

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

III. Relationship between the elements of liability of network service providers for infringement and conditions for exemption

Clarification of the relationship between the elements of liability for infringement and conditions for exemption is of great significance for adjudication of network copyright law-

suit. In the Copyright Law and the Regulations for the Protection of Right of Communication on Information Network (hereinafter referred to as the Regulations), no special provisions are set forth on the constitution of liability for infringement of intermediary network service providers providing system cache, information storage space, search and link services. But the exemption from liability for injury is specially prescribed in the Regulations. As a result, there have arisen great controversies over the issue of relationship between



the constitution of the liabilities imposed on the network technology service providers for infringement and the exemption thereof, i.e. whether a service provider who does not meet the conditions for exemption should be held liable for damages for infringement.

It is noted in the Beijing Higher People's Court's Guiding Opinions on Several Issues Relating to Trial of Cases of Network Copyright Dispute (hereinafter referred to as the Guiding Opinions) that, as far as the elements of civil infringement liability are concerned, no matter whether a general civil case or a network copyright dispute case is involved, or no matter whether the act of service of a network service provider's direct provision of content or its assistance for others to communicate information content by providing service of technology and equipment is directed, in finding whether an allegedly infringer infringing and should be jointly and severally liable for damages or not, the requirement of elements of civil infringement should be consistently observed, with account taken of whether it is at fault. To this end, it is specified in Article 1 of the Guiding Opinions that an ISP found infringing the right of communication through information network should be civilly liable for the infringement in the presence of the four elements: illicit act, consequence of injury, cause and effect between the two, and presence of fault. The significance lies in the fact that this provision is put at the very beginning of the Guiding Opinions. For the matter of exemption of network technology service provider, it is held in the Guiding Opinions that the type and nature of each specific condition for exemption in respect of various technology service providers as specified in the Regulations are different. Some are based on the exemption from liability for infringement, including the one based on the exemption from direct infringement liability as mentioned in Article 15 of the Guiding Opinions and the one based on the exemption from joint and several liability for infringement as mentioned in Article 14 thereof. Under this circumstance, the view stands that "the opposite of the condition for exemption is constitution of liability for infringement". However, some exemption has nothing to do with constitution of infringement in the sense of the civil law, which is neither based on exemption from direct infringement, nor on that from joint and several infringement. Then, the view that "the opposite of the condition for exemption is constitution of liability for infringement" does stand. For that matter, what should be considered first, generally, should be whether an ISP's act constitutes an infringement. On the basis and under the precondition of

this, determination is made in the light of consideration of whether an ISP's act is in keeping with the conditions for exemption under the Regulations and constitutes the elements of civil infringement. In other words, the conditions for exemption as provided for in the Regulations is only a "safe harbour"; the relationship between conditions for exemption and constitution of infringement is equivalent to that between the "safe harbour" and "risk of storm". Where the conditions for exemption under the Regulations are met, "anchoring" at the "safe harbour", generally no liability for damages for infringement would be imposed; but where the conditions for exemption under the Regulations are not or not fully met, one may or may not bear the liability for damages for infringement, which needs specific analysis and determination according to specific cases.

In practice, views are very much divided about the issue of application of Articles 22 and 23 of the Regulations. The difficulty in applying Article 22 of the Regulations lies in how to construe the conditions for exemption as mentioned in item (2) that "it does not alter the works, performances, sound recordings or video recordings provided by its subscribers", and in item (4) that "it does not seek financial benefits directly from the works, performances, sound recordings or video recordings provided by its subscribers".

For "alteration" as mentioned in the Article, the main difference is the issue that a video sharing website automatically inserts or overlays its logo at the corner of users' video uploaded. Some take the view that such website's logo as automatically added digital watermark alone does not constitute "alteration". But for others, whether alteration is constituted should specifically determined, depending on who puts the digital watermark, the ISP or the user himself, and where the added digital watermark is attached to the content in suit or display software. It is held in the Guiding Opinions that, from the perspective of the relationship between the condition for exemption and constitution of liability for infringement, this condition for exemption should be construed as "non-alteration of the content of a work", being one for direct infringement. In other words, "alteration" mentioned in the Article should refer only to the circumstance where after a website intentionally alters the contents of a work, performance, sound recording or video recording a user has uploaded, it releases them at its website; while a video sharing website's automatic insertion or overlaying of its logo at the corner of the video and automatic insertion of commercials before and after video display are equivalent to automatic

affixation of seal in warehouse management system at the corner of the goods put in storage, which should not be taken as “altering” video contents or as the video uploader. To this end, in the Guiding Opinions are mentioned three circumstances, as examples, which should not be deemed to be “alteration” of works, performances, and sound recordings or video recordings provided by subscribers, including those of alteration of the format in which the works, performances, and sound recordings or video recordings are presented; addition of website logo, such as digital watermark, to the works, performances, and sound recordings or video recordings; and broadcast of commercials at the beginning or end of, or in the middle of the works, performances, and sound recordings or video recordings.

As for item (4) of the Article “seeking financial benefits directly from the works, performances, and sound recordings or video recordings provided by subscribers”, it is held in the Guiding Opinions that the standard fees a network service provider charges from its users for its provision of the service of information storage space for subscribers based on the time and flow is equivalent to rent for a house, which is not an act of “seeking financial benefits directly from the works, performances, and sound recordings or video recordings provided by the subscribers”. The advertising or commercials fees a network service provider charges for its provision of the service of information storage space involves the matter of the mode of operation, which is a major mode to making revenue for a provider of the service of information storage space. Simple determination of commercials as directly seeking financial benefits would result in easily established infringement, and consequently impeding the development of the mode of the service of information storage space. It is, therefore, provided that the advertising fees charged for provision of the service of information storage space are generally not determined as financial benefits directly obtained. Similarly, for the circumstance where a network service provider puts advertisement for particular works, performances, and sound recordings or video recordings, it is generally improper to determine it as directly seeking financial benefits, which, however, should be comprehensively considered on the basis of the specific circumstance of a case when finding whether a network service provider should be held at fault. The reason is that under the Chinese General Principles of Civil Law and the Tort Law, this condition for exemption has no connection with the constitution of infringement; it is not the exemption based on direct

infringement, nor on contributory infringement. Advertising *per se* for particular works, performances, and sound recordings or video recordings may lead to network service providers’ direct contact of the content, which, then, may serve as one factor of consideration when finding whether the network service provider is at fault.

Regarding Article 23 of the Regulations, it is commonly held that, in practice, where the right owner fails to send a notification, it is not necessary for the provider of searching or linking service to be liable for damages. For this, in Article 26 of the Guiding Opinions, the condition for exemption for the provider of searching or linking service not to be held liable for damages is expressly prescribed on the similar basis of the relationship between the constitution of liability for infringement and the exemption formulated in the Regulations.

IV. Application of regulatory rules on “notification”

The right owner’s notification to the network service provider providing the service of information storage space, searching or linking should be in compliance with the provision of Article 14 of the Regulations, otherwise, the notification should be deemed not to have met the requirement. Some notifications from the right owners are fully in compliance with the provision of Article 14 of the Regulations with comprehensive and accurate information, and some are not. The former undoubtedly plays the role of a notification. Then, how should the latter be treated? It is held in the Guiding Opinions that, under certain circumstances, a right owner’s notification not fully in compliance with the provision of Article 14 of the Regulations may serve as the main factor for finding the fault of the network service provider. Due to the nature and technological limitation of the service provided by a network service provider, a network service provider is generally not obliged to monitor or examine the legitimacy of the information communicated through the network; objectively, it is difficult for them to notice whether the information is infringing. The right owner’s notification to them has the function of informing of infringement. If the network service provider disregards the right owner’s notification upon receipt thereof, where the notification is in line with Article 14 of the Regulations, it/he is knowingly at fault; where the notification is not fully in line with the Article, it/he may be held at fault for it/he should have known. In practice, it is comparatively common that in the notification from the right owner,

there is not the address of the website containing the allegedly infringing information. It is held in the Guiding Opinions that where the information of the notification is sufficient for the network service provider to accurately locate the allegedly infringing works, performances, and sound recordings or video recordings according to the information of the notification, it may be decided that the right owner's notification is a "warning with solid evidence" as mentioned in Article 4 of the Interpretation by the Supreme People's Court of Several Issues Relating to Application of Law to Trial of Cases of Dispute Over Copyright on Computer Network (Judicial Interpretation of Network for short). As for how to determine whether the information of the notification is sufficient for accurate location of the allegedly infringing works, performances, and sound recordings or video recordings, account should be taken of the specific circumstances, such as the type of the service the network service provider provides, the file type of the literal works, performances, and sound recordings or video recordings that the right owner requires to remove or disable the linking, and whether the names of the works, performances, and sound recordings or video recordings are particular. Regarding the legal consequences of the network service provider's failure to disable or disconnect the linking within a reasonable time limit, it is held in the Guiding Opinions that if the right owner's information is true in content, the network service provider may be found at fault, and be correspondingly liable for the extended portion of injury, which is in keeping with the provision of Article 36 of the Tort Law. As for how to determine the "reasonable time limit" for the network service provider to remove or disable the linking, since there are differences in the nature of service and works, and content of information, determination should be made by taking account of the factors, such as the form of the notification a right owner has filed, truthfulness of the notification, the quantity of the files involved in the notification, the difficulty for removal or delinkage, and the nature of the network service.

V. Other issues

(I) Technological measures

Different understanding, in practice, of the meaning of the provision on technological measures in the copyright sense under the Copyright Law and the Regulations leads to inconsistent application of law. For that matter, it is specified in the Guiding Opinions that the technological measures in

the sense of the Copyright Law should refer to those taken to protect the legitimate interests of the right owners under the Copyright Law, including those for restricting use of works and for restricting users' browsing or viewing the works. By summarising the international and domestic classical cases in judicial practice, the Regulations have exemplified the circumstances under which technological measures should not be determined as those in the sense of the Copyright Law. Meanwhile, it is provided in the Guiding Opinions that the technological measures susceptible to the protection under the Copyright Law should be effective ones. Whether technological measures are effective or not should be determined by taking as the standard whether the measures may be circumvented or decrypted by average users in a method they commonly have or use. That technological measures can be circumvented or decrypted in one way or another by a skilled person or an expert does not affect the effectiveness of the technological measures.

(II) Determination of website businesses

Regarding the issue of inconsistency between the businesses indicated in the recorded website registration information and those indicated in the information shown on the website, and the issue that who should be held liable therefor, it is provided in the Guiding Opinions that "the businesses indicated in the recorded website registration information or in the information shown on the website are the website businesses. Where the business indicated in the recorded website registration information is not the same as that indicated in the information shown on the website, it may be determined that they are businesses in partnership unless there is evidence to the contrary." In respect of the circumstance where it is impossible to determine a website business by consulting the recorded website registration information and the information indicated on the website, it is further specified in the Guiding Opinions that "registration information of a domain name holder may serve as preliminary evidence of the identity of a website business unless there is evidence to the contrary". The provisions are set forth out of the consideration, on the one hand, of the matter of the burden of proof an allegedly infringing website business has to bear in a particular case, and on the other, the enhancement of protection of the copyright owners to prevent website businesses from shifting off responsibility, which is conducive to the enforcement of the decision. ■

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