

Network Copyright Protection in the Internet Era

PROTECTION DU DROIT DE RÉSEAU À L'HEURE DE L'INTERNET

Zhang Caiqin^{1,2}

Abstract: This thesis puts forward the development prospect and concrete protections of the network copyright protection in the Internet era through the analysis of law. It figures that the variety of the network copyright has its own characteristics; the objection system on the Internet should be established to fix on the network copyright of a certain work; the range of the network works is different from that of the traditional works; the download, copying, printing, backing up, and paste of the network works should be also considered as the reasonable use under certain conditions; the network copyright, depending on different subjects, is applicable to different liability principles of infringement; the characteristics of the network copyright infringement case should be considered in the aspect of domination, and it is proposed that a large number of cases should be transferred to the basic people's court.

Key words: Network Copyright, Legal System, Protection

Résumé: L'essai présent expose, à travers l'analyse de la loi, la perspective de développement et des mesures concrètes de protection du droit de réseau à l'heure de l'Internet. D'après l'auteur, le droit de réseau a ses propres caractéristiques ; le système d'objection sur l'Internet devrait être établi pour déterminer le droit de réseau de certain travail ; le travail de réseau est différent du travail traditionnel ; le téléchargement, la copie, l'imprimerie, le secours, le collage sur le réseau devraient être considérés comme l'utilisation raisonnable dans certaines conditions ; le droit de réseau, dépendant de différents sujets, est applicable à des désavantages des principes d'infraction ; les caractéristiques du cas de violation du droit de réseau devraient considérées sur le plan de la domination ; bon nombre de cas devraient être transférés dans la cour populaire de base.

Mots-Clés: droit de réseau, système légal, protection

Today, the network technology rapidly develops, and the information technology has advanced the world into a new era of knowledge-driven economy, which brought quick changes to people's living and working way. Under the circumstances, the protection of network copyright has become a common concerned issue in the international community, and the special legislation of copyright protection under the network environment is more and more important day by day. As far as the network copyright protection is concerned, this thesis tries to analyze and study the legal system such as the domestic and international current development situation, the range of network works, the reasonable use, the liability principle of infringement and the domination in our country.

1. DOMESTIC AND INTERNATIONAL CURRENT DEVELOPMENT SITUATION OF NETWORK COPYRIGHT PROTECTION

Viewing countries all over the world, the study on the legal system of copyright protection in the network environment is processing in full swing. Especially in U.S.A., as the birthplace of Internet, the infringement case of network copyright rises day by day, which makes the U.S. government pay closer attention to the setting-up of the Internet law. And therefore, a lot of American scholars are full of enthusiasm about the study of this system. At present, there are two international treaties regarding the network copyright protection, namely, *World Intellectual Property*

¹ Management School in Wuhan University of Technology, China.

² Law School in Chongqing University, Chongqing, China.

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Organization Copyright Treaty (WIPO Copyright Treaty) and *World Intellectual Property Organization Performance and Phonograms Treaty (WIPO Performance and Phonograms Treaty)*. The two treaties have a great influence on the copyright using on the Internet, for example, the special exclusive economic rights given to the copyright owner and performer, including the right of distribution, right of rental, propagation right to the public, etc. Though a lot of countries in the world such as U.S.A., Japan, European Union, etc. begin to study the enactment of Internet law or to revise the existing domestic law for complying with these two treaties, up to the present, people still argue for the issues related to computer network copyright such as the reasonable applicable scope, the range of works, and the culpability for jurisdiction, etc. In U.S.A., the copyright of computer game is protected as "audio-visual works" among the judicial practice.

Up to now, there is no complete law issued to adjust the copyright in the Internet era in China, which makes the law of our country quite embarrassed and puzzled in adjusting the issues related to computer network copyright such as the range, the legal status of the subject of rights, the system of reasonable use, the liability principle of infringement, and the domination, etc. This is actually a very big defect in the legislation of our country. The copyright problem can be solved according to *General Principles of the Civil Law* and *Copyright Law* of our country in the network environment, but in practice only using these laws seems far from enough due to its various characteristics. At present, besides *Civil Law* and *Copyright Law*, the national legal norm concerning this field mainly contains *Regulation for Computer Software Protection* implemented by the State Council on Jan. 1, 2002, *Explanation of Certain Legal Problems on the Trial of Cases Concerning Disputes over Computer Network Copyright* passed by the Supreme People's Court on Nov. 22, 2000, *Provision on Certain Application of Laws in the Trial of Disputes over Copyright* implemented on Oct. 15, 2002, an amendment of *Explanation of Certain Legal Problems on the Trial of Cases Concerning Disputes over Computer Network Copyright* passed in Nov. 2003, and *Interpretation on Several Issues of Concrete Application of Laws in Handling Criminal Cases of Infringing Intellectual Rights* passed by the Supreme People's Court and the Supreme People's Procuratorate on Dec. 22, 2004; additionally, in WTO Rules, *Agreement on Trade Related Aspects of Intellectual Property (TRIPS)* respecting the intellectual property protection is also included. These legal norms play a very important role in adjusting issues about computer network copyright, but the weak legal applicability is still a problem in the judicial practice. To legislate as soon as possible and to perfect the adjustment of the legal system about computer network copyright mean that our country walks in the front of the international community.

2. PROTECTION RANGE OF NETWORK WORKS

The network works are various in style, for example, character works, oral works, music works, drama works, Quyi works, dance works, works of films and televisions, fine arts works, project design drawing, and computer software, etc. In addition, there are some new developing network works which have not been prescribed in traditional copyright laws, such as multimedia, mobile phone picture, animation, flash, cartoon, animated MTV, and web design, etc. The sources of these network works and authenticity of intellectual property have got great challenge. In Oct. 2001, Sina accused Sohu of plagiarizing the mobile phone pictures in Sina's message channel. After one-year lawsuit, finally, the Second Intermediate People's Court of Beijing Municipality tried the case for retrial, adjudged Sohu has committed the infringement of copyright and made the judgement that Sohu can not reuse the infringing mobile phone pictures, shall compensate 211,813 yuan to Sina, and shall publish the apology statement to Sina on Sohu's homepage for 24 hours continuously. However, thinking thoroughly, is there no possibility of infringement of mobile phone pictures on Sina net? In other words, are the pictures provided to Sina totally created primitively by the provider? The network works depend on the advanced digitized technology of network. It is easy for people to duplicate others' works or piece together other information, and then utilize software to reprocess. Can such works mixed with others' intelligence achievement and one's own intelligence achievement be totally defined as one's own copyright? I think, in the legislation of network copyright, the time limit of objection can be prescribed when the work is posted on the Internet (unsuitable to be long), so as to avoid disputing for one's own copyright and protect the copyright of the source works that may be plagiarized related to new works. Within the objection period, the possible infringer can propose the objection. As long as the evidence is fully conclusive, the person can require the website to promptly stop the infringement, delete and not to reutilize. Within the objection period, the work posted on the Internet is just an advertisement, so pasted and downloaded by user is unallowable, and transmitted as well as popularized by the Internet Service Provider is permitted. After the objection period, the work can be regarded as the real network copyright. Internet Content Provider (ICP) and Internet Service Provider (ISP) can openly spread and use the work to obtain remuneration.

3. REASONABLE USE OF NETWORK WORKS

The reasonable use system of works is prescribed in Article 22 of Copyright Law, which refers that the published work can be used without the permission of copyright owner and payment is not required, but the name of author and the source of the work should be pointed out and other rights enjoyed by the copyright owner can not be infringed. The works that can be reasonably used are numerous, such as the works published by others used for individual study, research, and appreciation, and properly quoted to introduce, comment on a certain work or explain a certain question. Besides works categories that can be used reasonably prescribed in the traditional Copyright Law, some new regulations which are suitable for network works should be added in the legislation. For example, the replication in hard disc or RAM when browsing the web; using offline browser for download; printing for reading after download; the regularly-made backup by website; network service of remote library; the replication resulting from the transmission among the servers; the browse of Internet cafe, etc. The works, published on the Bulletin Board System (BBS), is set up by the author to broadly spread. In this case, the behavior that people paste the works on one BBS to other BBS should be regarded as reasonable use.

4. INFRINGEMENT LIABILITY OF NETWORK COPYRIGHT

ICP is called Internet Content Provider in American and European countries, and takes on strict liability. In China, the law requires the publisher to take on the fault liability; therefore, it is recognized that ICP take on the fault liability. The current legal basis is showed in Article 206 of *General Principles of the Civil Law*: Citizens and legal persons who through their fault encroach upon state or collective property or the property or person of other people shall bear civil liability. ICP's fault mainly refers that it fails to take the attention liability, while uploading network works. The attention liability means ICP shall notice whether the work is the infringing work while uploading and transmitting it to the public. The main responsibility of ICP is to strictly review. However, someone thinks it is difficult for the copyright owner to investigate the liability of ICP's misconduct, because the Internet information is easily amended and canceled. Once the copyright owner finds the infringement behavior and investigates, it is possible for ICP to destroy the related infringing evidences as soon as possible without any trace. Second, too strict requirement to ICP's attention liability will largely confuse the enthusiasm of ICP, since it is difficult to review and pay attention to the tremendous network works and it may be harmful for its development, and consequently will affect the progress of society. But still, in order to protect the benefits of copyright owner to achieve the balance of profit

distribution, we still choose to investigate the fault liability, and make strict requirements to ICP, so as to achieve the protection of network copyright, which is the only choice for law.

ISP is called Internet Service Provider in the United States. ISP provides important transmission technical equipment for the realization of network copyright, so the benefits of ISP are closely related to ICP and users. I think that ISP, a special website agency, shall take the responsibility for the transmission service. In many situations, the transmission service is unconscious of the infringement behavior of ICP, which shows its joint intent of infringement with ICP. Provided that under the former situation, it is unfair to investigate the ISP; provided that under the later situation, it is necessary to investigate the infringement liability. Therefore, as regard to the investigation of infringement liability, we should analysis according to the specific situation. In this precondition, it is suitable to choose the Fault Presumption Principle, which requires the inversion of proof liability. Once the infringement happens, investigating the ICP's liability is the first action. It is quite difficult for evidence collection to confirm ICP and ISP bear the joint intent. But in some situation, the infringement behaved by ISP is evident, yet ISP pretends not to know, which means ISP has the intent to infringement. In some inconspicuous situation of infringement, how to control with difficult operation in practice shall depend on the legislation to regulate.

The user's infringement liability mostly means the liability shall be taken for the infringement through uploading other's works without permission. This infringement behavior is evidently finished by user's intent. Therefore, it should take the principle of fault liability for users' infringement behavior. Legislation shall prescribe that ICP should preserve the person's true name, address and other contact information (for example, unit) who uploads the work. Once the infringement done by user is found, it is easy to collect evidence.

5. DOMINATION OF INFRINGEMENT CASE

The infringement dispute domination of network copyright means that the infringement case shall be registered for trial in where and what level of court. It includes the regional-domination, level-domination, appointed domination, deportation domination and special domination, etc. in the Civil Procedure Law of China. In practice, apart from applying the domination principles, special conditions also exist when handling the network copyright infringement dispute. Chinese laws also strive to perfect this aspect. In the 1302nd conference on Dec. 31st, 2003 of judicial committee of the Supreme People's Court *Decisions on the Revision*

of Explanation of Certain Legal Problems on the Trial of Cases Concerning Disputes over Computer Network Copyright by the Supreme People's Court, Explanation for short (Amendment), the First Article prescribes: "The infringement dispute cases of network copyright are dominated by People's Court of the place of an infringement act, or the place of defendant's residence. The place of an infringement act contains the locus of computer terminal equipment where appealed infringement acts. If it is hard to confirm the place of an infringement act and the residence of the defendant, the locus where plaintiff finds the equipment of computer terminal about infringement content shall be regarded as the place of infringement act." In this Article, it is not certain to decide problems of computer terminal and Internet server. Computer terminal contains display, printer, and long-distance terminal, and portable computer, removable hard disk, etc. The locus of these equipments is hard to define, and to be certain. As for server, it contains server for providing enter service, for providing upload space, they have different locus. Therefore, it argues that the legislation should intensify this aspect, or dealt in case disposal, as for place of infringement act, it should be specified so that the court can master in inquisition.

As for level-domination, some consider that it is better for Intermediate Court to dominate, because the technology for evidence identification should conform to the standard of high technology, which will nicely recognize the truth of the case. It is only the Intermediate Court that possesses this technical condition. With the generalization of information technology and improvement of technical level for Management Science, it argues that the Basic People's Court can possess this condition entirely. With the

development of Internet technology, the infringement case will increase constantly. If all the cases go to the domination of Intermediate Court, it may not be fully completed. We can apply to the principle of lawsuit domination for level-domination to confirm the level of domination according to the degree of case and its range.

6. CONCLUSION

The rapid development of Internet technology puts forward new challenges to the traditional protection principle of copyright law. In the Internet era, it is necessary to use new legal protections to solve the sphere problems of network copyright and accomplish the reasonable use system, the liability principle of infringement, and lawsuit domination, etc. The development of Internet broke through boundaries among nations with its unique Digital means of information, and totally broke the terrain space concept of copyright protection; therefore, a lot of network works are widely spread all over the world through Internet. Hence, the national network copyright protection shall conform to the international community, which will in deed achieve the purpose of network copyright protection. Enacting and issuing the law of network works protection suitable for our situation as soon as possible is a problem worth to be commonly discussed by the law. To establish a smooth, clear and stable legal environment will make the whole network copyright protection more standardized, and will also promote the development of economy and the progress of society.

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THE AUTHOR

Zhang Caiqin, Doctor candidate of Management School in Wuhan University of Technology; Associate professor of Law School in Chongqing University, China.
Address: Law School in Chongqing University, Chongqing, 400040, P.R. China.
Email:caiqins@126.com