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CHINA'S POLICY TOWARDS INTERNET SERVICE PROVIDER LIABILITY FOR COPYRIGHT INFRINGEMENT

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As in Europe and in the US, in China the number of copyright infringement cases in Internet has significantly increased in the last years[1]. In order to face the challenge represented by the internet service providers's growing role in copyright infringement cases, China adopted in 2006 the Regulations on the Protection of the Right of Communication through Information Network, revised in 2013, which provide the guidelines to determine the direct or indirect liability of the internet service providers in case of infringement of the right of communication through information network of copyright owners, performers and producers of sound and video recordings. Having developed similar safe harbor provisions as the United States and Europe, there is nevertheless uncertainty and discrepancy regarding some specific elements that could be decisive in the assessment of ISP's liability, as it will be explained below when referring to several cases involving some of China's most important companies.

Direct liability

One the one hand, the Regulations provide a legal framework to determine the liability of the direct infringers to the "right of communication through information network", essentially following the Copyright Law of 1990 (amended in 2001) in copyright infringement cases when a non authorized ISP makes public a work.
In *CCTV v. All Potato Company*[2], China Central Television, China's predominant state

[1] The Supreme People's Court's "Intellectual Property Infringement Big Data Report" released in July 2017 shows that three quarters of the 6,0000 national copyright cases accounted from 2015 to 2016 were related to the information network.

[2] See "Tudou found guilty of violating CCTV copyright". *China Daily*, on June 24 of 2014. Retrieved from thttp://www.chinadaily.com.cn/business/tech/2014-06/24/content_17611127.htm (last access on 30 December 2018).

television broadcaster, sued All Potato Company (www.tudou.com) claiming that the latter was providing on-demand videos of the well reputed food documentary film "A Bite of China" (produced by CCTV) during its live broadcast period. The Minhang District People's Court of Shanghai and the Shanghai No. 1 Intermediate People's Court held that the defendant's actions constituted an infringement of the right to communicate information and held him liable according to articles 2, 5 and 10 of the Regulations.

The same decision was adopted in *Columbia Pictures v. Sohu*[3]. The Beijing First Intermediate Court ruled that Sohu.com infringed Columbia's "right of communication through information network" by providing subscription-based access to an unauthorized online video archive of about 100 US movies produced by Columbia Pictures and other studios.

Indirect liability

On the other hand, by specifying the four safe harbors the Regulations provide the guidelines to determine the ISP's indirect liability for those cases when he is not the primary infringer. This form of involvement is present in the majority of the copyright infringement cases in connection to ISPs, being article 22 (hosting) and article 23 (searching/linking) the most frequently encountered provisions[4].

1. Network service provider

First of all, article 20 regulates the liability of the network service provider, that is, the ISP enabling access and/or transmission to a communication network. According to this article, he bears no liability for compensation if he a) doesn't make any selection or modification of the work and; b) makes the work available only to the anticipated service recipients.

2. Caching service provider

Second, article 21 specifies the liability of the ISP that provides an automatic storage of the work in order to increase the efficiency of the transmission, and statues that he won't bear liability if he a) doesn't make any modification of the work; b) does not hinder the original network provider which makes available the work from keeping abreast of the

[3] See *Columbia Pictures v. Sohu.com*, Beijing First Intermediate Court, 27 Dec. 2006.

[4] S. Song. (2010). A Comparative Copyright Analysis of ISP Liability in China Versus the United States and Europe, *The Computer and Internet Lawyer, 27* (7).

information concerning the access; c) it automatically modifies or removes the access to the work when the original network service provider does so.

3. Hosting service provider

Third, article 22 regulates the liability of the hosting provider, that is, an ISP that allows users to store contents and information in systems or Internet networks. According to this article he won't be held liable if he a) clearly indicates that that information is provided for the service recipient, making his name known to the public; b) does not make any modification of the work; c) does not know or has no reasonable grounds to know that the work is an infringement; d) doesn't gain any financial benefit from the service recipient making available the work; e) removes the work upon receiving a written notification of the right owner. In China this category of ISP has been involved in several copyright infringement cases, similarly to Amazon or Google Books in Europe and in the US.

In *Han Han v. Baidu Library* the famous Chinese writer Han Han claimed that many netizens had uploaded his work "Like Adolescents" to Baidu Library for free downloading. The Court judged that, although there was no evidence that lead to conclude that Baidu Library knew about the infringement, considering the defendant's business model and its ability to stop the infringement it was clear that he did not fulfill its higher duty of care. Consequently, article 22 (the hosting provider provision) was not applicable and Baidu was held liable[5].

In *Success Media v. Alibaba*[6], the first sued Alibaba for copyright infringement, claiming he had uploaded and shared without authorization the TV drama "Struggle", for which Success Media enjoyed exclusive rights to broadcast in China. Alibaba claimed that the safe harbor clause of Article 22 should apply since there was no knowledge or reason to know that the uploaded material was an infringement and there was no direct economic benefit derived from the transmission. Finally, he claimed that he had removed the materials immediately after receiving Success Media's take-down notice. Although the argument was accepted by Beijing Chaoyang District Court, Beijing No.2 Intermediate Court overruled this decision arguing that Alibaba knew or should have known about the infringing content as a hosting provider and therefore should bear joint liability for the copyright infringement. When addressing the knowledge element of the defendant, the court

[5] See *Han Han v. Baidu Library* http://www.court.gov.cn/zixun-xiangqing-5269.html (last access on 30 December 2018).

[6] See *Ningbo Success Media Communications Ltd. v. Beijing Alibaba Information Technology Ltd.*, decided by Beijing No. 2 Intermediate Court, (2008).

reasoned that the TV episodes were uploaded during the same period as the prime time of local TV broadcast. Moreover, Alibaba had provided a detailed introduction of the TV series, including posters, actors/directors, and synopsis, for example, on its home page[7].

4. ISP providing searching or linking services

Finally, article 23 specifies the liability of the ISP providing searching or linking services which enable user's access to other websites, a service particularly sensitive to copyright infringement in connection to the *peer to peer* networks. According to article 23 the ISP won't bear liability if he disconnects the link upon receiving a written notification of the right owner. However, he will bear liability for compensation if he knows or has reasonable grounds to know about it.
In *Universal International Music B.V v. Beijing Alibaba Information Technology Co*[8]*., Ltd.* the first sued the second for copyright infringement. According to the court, *Alibaba's* involvement in the case did not constitute a copy or distribution of the songs since it only provided music search services but not the song itself. The songs were provided by a third-party, a website's owner, whom the court held liable for copyright infringement. Universal Music claimed it had informed Alibaba of the existence of the infringement facts, provided information about the producer's rights and asked Alibaba to delete all links related to the album. Alibaba deleted the infringing search link specific URL address but did not remove other search link results generated by its music service that enabled access to the song, so the infringement persisted. Alibaba's involvement was considered an act of helping others to carry out infringement through the network and consequently the court held him jointly liable with the third party.

In *IFPI v. Baidu*[9], IFPI sued Baidu for direct copyright infringement. Baidu argued that it only provided users with "search/link services" and did not infringe directly the rights of copyright owners. The Beijing No. 1 Intermediate People's Court agreed with Baidu's argument, acknowledging his status as a link provider, and ruled that the safe harbor provision contained in article 23 should apply. The court rejected the IFPI argument of having sent a take-down notice to Baidu, considering it was a "defective notice" and could not be regarded as a qualified take-down notice. The Beijing High Court later affirmed

[7] Song, 9.
[8] See *Universal International Music B.V. v. Beijing Alibaba Information Technology Co.,* Ltd. http://en.pkulaw.cn/display.aspx?cgid=a25051f3312b07f363dcb5287cea05bc75df87b559cc8657bdfb&lib=case (last access on 30 December 2018).
[9] See *IFPI v. Baidu* (Beijing High Court, 2007 No. 594).

the ruling of the Intermediate Court. However, six months later IFPI sued Alibaba (*IFPI v. Alibaba*[10]) and this time the Beijing High Court reached a different conclusion, considering that the search engine Alibaba/cn.yahoo.com should bear indirect liability for copyright infringement since it had received several take-down notices and had failed to remove the link.

Conclusions

As it has been shown, China has adopted a similar policy towards ISP liability for copyright infringement as the US and the EU. Although no secondary liability theories have been developed, the Regulations and the court decisions show that the factors the legislators and the courts have been taking into account when addressing the ISP's liability (the knowledge, the financial benefit or the ability and right to control the infringement, that is, the cornerstone of the vicarious and contributory liability theories) are similar to the ones pondered by the US and European courts.

Yet some in some cases Chinese courts have reached seemingly contradictory solutions when judging almost analogous cases. The exigence of a "qualified take-down notice" in some cases in order to assess the key element of the ISP's knowledge may seem to be contrary to the objective knowledge requirements generally applied by US and European courts. Moreover, the formality of a "qualified take-down notice" risks of hindering the access to protection of copyright owners by an excessive bureaucratization.

Finally, the twenty-seven articles contained in these Regulations provide a very bounded outline to determine the ISP's liability. In this regard, the Supreme People's Court's decisions and interpretations on this subject, although not having the force of law, play a major role in shaping China's policy towards the ISP liability[11].

[10] See *IFPI v. Alibaba* (The Beijing High Court, 2007 No. 1190), 2007 Gao Min Zhong Zi Di 1990 Hao.

[11] See "Parsing the New Internet Rules of China's Supreme Court", *China Copyright and Media*, 11 October 2014. Retrieved from https://chinacopyrightandmedia.wordpress.com/2014/10/11/3701/ (last access on 30 December 2018)