An Overview of the Seminar on Practice and Trial of Internet-related Copyright Cases

On 13 August 2010, the Seminar on Practice and Trial of Internet-related Copyright Cases was organised and held in Beijing by the Beijing No. 1 Intermediate People's Court, with the help of the International Intellectual School of Peking University and the National Digital Copyright Research Base.

The Beijing No. 1 Intermediate People's Court, known as a court that tries the most IP-related cases in China, has been, for years, active in launching academic researches within the court system. The court forms groups headed by trial judges and devoted to research projects on various emerging new issues in its practical trial. It holds seminars and workshops in their researches with a view to exchanging and sharing their preliminary academic findings with experts and scholars in the IP community. In doing so, it has been constantly improving the research work, which in turn serves to guide the trial of IP-related cases.

At the Seminar was discussed the new research project on the network copyright protection. The topic consists of four main themes: establishment of ISPs' acts of infringement, liability for destruction of technological measures and removal and alteration of right administration information, jurisdiction of network copyright cases and determination of website operation, and reliefs in network copyright cases. As usual, the exchange among judges, scholars and practitioners were fruitful. Following is an overview of the views pre-

sented at the Seminar.

Establishment of ISPs' act of infringement

The legislation concerning the online copyright in China, that is, in Articles 20 to 23 of the current Regulations for the Protection of the Right of Communication through Information Network and Article 36 of the Tort Liability Law, has been incorporated the "safe harbour" provision of the US Millenary Digital Copyright Act (MDCA). According to the "safe harbour" provisions, the circumstance under which an ISP may be exempted from liability is determined, which may reversely presume non-infringement. In China, infringement is determined obversely under the general principles of the civil law in China. The difference in perspective does not hamper the judicial trial.

Most participants of the Seminar took the view that "know" mentioned in Article 36 of the Tort Liability Law and "clearly know or should know" in Articles 22 and 23 of the Regulations for the Protection of the Right of Communication through Information Network were identical in meaning, and the provisions consistent. The issue of whether there existed any conflict in other aspects was not further discussed at the Seminar.

Automatic access (communication) services

Those present at the Seminar generally believed that the purely technical service of the nature should not be held liable for damages for infringement, nor for ceasing and desisting from infringement. In respect of this, the provision that "mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this Treaty in the Agreed statements concerning Article 8 should be taken into account. The provision embodied the doctrine of "technology neutrality". Pure automatic access, though not physical facilities, was almost identical with neutral technology, which, consequently, was deemed to be neutral technology not only in China, but also in other countries and regions, such as the United States and the European Union.

Whether information storage space service provider is obliged to filter infringing contents

Under the internet environment, it was impossible for an information storage space service provider to take the responsibility for filtering, so it should be obliged only to perform its duty of care.

Determination of liability for infringement for communication of TV programs through internet

TV programs are generally communicated through internet by virtue of cooperation between TV sets manufacturers and an internet content provider. It is necessary to consider their cooperative relations between the two parties when determining whether a TV sets manufacture should be jointly and severally liable for infringement. That is, whether it had tied up a website providing particular content (such as one providing download of TV plays), or whether it had put in place a special technological platform inside TV sets to realise the cooperation. That is to say, no matter whether a TV sets manufacturer sets up, by itself, a platform for providing content, or co-operates with a content provider or a search service provider to provide the services of browsing and downloading content, it should bear the liability when infringement occurs as the TV sets manufacturer has changed its role of a TV sets manufacturer into that of a content provider. Where a TV set only has the function to provide access to the internet, the requirement for technology neutrality was met and its act is not infringing.

Business model

Regarding the business model of high risk of infringement, it should not be presumed that an ISP is at fault; instead, it should be found whether a service provider should be subject to more duty of care with regard to infringement of other parties' rights and interests.

Legal nature of circumventing technological measures and removing and altering information of right administration

The provision on prohibiting circumvention of technological measures and removal and alteration of the information of right administration are first set forth in WCT and WPPT with a view to putting in place measures for security and protection of the digital environment, including internet. The emergence and development of digital technology have made possible reproduction of works or information in a very quite simple way and at low price, and with quality identical with that of the original. Besides, under the digital environment, the authenticity of the information of right administration directly related to the security and realisation of rightholder's economic and spiritual interests. Consequently, rightholders generally use technological measures to protect their works or information, and draw support from the law to prohibit circumvention of their technological measures and removal and alteration of the information or right administration.

It was deemed to be illegal in the U. S. to circumvent technological measures, including the technological measures for preventing reproduction and visit. But in the current

Chinese law has only been incorporated the provisions concerning the technological measures for prohibiting circumvention of the technological measures for preventing reproduction. Putting tools for circumventing technological measures on the network should be deemed to be an illegal act and liability be imposed therefor depending on the seriousness of consequence. As for an act of removing and altering the information of right administration alone, an authorised party's removal and alteration of the information of right administration was also an illegal act; and how serious the act is has nothing to do with the scope of communication.

The conditions for the technological measures circumvention exemption include use of technological measures impeding users' use and due use thereof.

Jurisdiction of online copyright cases

The present day sees an over-concentration of online copyright cases. Judges hope to reduce the phenomenon of willful creation and option of jurisdictions in lawsuit by excluding, beforehand, improper and non-indispensable defendants. Considering the cost and efficiency of trial of online copyright cases, courts generally tend to exclude, from jurisdiction, the place where the consequences of an infringement occur. For some scholars, such exclusion was not conducive for rightholders to enforce their rights; whether the issue should be addressed this way is determined by the judicial policy. Determination of indispensable and non-indispensable defendants can only be made in the course of judicial proceeding, and it is impossible for it to be a factor to be considered when decision is made on matters of jurisdiction when a case is placed on docket. As for whether judges may add a defendant *ex officio*, one view was that, according to the Tort Liability Law, in respect of contributory/joint infringement, rightholders have the right to request to hold some parties jointly and severally liable, and courts are not empowered to add defendants *ex officio*; the other view was that all the parties jointly and severally liable should be added as defendants.

Reliefs in online copyright infringement cases

With regard to damages for infringement of the copyright in unpublished works, infringement of personal right might be first established, and meanwhile, determination of the amount of damages be made according to the remuneration standards promulgated by the relevant State authorities on the basis of the foreseeable damage. Some took the view that, in a case where several rightholders were involved in one right, and only some of them sue for the infringement, it is unnecessary to reserve in advance part of the damages for the other rightholders when damages are being calculated.

In the judicial practice, a Beijing court once decided, in a case, on the damages due to the word writer, composer, performer and sound recordings producer of an infringed musical work at the ration of 1.2 to 1.8 to 2 to 10. Some scholars found it unnecessary to decide on the damages of different amount; the damages due to each rightholder should be decided on the basis of the claim made and evidence presented by him or it.

To support the emerging industry, we may consider applying the minimum amount of damages on online copyright infringers in the emerging industry, such as digital libraries.

After an infringement is found, it is not necessary for the court to invariably order the infringer to cease and desist from the infringement; if the cessation affects the public interests, the court may not give such an order.

Present at the Seminar were, among others, Xu Chao, Inspector of the State Copyright Administration; Xiao Jianguo, Professor of the Law School of the Renmin University of China; Wang Qian, Professor of the East China University of Political Sciences and Law; Zhang Ping, Professor of the Law School of Peking University; Zhang Jin, Professor of the Civil and Commercial Law School of the University of Political Sciences and Law of China; Jin Haijun, Associate Professor of the Law School of the Renmin University of China, Zhang Guangliang, Visiting Research Fellow of the Institute for International Intellectual Property of Peking University; judge from the Supreme People's Court, the Beijing Higher People's Court, the Beijing Nos. 1 and 2 People's Courts; and representatives of copyright owners and internet businesses and those from the interested mass media.

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Major laws and regulations applicable to determination of online copyright infringement:

Article 130 of the General Principles of the Civil Law, Article 148 of the Judicial Interpretation of the General Principles of the Civil Law, Article 3 of the Supreme People's Court's Judicial Interpretation of Network Copyright, Articles 20 to 23 of the Regulations for the Protection of Right of Communication through Information Network, and Article 36 of the Tort Liability Law