Comparative Studies on ISPs' Secondary Copyright Liability in China and the US

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Introduction

In the age of information, Chinese people have enjoyed plentiful various online sources through internet service providers (ISPs). Inputting forward key words in Baidu or Google and clicking to search, thousands of matching materials could be available in less than one second. And the market of search engines service has developed very fast. In China, according to the research of "iResearch Consulting Group", the amount of search engines service market has been 10.98 billion RMB (1.65 billion US dollars) in 2010, increased 57.7% from 2009.\(^1\) However, with the fast development, series of legal problems have emerged. The amount of copyright infringement disputes cases related to ISPs is rapid increasing, and current legislation seems to be insufficient to regulate these problems. Moreover, there is a chaos in different courts around China using different approaches and standards on search engines' secondary liability. Therefore, how to improved Chinese copyright legislation and unite relevant judgments with reasonable approaches has become an urgent task. Under this circumstance, studying experience from other countries is very valuable. The US could be considered as the best country for China to study, as its copyright law has developed with very long history and greatly contributed to the US ISPs' development. The purpose of this essay is to compare legislation and legal practice in China and the US, to point out the tendency of ISPs' secondary copyright liability in these two countries, and to make useful suggestions for improving of Chinese copyright legislation and legal practice.

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Based on case studies and comparative research, this essay is divided into four sections. In the first section, overview of legislations of ISPs' liability in China and the US is made, observing that Chinese regulation seems not as appropriate as the US one. In the second section, difference between secondary infringement and direct infringement is analyzed. Because Chinese courts apply various standards on the recognition of direct infringement, it seems not predictable in China whether the deep linking apply direct infringement or secondary infringement. After that, in the third section, applications of contributory liability are discussed. And it is surprisingly found that Chinese courts apply stricter standards than US courts, as many Chinese courts do not require the submission of URL address of infringing materials in the infringing notification. That means ISPs are more likely to be judged liable in China than in the US to some extent. Finally, in the fourth section, vicarious liability is discussed. It is suggested that China need to introduce vicarious liability in the future similar as the practice in the US.

1. Overview of Legislations

Generally, current Chinese legislations on ISPs' liability are not clear, sufficient and systematic. On one hand, there is no clear clause on the PRC Copyright Law regulating the liability of ISP. Courts could only deal with ISP's cases using two administrative regulations and one judicial interpretation from the Supreme Court. The two administrative regulations include the Regulation on Protection of the Right to Network Dissemination of Information (the Chinese Regulation)\(^2\) and the Method on Administrative Protection of Internet Copyright (the Chinese Method)\(^3\). Although administrative regulations and judicial interpretation are legal sources in China, they are at lower legal hierarchy than the Copyright Law. On the other hand, in current

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administrative regulations, there is no clear instruction about the ISPs’ secondary liability. The article 19 of the Chinese Regulation and Article 11 of the Chinese Method regulate the administrative liability, but they are not civil liability. The article 23 of the Chinese Regulation mentions the joint torts liability, but it does no clear interpret how to apply the joint torts liability. And there is no mention of contributory liability or vicarious liability in this clause. Therefore, in practice, Chinese courts might find difficult to apply the joint torts liability to the ISPs. Moreover, different from the US, theoretically previous cases are not formal legal sources in China. Although there have been some remarkable cases in China, for example many cases involving Baidu, these cases cannot be directly applied by courts as case law reference.

In contrast, secondary liability of ISPs has been clearly regulated in the US through establishing of the Digital Millennium Copyright Act (the DMCA)\(^4\) and accumulating of case law. For one thing, the DMCA was passed on 12 October 1998. There are detailed instructions of ISPs secondary liability and limitations on liability relating to material online.\(^5\) For another thing, remarkable cases have been accumulated. From *Religious Tech. Ctr. v. Netcom On-Line Communication Servs., Inc.*\(^6\), to *A & M Records, Inc. v. Napster, Inc*\(^7\) and then to *MGM Studios, Inc. v. Grokster, Ltd.*\(^8\), these cases clearly instructed application of the DMCA and interpreted contributory liability and vicarious liability of ISPs. Following cases, for example *Perfect 10, Inc. v. Google, Inc.*\(^9\) further developed the case law.

Taking the US experience, it is suggested that the PRC Copyright Law need to be amended with clear regulation about the ISPs’ Liability. And further interpretation of joint torts liability should be made in order to suitably apply the contributory liability

\(^5\) Ibid.
\(^7\) 239 F.3d 1004 (2001)
\(^8\) 125 S. Ct. 2764 (2005)
or vicarious liability to ISEs. And the Supreme Court might conclude good ISP cases as judgment guidances in the future for local courts' application.

2. Direct infringement or secondary infringement

In order to apply secondary liability, firstly difference between direct infringement and secondary infringement should be analyzed. This issue is particularly important in the deep linking cases. Because using different standards, the courts might judge the deep linking websites for either direct infringement or secondary infringement. Currently, there are two standards for recognition of direct infringement. One could be known as the objective standard, which is based on whether the infringing materials are located in the servers. Another is the subjective standard, which based on whether the visitors think the infringing materials is located in the website.10

I considered secondary liability is more suitable than direct infringement in the application of deep linking cases. Currently in China, the applications in different courts were quite different to each other, and there is no united standard to apply. On one hand, in Universal Music Ltd. v. Beijing Baidu Network Technology Ltd.11, and Universal Music Ltd. v. Beijing Alibaba Network Technology Ltd.(Yahoo! China)12, plaintiffs argue that the deep linking websites should liable for direct infringement. They claimed that users thought they download music directly from Baidu and Yahoo! China. Although the music was transmitted from other website actually, the users naturally consider the music is located in the websites of Baidu and Yahoo. In both cases, these claims were not accepted by the courts in Beijing. The courts applies objective standard and pointed out that the ISPs were not liable for direct infringement, because they did not store the infringing materials in their servers. However, on the other hand, some other court in China accepted the subjective

11 (2005) Beijing First Intermediate People's Court First Trial No. 8474
12 (2007) Beijing Second Intermediate People's Court First Trial No. 2622
standard. In *Shanghai Youdu Broadband Technology Ltd. v. Shenzhen Thunder Network Technology Ltd.*\(^\text{13}\), the court in Shanghai considered that with deep linking technology, uses searched and downloaded the infringing movies in Thunder website, and the infringing contents from the third party have been directly used by Thunder. More clear instruction was made in another case, *Guangdong Mengwenhua Cultural Development Ltd. v. Beijing Henzhun Technology Ltd*\(^\text{14}\). The Beijing Haidian court stated that because Henzhun website used technical method to show the infringing material on its own website, it has become internet content provider, not search engine service provider.\(^\text{15}\)

Therefore, I found the standards of direct liability of ISPs are quite disordered in China. And this situation makes the judgments unpredictable. I suggest the Supreme Court to guide Chinese local courts to deal with this kind of cases equally with same standards. And the US experience could be adopted. In the US, the standards are quite clear applying the objective standard. If the infringing materials are not located in the ISPs' servers, the ISPs might only have secondary liability, not direct liability. For example, in the case *Perfect 10, Inc. v. Google, Inc.*\(^\text{16}\), the US court clearly declared that the recognition of direct infringement is based on whether the infringing materials are located in the servers. And the court rejected to consider the subjective standard.\(^\text{17}\)

3. Contributory liability

It was claimed that the Chinese *Regulation on Protection of the Right to Network Dissemination of Information* (the Chinese Regulation) greatly learned from the DMCA in the US. And contributory liability has been introduced with the

\(^{13}\) (2007) Shanghai Pudong New Area People's Court Third Civil Tribunal (IP) First Trial No. 69  
\(^{14}\) (2005) Beijing Haidian People's Court First Trial No. 25153  
\(^{15}\) Ibid.  
\(^{16}\) 416 F. Supp. 2d 828 (2006)  
establishment of the Chinese Regulation. I agree with this statement as many Chinese cases judgments have clearly mention the concepts of contributory liability. Normally, two elements must be demonstrated to establish contributory liability, including: firstly the defendant must know or have reason to know of someone else’s directly infringing activity; and secondly the defendant must actively participate by materially contributing to the infringing acts. In the US case A & M Records, Inc. v. Napster, Inc., the court held that defendant, Napster, a peer-to-peer file-sharing service provider, could be liable for contributory infringement copyrights. And similarly, in MGM Studios, Inc. v. Grokster, Ltd. the court held that the Grokster companies distributed software, and promoted that software to infringe copyrights, so were liable for the resulting acts of infringement. In order to avoid contributory liability, ISPs might use provisions of limitations on liability relating to material online in the DMCA. These regulations are known as ISPs’ "safe harbors". Under "safe harbors", generally, after receiving notification from copyright owner, if the ISPs effectively removed the link of infringing material, they will be not liable. Similar as the DMCA, the Chinese Regulation provided limitations on liability relating to material online for some ISPs. However, there are two main differences between China and the US in term of the practice of the contributory liability to the ISPs.

First of all, the Chinese Regulation seems provide more friendly treatment to search engines, as it allow search engines to receive no financial benefit from infringement. Actually there are four "safe harbors" in the Chinese Regulation, including transitory digital network communications, system caching, information storage, and search or

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19 See details in Zheng Xi and Lou Hong (2011), "Legal Analysis of regulating Search Engines", Information Construction, Vol.5 (Accepted for publication)
20 239 F.3d 1004 (2001)
21 125 S. Ct. 2764 (2005)
22 17§ 512
linkage service.23 For the information storage service, there is a clear requirement in Article 22(3) that financial benefit from infringement is not allowed. But there is no similar mention in the Article 23 for search engines. In contrast, the DMCA provides equal treatment to both search engines and information storage service. Dr. Wan claimed the main reason of this situation is the powerful influence of Baidu in China.24 In the end of 2010, Baidu's market share has been 83.6%, overwhelmingly bigger than its main competitor Google, which is 11.1%.25 Baidu uses an auction-based P4P services system, which enables its customers to bid for priority placement of their links in keyword search results. So there is very big amount of income from potentially infringing materials.26 I believe there is big influence of Baidu in Chinese legislation as well, and I think the regulation is not fair. I suggest the copyright makers in China to adopt approach in the DMCA, equally treat both search engines and information storage service. Moreover, in the future, anti-monopoly law might be applied to Baidu, as its 83.6% market share is too big. For example, Hudong Baike has argued that Baidu abused its dominant position. Hudong Baike has asked the State Administration for Industry and Commerce (SAIC) to make antitrust investigation on Baidu, and ask 790 million yuan compensation.27 As one of the method to reduce Baidu's monopoly power, unfair beneficial regulations might be revised in the future.

Secondly, different from the US courts, Chinese courts seemed not require the submission of URL address of infringing materials in the infringing notification. Although in the Article 14(2) of the Chinese regulation there is requirement of internet address in the notice, the court gave different requirement. In Universal

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23 Art 20-23
Music Ltd. v. Beijing Alibaba Network Technology Ltd. (Yahoo! China)\(^{28}\), the court found the dependence liable for contributory liability, as it did not remove the infringing materials after receiving the notification. Actually, in the notification from the copyright owner, there were two parts of songs. Some of them were with URL address, but others are not. When Yahoo received the notification, it removed the infringing songs with the RUL address, but did not remove the others without RUL address. The court judged that the RUL address plaintiff provided were only functioned as examples. When the dependence received the notification, it could easily locate the infringing materials using other information in the notification. Therefore, Yahoo! China has responsibility to removed all the songs in the notification, no matter with RUL address or not.\(^{29}\) I disagreed with this judgment and considered that the courts should apply the regulation lawfully. Firstly, the RUL address requirement must be considered an essential element in the notification. Even for one song, there could be thousands of downloading sources on the internet. Without RUL address, ISPs cannot effectively identify which sources are legal or illegal. Secondly, compared with ISPs, the copyright owners have better ability to identify infringing sources. Therefore, the requirement of RUL address in the notification is cost-effective. Moreover, in the US, the DMCA require the plaintiffs to provide information reasonably sufficiently to permit the service provider to locate the material.\(^{30}\) As a developing country, China should encourage creation more. It is not reasonable for China to provide higher level of copyright protection than the US.

4. Vicarious liability

Vicarious liability is another important secondary liability, widely used in the US. There are two requirement of vicarious liability application: one is that a defendant has the right and ability to supervise the direct infringer; another is that the defendant

\(^{28}\) (2007) Beijing Second Intermediate People’s Court First Trial No. 2622
\(^{29}\) Ibid.
\(^{30}\) 17§ 512 (3)(a)(iii)
gets a direct financial interest in the infringement. Traditionally, the vicarious liability is applied in the employer-employee relationship when the employee is either following the employer’s instructions or otherwise acting within the employee’s job description.\textsuperscript{31} Vicarious liability has been used in ISP cases for long time. For example, in *A & M Records, Inc. v. Napster, Inc*\textsuperscript{32}, the court found the vicarious infringement and contributory liability at same time. Because of Napster's failure to provide supervisions combined with the financial interest factor, the Ninth Circuit affirmed the District Court's finding of vicarious infringement.

Vicarious liability might be not suitable to apply with all ISPs. Dr. Wan have claimed that a provider of an essential service, for example online payment service, is generally considered to be an unsuitable candidate for vicarious liability, as it lacks the ability to supervise its users.\textsuperscript{33} And recent cases in the US have supported this standpoint, including *Tiffany, Inc. v. eBay, Inc.*\textsuperscript{34}, and *Perfect 10, Inc. v. Visa Int'l Serv. Ass'n.*\textsuperscript{35} I consider the vicarious liability should to be introduced in China and could be important supplement for ISPs' contributory liability. For providers of essential service, it might not apply, just as Dr. Wan considered. But in some other cases, courts might find difficulty to apply direct infringement liability and contributory liability. At that scenario, vicarious liability might be only potential remedy to apply.

**Conclusion**

Above, this essay compares ISPs' secondary copyright liability in China and the US. It is found that because Chinese learned a lot of experience of the US, these two countries are quite similar to each other in term of legislation and legal practice on ISPs' copyright liability. However, there are some shortages in China needed further


\textsuperscript{32} 239 F.3d 1004 (2001)


\textsuperscript{34} 576 F. Supp. 2d 463 S.D.N.Y. (2008)

\textsuperscript{35} 494 F.3d 788 9th Cir. (2007)
developments. Firstly, the PRC Copyright Law should be edited with the content of ISPs' copyright liability, because current relevant administrative regulations are not detailed and are at lower legal hierarchy. Secondly, there is a need to clarify the difference between the direct infringement and secondary infringement, so courts could apply same standards in China. Thirdly, in terms of contributory liability applications, I suggest that the law maker should equally treat search engines and information storage service, and the URL address should be an essential element in the notification. Last but not least, as valuable experience in the US, vicarious liability needed to be introduced to China. It is hoped that some suggestions in this essay could be adopted by Chinese law makers and legal authorities in the future. And it is believed that one day, Chinese Copyright Law will be as perfect as the US one, or even be better.

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