

The Beijing Higher People's Court's Guiding Opinions on Several Issues Relating to Trial of Cases of Network Copyright Dispute

Adopted on 17 May 2010 at the 7th Meeting of
the Adjudication Board of the Beijing Higher People's Court

I. Elements of ISPs' infringement liability

1. An ISP found infringing the right of communication through information network shall 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 fault.

II. Judgment on, and law regulating, acts of communication through information network

(I) Judgment on, and law regulating, acts of communication through information network

2. By the act of communication through information network is meant the act to upload or put, on a network server open to the public by other means, works, performances, and sound recordings or video recordings, so that people may have access to them from a place and at a time individually chosen by them.

The act to upload or put, on a network server open to the public by other means, works, performances, and sound recordings or video recordings, so that people may have access to them from a place and at a time individually chosen by them constitutes an act of communication through information network. It is unnecessary for an interested party to adduce evidence to show the facts of actual downloading, browsing or online access by other means.

3. An ISP's provision, to its subscribers, of the service of automatic access, automatic transmission, information storage space, search, link or P2P is an act of assistance by providing technological and facility support on a network to its subscribers to communicate their information, and does not directly constitute an act of communication through information network.

4. Whether an ISP's act constitutes one of communication through information network is determined by taking consideration of whether the works, performances, and sound recordings or video recordings communicated are uploaded or put, by the ISP, on a network server open to the public by other means.

Where a plaintiff claims that an ISP provides its service in a way that leads users to wrongly believe that the ISP is communicating works, performances, and sound recordings or video recordings, but the ISP can produce evidence to prove what he has provided is merely a service of automatic access, automatic transmission, information storage space, search, link or P2P, the ISP's act shall not be held to have constituted an act of communication through information network.

5. Where an ISP argues that it provides only the service of technology and/or equipment, such as information storage space, search, link and P2P, but the ISP is in cooperation with an ISP providing works, performances, and sound recordings or video recordings in terms of content of channels or columns, it may be determined, depending on the specific circumstances of the cooperation, that said ISP has performed an act of communication through information network.

6. Where an ISP providing service of information storage space examines the subject matter, quality or content of the works, performances, and sound recordings or video recordings provided by its subscribers, or selects, edits or arranges the works, performances, and sound recordings or video recordings according to the contents, so as to decide whether to make them available on the Internet, its act con-

stitutes a direct act of communication through information network, except, however, examination made of the contents, other than the status of copyright, as required under the laws, regulations and industrial regulations.

7. Where an ISP provides its search or linking service in such a form that it leads a user to wrongly believe that the ISP is the host of the linked website on which the user provides his or its works, performances, and sound recordings or video recordings and alleges that the ISP infringes, the Unfair Competition Law may apply.

8. An ISP shall adduce evidence if it argues that it has only provided the service of information storage space, search, link or P2P in respect of the allegedly infringing works, performances, and sound recordings or video recordings. If an ISP has no evidence to prove that the allegedly infringing works, performances, and sound recordings or video recordings were provided and put, by another party, in the network server open to the public, it is possible to presume that said ISP has performed an act of communication through information network.

9. Uploading or putting, by other means, on an intranet open to the public, works, performances, and sound recordings or video recordings so that people may have access to them from a place or at a time individually chosen by them is an act of communication through information network.

10. An ISP's provision to the public of online broadcast of works through information network according to a prefixed schedule does not constitute an act of communication through information network, and shall be regulated by Article 10, paragraph one (17) of the Copyright Law.

(II) Nature of and legal liability for "snapshot"

11. Where an ISP, when providing search service, generates, on its server, reproductions of works, performances, and sound recordings or video recordings in the form of "snapshots", and make them available to the public through information network to enable the public to have access to the works from a place and at a time individually chosen by them, the acts constitute acts of communication through information network.

12. Where an ISP argues that its webpage "snapshot" service is provision of the system cache service mentioned in Article 21 of the Regulations for the Protection of the Right of Communication through Information Network, and it should be exempted from any liability, and if the "snapshot" service is the circumstance where the ISP stores the allegedly infringing works, performances, and sound recordings or

video recordings in the network server beforehand or its act does not meet the three exemption conditions as provided for in Article 21 of the Regulations for the Protection of the Right of Communication through Information Network, the exemption Article shall not be referred to.

13. Where an ISP uses, in the form of provision of webpage "snapshot", works, performances, and sound recordings or video recordings communicated on another party's website, without affecting the normal use of the works, performances, and sound recordings or video recordings on the other party's website and without unreasonably infringing the legitimate rights and interests of the party's website in the works, performances, and sound recordings or video recordings, and thus the ISP does not visit the other party's website substantially on behalf of users, and complies with the other conditions set forth in the law, the use may be established as fair use.

III. Legal character of act of network technology and equipment service provision, determination of service provider's fault and application of law

(I) Legal character of act of network technology and equipment service provision

14. Where an ISP providing the service of information storage space, search, link or P2P is involved in, aids and abet, through network, others in their infringement of the copyright, performer's right or the right of producer of sound recordings or video recordings, and is at fault, the ISP shall be jointly and severally liable for the infringement.

15. That another party has performed an act of direct infringement is the precondition to find an ISP providing the service of information storage space, search, link or P2P infringing, that is, a third party's act of communicating works, performances, and sound recordings or video recordings by using the service of information storage space, search, link or P2P is an act of infringement of another party's right of communication through information network.

(III) Standard and determination of fault of network technology and equipment service providers

16. Whether an ISP providing the service of information storage space, search, link or P2P is at fault shall be determined by examining whether the ISP knows or has reasonable grounds to know about the adverse consequence of its act. Whether an ISP knows or has reasonable grounds to know about it shall be judged on the basis of the capability and scope of its prediction, with distinction made between the general level and professional level of prediction.

By an ISP's knowing or having reasonable grounds to know about the adverse consequence of its act is generally meant that the ISP knows or has reasonable grounds to know that the other party's use of its service to communicate the works, performances, and sound recordings or video recordings in suit constitutes an infringement.

By the word "knowing" is meant that an ISP actually knows about the existence of infringement; by "having reasonable grounds to know" is meant that an ISP should have been aware of the existence of infringement in the presence of the fact or circumstance of obvious infringement.

17. An ISP providing the service of information storage space, search, link or P2P is not obliged to examine or monitor, on its own initiative beforehand, whether another party's communication, by using its service, of works, performances, and sound recordings or video recordings constitutes an infringement.

One shall make examination if such examination should be made under the relevant law and the law provisions.

18. Where the service of information storage space, search, link or P2P is automatically provided to allegedly infringing works, performances, and sound recordings or video recordings at a user's directions though information network, and no edition, alteration or selection is made to the allegedly infringing works, performances, and sound recordings or video recordings, an ISP shall not be found at fault unless the ISP knows or has reasonable grounds to know about the existence of infringement.

19. Under any one of the following circumstances, if an ISP providing the service of information storage space that should know and possibly knows that the works, performances, and sound recordings or video recordings in suit are infringing, it is possible to find the ISP at fault:

(1) where the allegedly infringing contents stored are sound or video works, works of popular music, or other works with relatively high reputation and the related performances and sound recordings or video recordings in their showing season or in the period of being briskly broadcast or shown, and the said works, performances, and sound recordings or video recordings are put on the first webpage, other main webpages or in other places obviously visible to the service provider;

(2) where the allegedly infringing works, performances, and sound recordings or video recordings are put on the first page of BBS or other main webpages, and the ISP does not take any measures to remove or delete them within a rea-

sonable period of time;

(3) where the allegedly infringing sound recordings or video recordings professionally and fully produced or the sound recordings or video recordings in their showing season or in the period of being briskly broadcast or shown are put in noticeable places, or recommended or particularly listed or catalogued in classification of cinematographic or TV works shown in the Film/TV channel;

(4) where the allegedly infringing works, performances, and sound recordings or video recordings which subscribers have uploaded are selected, sorted out or classified; or

(5) Any other circumstance.

20. If an ISP providing the service of search, link or P2P correspondingly classifies or lists, out of its own will, allegedly infringing works, performances, and sound recordings or video recordings on the basis of collection, sorting out or classification thereof, or the ISP knows or has reasonable grounds to know that the allegedly infringing works, performances, and sound recordings or video recordings constituted infringement, it is possible to find the ISP at fault.

(III) Law applicable to P2P services

21. Where an ISP providing P2P service is involved in, abets and assists others in their infringement and thus is found infringing by way of P2P service provision, Article 130 of the General Principles of the Civil Law and Article 3 of the Supreme People's Court's Interpretation of Several Issues Relating to Application of Law to Trial of Cases of Dispute over Copyright on Computer Network as revised in December 2006 shall apply.

(IV) Conditions for exemption of network technology and equipment services providers

22. The condition for exemption of an ISP providing service of automatic access, automatic transmission, system cache, information storage space, search or link as specified in Articles 20–23 of the Regulations for the Protection of the Right of Communication through Information Network refers only to the exemption from damages; whether an ISP should bear any other liability shall be determined under the laws and regulations, such as the General Principle of the Civil Law and the Copyright Law.

23. An ISP claiming exemption under the Regulations for the Protection of the Right of Communication through Information Network shall be under the burden of proof in relation to the relevant facts based on which it makes the claim.

24. The "alteration" as mentioned in Article 22 of the Regula-

tions for the Protection of the Right of Communication through Information Network shall refer to the alteration made of the contents of works, performances, and sound recordings or video recordings provided by subscribers.

The following shall not be deemed to be acts of “alteration” of works, performances, and sound recordings or video recordings provided by subscribers:

(1) alteration made only of the format in which the works, performances, and sound recordings or video recordings are stored;

(2) addition of website logo, such as digital watermark, to the works, performances, and sound recordings or video recordings; and

(3) broadcast of advertisements at the beginning or end of, or in the middle of works, performances, and sound recordings or video recordings.

25. An ISP’s collecting standard subscribers’ fees according to the time and flow of its information storage space service provision does not fall into the circumstance as mentioned in Article 22 (4) of the Regulations for the Protection of the Right of Communication through Information Network of “... seeking financial benefits directly from the works, performances, and sound recordings or video recordings provided by its subscribers.”

The advertising fees an ISP charged for its information storage space service provision shall not normally be determined as financial benefits directly obtained; the advertisement the ISP broadcasts in direction to particular works, performances, and sound recordings or video recordings may be comprehensively considered according to the specific circumstance of a case when determination is made as to whether the ISP should be held at fault.

26. Where an ISP providing the service of search or link is exempted from the liability for damages under Article 23 of the Regulations for the Protection of the Right of Communication through Information Network, the ISP shall simultaneously meet the following two conditions: one, the ISP providing the search or link service does not know and does not have the ground to know about whether the linked works, performances, and sound recordings or video recordings infringing ones; and two, upon receiving the right owner’s notification, the provider disables the link to the infringing works, performances, and sound recordings or video recordings under the Regulations for the Protection of the Right of Communication through Information Network.

27. The notification the right owner sends to an ISP pro-

viding service of information, search or link shall comply with the provision of Article 14 of the Regulations for the Protection of the Right of Communication through Information Network.

28. Where the notification the right owner filed does not contain the address of the website of the allegedly infringing works, performances, and sound recordings or video recordings, but the information provided by the ISP according to the notification may accurately locate the allegedly infringing works, performances, and sound recordings or video recordings, it may be determined that the notification the right owner filed is the “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.

29. Whether allegedly infringing works, performances, and sound recordings or video recordings can be located in a sufficiently accurate manner shall be determined, with account taken of the specific circumstances, such as the type of service an ISP provides, the type of file of the literary works, performances or sound recordings or video recordings which the right owner asks to remove or delink, and whether the titles of the works, performances, and sound recordings or video recordings have some particular characters.

30. If, upon receiving a right owner’s notification that is in conformity with the provision of Article 14 of the Regulations for the Protection of the Right of Communication through Information Network or a “warning with solid evidence” as mentioned in Article 4 of the Supreme People’s Court’s Interpretation of Several Issues Relating to Application of Law to Trial of Cases of Dispute over Copyright on Computer Network, an ISP fails, within the reasonable time limit, to remove, in a timely manner, the infringing works, performances, and sound recordings or video recordings the right owner alleged infringing or fails to disable, in a time manner, the link to the infringing works, performances, and sound recordings or video recordings, it may be determined that the ISP is at fault, and should be correspondently liable for the extended portion of the injury if the right owner’s notification is true in content.

31. Whether an ISP has, in a timely manner within the reasonable time limit, removed, or disable the link to, the infringing works, performances, and sound recordings or video recordings shall be determined 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.

IV. Technological measures

32. The technological measures specified in Article 26 of the Regulations for the Protection of the Right of Communication through Information Network refer to those taken to restrict the acts of browsing and viewing or restrict using the works, performances, and sound recordings or video recordings for the purpose of protecting the legitimate rights and interests of the right owners under the Copyright Law.

The technological measures taken under the following circumstances shall not be determined as those susceptible to the protection under the Copyright Law:

(1) those for selling, in bundle, works, performances, and sound recordings or video recordings with a product or service;

(2) those for pricing works, performances, and sound recordings or video recordings;

(3) those for disrupting users' computer systems using works, performances, and sound recordings or video recordings without authorisation; and

(4) those detrimental to the protection of the public interests or irrelevant to the legitimate interests of the right

holders under the Copyright Law.

33. The technological measures susceptible to the protection under the Copyright Law shall be effective ones. Whether a technological measure is effective or not shall be determined by taking as the standard whether the measure may be circumvented or decrypted by average users in a method they commonly have. That a technological measure can be circumvented or decrypted in one way or another by technicians or experts does not affect the effectiveness of the technological measures.

V. Determination of website businesses

34. The businesses indicated in the recorded website registration information or in the information shown on the website are the website businesses. Where the businesses indicated in the recorded website registration information is not the same as that indicated in the information shown in the website, it may be determined that they are businesses in partnership unless there is evidence to the contrary.

35. The 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. ■