

# Explanation of Beijing Higher People's Court's Guiding Opinions on Several Issues Relating to Trial of Cases of Network Copyright Dispute (I)

The Intellectual Property Tribunal of the Beijing Higher People's Court

It has been almost a decade since the courts in Beijing began to receive online copyright lawsuits in late 1990s. In recent years, online copyright lawsuits have taken up nearly 50% of all the copyright cases, and become an important part of the trial of the copyright cases, and even trial of the IP cases by all the courts in Beijing. More importantly, online copyright disputes are often closely related to the development of internet technology (IT) and new business models, while new circumstances and new issues constantly emerging, there are heated debates in the academic, internet, and judicial practice communities in and out of China. Besides, there are a large proportion of highly relevant, similar cases in the practice of court trial; the matter of inconsistent enforcement needs to be urgently addressed. To this end, the Beijing Higher People's Court introduced, in May 2010, the Guiding Opinions on Several Issues Relating to Trial of Cases of Network Copyright Dispute (Tentative) (I) (hereinafter referred to as the Guiding Opinions). The article is meant to explain some of the major issues mentioned in the Guiding Opinions.

## I. Judgment of acts of communication through information network

Under the law provisions, the right of communication through information network controls the acts of communication through information network. In practice, an allegedly in-

fringing act possibly involves a direct act of communication through information network, and an act of communication through information network performed by another party, with an internet service provider (ISP) being involved through internet technology and equipment. The former directly constitutes infringement of the right of communication through information network. As for the latter, if an ISP who is involved or assists another party in performing an act of communication through information network by providing the IT or equipment for the purpose constitutes contributory infringement together with a direct actor. Therefore, correctly distinguishing an allegedly infringing act as to whether it is an act of communication through information network or that of providing the technology is crucial to correctly defining the nature of such act and correctly applying the law thereto, and it is a precondition for due adjudication of such cases.

### 1) Determination of acts of communication through information network

For one view, in practice, only in the presence of online access by actual downloading, browsing and other ways is it possible to prove the performance of an act of communication through information network. An act of communication through information network refers to an act to upload a work, performance, sound-recording or video-recording to or put it, in other ways, in an internet server open to the public, so that the public may access it at a time or a place individually chosen by them. The act of communication through information network controlled under the right of communica-

tion through information network highlights providers' provision. Regarding this, it is specially pointed out in the Guiding Opinions that for an act of communication through information network to be constituted, it is not necessary for an interested party to adduce evidence to prove the facts of the presence of online access by actual downloading, browsing and in any other ways.

Views are divided in practice on what standards should apply to the determination of a constituted act of communication through information network, namely, an objective standard and a subjective standard (i.e. one of user's perceptions). For the view supporting the objective standard, whether a work, performance, sound-recording or video-recording is uploaded or put, in any other way, in an internet server open to the public by an ISP should be taken as a standard. For the view supporting the subjective standard, since a user has direct access to some content on a linking website and the model of the linking website service lead the user to believing that said website is making the information available, the making available should be deemed to be a direct act of communication through information network.

In the Guiding Opinions is adopted the objective standard, which insists on the fact that who has objectively performed the act of uploading. Of course, the matter of determination of acts of communication through information network exists not only when determining infringement in search link service provision, but also when determining infringement in the information storage space service and P2P service provision. As the debate on the two standards starts from the deep-link technology, only the deep link is used to explain the reason. Deep link is not a legal term, but a form of product, and its essence lies in the fact that a user directly obtains, on a search service provider's website, only a URL, not any real content coming from a third party. By nature, the deep-link technology service is still a neutral technology service, linking to both lawful, and unlawful, infringing information. Failure to follow the objective standard and adoption of the subjective standard by determining a deep-link technology as a direct act of communication through information network on the basis of a user's subjective perception that he can access the relevant information on a linking website would strangle the development of the technology. Besides, it is not possible to address the matter of the fate of a legitimate work, nor resolve the problem of piracy once and for all.

However, this does not mean that a linking website is

not subject to any legal liability. The Guiding Opinions provide that the forms of services provided by ISPs that confuse or mislead internet users, or illicitly take away others' achievements of labour (e.g. if deep-link technology service is confusing and misleading) may be regulated by the Unfair Competition Law. For that matter, that an allegedly infringing act does not constitute an act of communication through information network, nor does it constitute a direct infringement does not mean that it is not subject to the regulation of the Copyright Law; that an allegedly infringing act is not regulated by the Copyright Law does not mean that it is not subject to the regulation of the other laws. It is not the case that the Guiding Opinions disregard allegedly infringing acts, instead, they highlight regulation thereof with proper reason, aiming at addressing the fundament issues, such as the IT development, fate of legitimate works, and matter of piracy.

It is also provided in the Guiding Opinions that, when the objective standard applies, attention should be paid to application of the distribution of burden of proof. Where an ISP's service model leads a user to wrongly believing that it provides the service, and the ISP argues that it merely provides technological service, the ISP should adduce evidence to prove it; where the ISP cannot furnish evidence to show that the allegedly infringing information is provided and put, by any other party, in the internet server open to the public, the ISP may be presumed to have performed the act of communication through information network. But the practice of presuming uploader according to the burden of proof should not be confused with the "users' perception standard".

## **2) Relationship between interactive communication and act of communication through information network**

For one view, according to the expression of the communication through information network in Articles 37, 41 and 45, paragraph two, of the Copyright Law, and Article 2 of the Regulations for the Protection of the Right of Communication through Information Network (the Regulations), the right of communication through information network should not be limited to interactive communication. It is not difficult to find out that an important feature of the act of communication through information network is interactivity, referring to the definition thereof made in Article 10, paragraph one (12), of the Copyright Law. Where the law expressly provides that the act of communication through information network is characterised by interactivity, Any non-interactive communication should not be incorporated in the acts of communication through information network in disregard of the definition.

In the Guiding Opinions, provisions are set forth regarding the two circumstances on the basis of the understanding of the interactive character of the act of communication through information network.

One, the guiding Opinions provide that communication of a work on intranet is an act of communication through information network. For a view, the service provided through information network of netbars and campus intranet does not meet the condition of “individually chosen a place”, so it is not an act of communication through information network. In practice, some courts determine a defendant’s infringement on the ground of infringement of the rights of showing, broadcast and reproduction. The “public access works at a time and a place individually chosen by them” in the right of communication through information network, in essence, controls the act of “interactive” communication through network. “Access to a work at a time and a place individually chosen by them” refers to the characteristics of interactive communication. Any interactive communication through network should be controlled by the right of communication through information network. If there are more terminals on which information can be accessed, the condition of “a chosen place” is met. Therefore, the Guiding Opinions provide that communication of works through intranet is the communication through information network.

Two, as for the act of communication of works at a fixed time through network, the Guiding Opinions follow the practice of regulation under Article 10, paragraph one (17), of the Copyright Law. The authors’ right of communication through information network as provided for in the Copyright Law is clearly confined to interactive communication right, while communication at fixed time is an act of communication through network by non-interactive means, it is not an act of communication through information network. Since communication at fixed time is direct communication by wire means, while the right of broadcast under the Copyright Law does not cover direct communication by wire means, it hence falls outside the scope of the right of broadcast under the current Copyright Law. Therefore, the form of communication at fixed time can only be regulated by the embrative provisions on works in the Copyright Law.

It needs to be explained that Article 10, paragraph one (17), of the Copyright Law applies only to acts of online communication of works at a fixed time, but not that of online communication of performances and sound recordings or video-recordings at a fixed time because under Articles 37 (on the right of performers) and 41 (on the right of producers of sound-recordings or video-recordings) of the Copyright

Law, there is not any “embrative rights” of performers and producers, and the rights are not extended to cover acts of non-interactive communication. It should be said that, in terms of extent of protection, the “right of communication through information network” the Chinese Copyright Law has given performers and recordings producers fully complies with the WCT and WPPT provisions. WPPT has only provided for the “interactive communication right” of performers and producers, and it does not give them the right to regulate non-interactive communication.

### 3) Relations of “snapshot” and act of communication through information network

In practice the issue of “snapshot” is mainly related to three aspects: nature of “snapshot” and its relationship with the search engine service; the relationship between snapshot and the system cache service provision mentioned in Article 21 of the Regulations and the exemption of snapshot from liability; and the relationship between snapshot and fair use.

As “snapshot” is closely related to search engine service, ISPs often argue that “snapshot” is one type of search engine services. The argument is not in line with the facts. When providing search engine service, an ISP provides “snapshot” by generating copies of works, performances and sound-recordings or video-recordings in its server; hence, “snapshot” is no longer an act of pure provision of service of network technology or equipment. It constitutes an act of communication through information network.

To date, the trial practice in China involves a temporary storage, which may be technically known as “cache”. But the “snapshot” differs from the “cache” as mentioned in Article 21 of the Regulations, which refers to an ISP’s storing, for a period of time, a webpage a user visited in the past so that a next user can directly access it from the server when he visits the same webpage for the purpose of improving the efficiency of network transmission and reducing crowdedness on the network. The ISP’s cache service, an automatic, intermediate and temporary storage, is a pure technical service. The “cache” as mentioned in Article 21 of the Regulations is not dissimilar to that provided for in DMCA. The “webpage snapshot” commonly seen in lawsuits in China is also a short time storage, and can also be technically referred to as a “cache”, which, however, is fundamentally different from the “cache” as mentioned in Article 21 of the Regulations in nature since the “snapshot” is pre-stored in the network server. Therefore, it is specially pointed out in the Guiding Opinions that, if “snapshot” service is an ISP’s restoring an allegedly infringing work, performance and

sound-recording or video-recording in a network server or its action does not meet the three conditions for exemption from liability under Article 21 of the Regulations, the provision should not be cited for exemption from liability.

Of course, “the provision should not to be cited for exemption from liability” mentioned here does not mean that the ISP cannot be exempt from liability. For example, it may be exempted on the basis of fair use defence under specific circumstances. In the Copyright Law and the Regulations are clearly listed the circumstances of fair use. The circumstance where an ISP uses a work, performance and sound-recording or video-recording communicated through another party’s website in the form of webpage “snapshot” provision is not such a circumstance. But Rule 21 of the Implementing Regulations of the Copyright Law provides that, under the relevant provision of the Copyright Law, where a published work can be used without authorisation from the copyright owner, the normal use of said work should not be affected, nor the copyright owner’s legitimate interests be unfairly prejudiced. The provision spells out the basic condition for the constitution of fair use. The provision of Rule 21 of the Implementing Regulations of the Copyright Law is similar to the “three-step test” under the Agreement on trade-Related Aspects of Intellectual Property Rights (TRIPS) and other international treaties in substantive content. The Guiding Opinions have addressed the issue of whether “snapshot” constitutes fair use under Rule 21 of the Implementing Regulations of the Copyright Law. Accordingly, it is possible to address the issue of whether “snapshot” constitutes fair use under Rule 21 of the Implementing Regulations of the Copyright Law. It is pointed out in the Guiding Opinions that where an ISP uses another party’s works, performances and sound-recordings or video-recordings in the form of webpage “snapshot” provision without affecting the normal use, website, of his works, performances and sound-recordings or video-recordings and without infringing the other party’s legitimate rights and interests in these works, performances and sound-recordings or video-recordings, so not substantially replacing a user’s visit of another party’s website, and its use meets the other conditions under the law provisions, its use may be held to constitute fair use.

## II. Legal nature of network technology and equipment service provision and determination of fault on the part of service providers

### 1) Legal nature of network technology and equipment service provision

As for the legal nature of network technology and equipment service provision, some, resorting to direct infringement and indirect infringement doctrines in the UK and US laws, believe that the service providers constitute indirect infringement; some argue that ISPs should be liable for contributory infringement. As for the form of liabilities, some believe that ISPs should not be jointly and severally liable for infringement, but the supplementary liability. For us, in the relevant civil law regime in China there has not been incorporated the direct and indirect infringement system. Under the Chinese General Principles of the Civil Law, the Regulations and the relevant judicial interpretations, the joint infringement system should apply to regulate ISPs’ acts of participation in communication through information network by utilising their facilities and providing technical assistance. The supplementary liability is a principal and subordinate liability, and when the party of the principal liability cannot sufficiently pay for all its debt, the party of the subordinate liability should pay the remaining part of it. Article 37 of the Tort Liability Law has provided for the supplementary liability directed to the circumstance where a party obliged to ensure security fails to meet its obligation. The provision of Article 36 thereof, a provision relating to online copyright, has obviously ruled out the application of “supplementary liability”.

As for constitution of infringement, the Guiding Opinions make it clear that an ISP providing the services of information storage space, search, link or P2P constitutes infringement if another party performs a direct infringement. That is, a third party’s communication of works, performances and sound-recordings or video-recordings utilising the services of information storage space, search, link or P2P is an infringement of another party’s right of communication through information network.

### 2) “Form” of faults and “standards” for establishing faults

It is held in the Guiding Opinions that the forms of ISPs’ faults include “know” and “should know”, namely intentionality and negligence. Article 36, paragraph three, of the Tort Liability Law effective as of 1 July 2010 provides that where an ISP knows an internet user makes use of its internet service to infringe another party’s legitimate rights and interests, and fails to take the necessary measures, is jointly and severally liable with the internet user. Views are divided on how to understand “know”. But according to the main stream view, “know” covers “clearly know” and “should know”. Wang Shengming has noted, in his edited book entitled Explanation of Tort Liability Law of the People’s Republic of China, that “know” has two subjective states: “clearly know” and “should know”. Xi Xiaoming, Vice-President of the Supreme People’s Court, pointed out, at the All-China Intellectual

Property Trial Forum held on 28 April 2010, that the subjective element of “know” mentioned in Article 3 of the Tort Liability Law covers two circumstances of “clearly know” and “should know”. The view has been accepted in the Guiding Opinions, but the expressions of “know” and “have reasonable ground to know” are used therein. The terms of “know” and “have reasonable ground to know” have their origin in Article 23 of the Regulations. Article 23 of the Regulations also mentions “know” and “should know”. The expressions of “have reasonable ground to know” and “should know” as mentioned in the Guiding Opinions are of the same meaning. Specifically speaking, “know” means an ISP has actually had the knowledge of the existence of an infringement; “have reasonable ground to know” means that there obviously exist the facts or circumstances of infringement, and the ISP should be aware of the existence of an infringement.

As for determination of “fault”, it is believed in the Guiding Opinions that the reasonable person standards in the civil law also apply to ISPs. Indeed, network service provision has its special characteristics. A network technology and equipment service provider provides users with technology and equipment services to communicate information through network, and usually has to monitor information running through its network by virtue of technological means. However, since the technological means are limited, the network information is plentiful, and the contents are under constant change, its faults should be determined depending on the characteristics of its service. Anyway, whether an ISP is at fault or not should be judged by making examination as to whether the ISP knows or has reasonable ground to know about the adverse consequence of its act. Its knowing or having reasonable ground to know about it should be determined according to the capability and scope of its prediction and by distinguishing the level of average and professional predictability.

### 3) Two principles to be followed in establishing fault

On the basis of following the reasonable person standards for identifying the faults of a technology and equipment service provider, the Guiding Opinions have developed two principles to be followed in establishing fault according to the position and role of the technology and equipment service providers. One is that determination of fault should be associated with particular works, avoiding presuming fault of an ISP according to the mode it runs the website, which would impede the development of the internet industry. For example, a search and link service provider should not be held to “have the reasonable ground to know” under the circumstance where most MP3 that can be searched online were sound-recordings produced and uploaded without authorisation from the rightholders, and where in MP3 lists in its website do not exist the involved sound-recordings. Two is

that attention is paid to the law and characteristics of the network development per se in determining faults. First of all, it should not be required that ISPs providing technology and equipment services be obliged to make examination and monitor online on their initiative in advance. ISPs are not generally obliged to examine and monitor online as to whether users' communication of works, performances and sound-recordings or video-recordings utilising its technical service is infringing. That is, whether an ISP is at fault or not should only be proved with relevant facts, and an ISP should not be presumed to be at fault depending merely on the fact it fails to monitor the network and does not find and cease the infringement beforehand. Next, the precondition of “should know” is that the facts of infringement are glaringly obvious. That is, only if an ISP has its major fault, is it held to be at fault.

The principle adopted in the Guiding Opinions is substantially consistent with the practice in the developed countries and regions, such as the U.S. and EU. For example, §512 (m) of the US DMCA provides that ISPs are not obliged to monitor internet to find infringing activities. Article 15 of the EU E-Commerce Directive also requires the member states not to provide that ISPs have the obligation to police the information they communicate or store and to actively find the relevant facts.

How to find whether a technology and equipment service provider is at fault or not in particular cases is a very complicated matter. In addition to developing the general standards and principles for establishing fault, the Guiding Opinions enumerate the cases of determination of faults under specific circumstances according to the experience accumulated from the practice of trial of cases of the nature. Article 19 of the Guiding Opinions concerns determination of fault on an ISP providing information storage space service; Article 20 deals with the matter of forms of services of classification and listing of information related to the search, link and P2P services provisions. It needs to be pointed out that the above-listed circumstances are those with “glaringly obvious” facts of infringement. Determination of fault in practice often requires consideration of a variety of factors, and in a specific case, whether an ISP should know and is able to know that some accused works, performances and sound-recordings or video-recordings are infringing according to the specific case.

(To be continued)

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