

Judicial practice in copyright infringement cases in cyberspace circumstances

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Three categories of copyright infringement cases

- ◆ Services provided by ISP:
 - ◆ network access service
 - ◆ providing “transmission channel”
 - ◆ have no control over the content of the transmitted information
 - ◆ information memory space service
 - ◆ BBS /MSN/BLOG
 - ◆ information location service
 - ◆ search and link service by Google, Yahoo, Baidu

Cases with respect to information memory space service

- ◆ Ordinance on Protection of The Right of Communication over Information Network (1/7/2006):
- ◆ **Article 22** Where a network service provider provides information memory space to its service objects, or provides the works, performance and audio-visual products to the general public through the information network and in case the following requirements are satisfied, he is not required to assume the liabilities of compensation: (1) Clearly indicating that the information memory space is provided to the service objects and publicizing the name, contact person and web address of the network service provider; (2) Having not altered the works, performance and audio-visual products that are provided to the service objects; (3) Having no knowledge of and having no justifiable reason to know the infringement of the works, performance and audio-visual products; (4) Having not derived any financial benefits from the provision of the works, performance and audio-visual products to its service objects; and (5) On receiving a notice from the owner, deleting those allegedly infringing works, performance and audio-visual products by the owner per the present Ordinance.

- ◆ Disputes often arises as to the interpretation of the third factor, especially “having no justifiable reason to know ”.

How to assess if the defendant have justifiable reason to know or not?

Ningbo victory multimedia co. v. China Yahoo

- ◆ Plaintiff:
- ◆ Victory multimedia co.
- ◆ Defendant:
- ◆ China Yahoo the operator of “yahoo.com.cn”
- ◆ Abstract :
- ◆ (1)The plaintiff holds the right of communication over information network of the TV series 《Striving》
- ◆ (2)A net friend uploaded the TV series onto the BBS page of “yahoo.com.cn” during the first round of screening of the works through TV network in Beijing
- ◆ (3)On the front page of the BBS, there posted a list of recommending visual works on top of which was the disputed one, providing much details as the cast, abstract and still
- ◆ (4) On receiving the notice from the plaintiff, the defendant removed the works within reasonable time

Court decisions

- ◆ The first instance court holds that the defendant qualifies for safe harbor protection under **Article 22 of the Ordinance** and rules against the plaintiff
- ◆ The appeal court finds the defendant liable for copyright infringement on the ground that the defendant have a justifiable reason to know that the uploaded works most likely infringe given the facts
- ◆ (1) the works were uploaded during the first round of screening of the works through TV network.
- ◆ (2) the recommendation of the works with much details was posted at the BBS front page.
- ◆ The appeal court overturns the first instance decision and awards the plaintiff damages relief

Cases with respect to the information location service

- ◆ Ordinance on Protection of The Right of Communication over Information Network (1/7/2006):
- ◆ **Article 23** Where a network service provider provides any searching or linking service to its service objects and cuts off the link to any infringing works, performance, or audio-visual product after receiving a notice from the right owner according to the provisions of the present Ordinance, it is not required to assume the liabilities of compensation. However, when anyone is fully aware or should have known that any of the works, performance or audio-visual product it has linked to constitutes any infringement, it shall be subject to the liabilities of joint infringement.

Universal music ltd, etc v China Yahoo

- ◆ . Plaintiff:
- ◆ **Universal music ltd** and other ten recording companies
- ◆ Defendant :
- ◆ **China yahoo.** operator of " yahoo.com.cn "
- ◆ Abstract:
- ◆ (1)The plaintiffs filed individually eleven lawsuits against the defendant, alleging infringement of the right of communication over information network on both direct copyright infringement claim and secondary copyright infringement claim.
- ◆ (2) the plaintiff found that the defendant have provided to the public a music search page that included an mp3 search service. The service provided users with links to music tracks from unlicensed websites and allowed users to download or play songs for free via the China Yahoo! Website.
- ◆ (3) the plaintiff notified the defendant with lawyer' s letters, taking several linked URL as example and asking China Yahoo to remove all the links to the music tracks concerning their songs,
- ◆ (4)the defendant only removed the links with specified URLs in the above lawyer' s letters.

- ◆ The defendant contends that the notice from the copyright owners didn't fully qualify for the notice under the ordinance as it only specify several infringing URLs. China yahoo only has the duty to remove the links with URLs as it has already did, it has no duty to remove all the links related to the copyrighted audio products.

Court decision

- ◆ Both instance courts holds that linking to a third-party websites doesn't constitute direct infringement. Because the infringing MP3 tracks are stored on and served by the linked-to third-party websites, not the defendant's hardware.
- ◆ Whether the defendant qualify for safe harbor protection, or whether the defendant should subject to secondary liability, depend on if the defendant "aware of or should have known of" the direct infringement.

- ◆ Both instance courts finds China Yahoo “ should have known” the direct infringement on the basis that
- ◆ (1) china yahoo set up a music page which engaged exclusively in MP3 search service. As professional MP3 search service provider, yahoo china should have the knowledge that the copyright owners are not likely to make their music albums available free over internet. As a matter of fact, the licensed websites all require users to register or pay a subscription fee. Both parties agree that these websites are not able to be linked to by the MP3 search engine. In other words, at least an overwhelmingly amount of links available ,if not all, are infringing.
- ◆ (2)the copyright owners has sent notice to china yahoo including the name of the copyrighted albums and related singers as well as several linked URLs as example. In the notice the copyright owners made it clear that every link to the copyrighted audio products was infringing, and asked china yahoo to remove all the links. Thus, yahoo should have known that the linking MP3 tracks infringe.

Wen xiaoyang v china yahoo

- ◆ Plaintiff:

Wen xiaoyang, a professional photographer

Defendant:

China yahoo

Abstract:

- (1) China yahoo offers an image search service which display thumbnail images to help users to choose which results respond to their search queries.
- (2) The plaintiff claims that the defendant's creation and storage of the thumbnail image constitute direct copyright infringement
- (3) The plaintiff claims that the defendant's act of providing links to full-sized images after users click on the thumbnail image constitute secondary copyright infringement.
- (4) The plaintiff did not send notice to the defendant

- ◆ As to the first claim
- ◆ the court holds that providing thumbnail image is part of the search service, functioning as expediting and facilitating the users to choose the responsive search results. Though the court do not explicitly says that even though the thumbnail image may constitutes reproduction under the copyright law, it still qualifies for fair use, the above reasoning does have such implications.
- ◆ As to the second claim
- ◆ as the plaintiff didn't prove that **China Yahoo “fully aware of or should have known” the direct infringement, the defendant shouldn't be held liable for secondary liability.**
- ◆ Both instance courts ruled against the plaintiff.