A Coursebook on IP Law, the Remin University of China Press, 2007, P.167.