Determination of Indirect Tort Liability under the Circumstance that the ISP Gains Economic Benefits from Advertisements in Infringing Works in China

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Abstract. According to Chinese law, "directly obtaining any economic benefits" from the works of network users cause network service providers to bear a "higher duty of care" for the infringement acts. However, the standards of "directly obtaining any economic benefits" and "a higher duty of care" have triggered a series of controversies in theory and practice. In terms of theory, this article compares the provisions regarding "direct economic benefits" under the PRC law with the Safe Harbor Rules of the U.S. Digital Millennium Copyright Act (DMCA), pointing out the cognitive bias existing in the PRC interpretation of the DMCA. Meanwhile, this article analyzes the determination of tort liability when the ISP gains economic benefits by placing advertisements in infringing works in Chinese judicial practice. The author finds that the standard for determining "direct economic benefits" is relatively vague, and there are issues concerning the direct presumption of fault on network service providers who are found to gain "direct economic benefits" from advertisements in infringing works. These problems often lead to Chinese network service providers being deemed to be liable for damages even though they are doing the normal business of advertising. This article explains the important role of "direct economic benefits" in determining the indirect tort liability of the ISP and how to optimize the rules for determining the indirect tort liability of the ISP in China.

Keywords: Internet Service Providers (ISP), direct economic benefits, advertisements, infringing works, tort liability.

1. Introduction

According to Chinese law, the Internet Service Providers (ISP) "has a higher duty of care for the network user's infringement of the right of communication to the public on information networks where it directly obtains any economic benefits from a work provided by a network user" [1]. This provision also defines "direct economic benefits" as the earnings of the ISP from placing advertisements in specific works. However, in Chinese judicial practice, there are different judgment standards for whether the economic benefits obtained by the ISP from the pre-show and post-show advertisements or advertisements on the landing pages of the infringing works constitute "direct economic benefits". Meanwhile, if the ISP's advertising on infringing works is deemed as obtaining "direct economic benefits" from the works, some courts directly hold that the ISP "should have known" the infringement and shall bear the liability. Moreover, there are some deviations between different courts' determination of "a higher duty of care". In Chinese judicial practice, a "higher duty of care" is often unconditionally equal to the duty of review. Therefore, the ISP determined as gaining "direct economic benefits" from advertisements in infringing works is often liable for indirect infringement and thus has to bear the compensation, as a result of not exercising "a higher duty of care".

The vague standards for determining "direct economic benefits" and a "higher duty of care" in China result in the ISP being deemed to be liable for damages due to its normal act of making commercial benefits from the advertising. This is undoubtedly adverse to the healthy economic development of network service providers and the improvement of their technologies and services. Through a theoretical analysis of relevant legal provisions, as well as a judicial analysis of the standards for determining "direct economic benefits" and the ISP's "higher duty of care" in the case

discussed in it, this article will discuss how to optimize the rules concerning "direct economic benefits" for determining the ISP's indirect infringement liability.

2. Relevant Legal Provisions

In Chinese law, the term "direct economic benefits" first appeared in the Regulation on the Protection of the Right of Communication to the Public on Information Networks (hereinafter referred to as the "Regulations"). Item 4 of Article 22 of the Regulations stipulates that a network service provider "shall not be liable for damages if it has not directly obtained any economic benefits from its service recipients' works" [2]. Such provision is adopted for reference from Article 512 of the Digital Millennium Copyright Act of the United States (DMCA). Section 512 (c) (1) (B) of the DMCA provides that, an ISP "shall not be liable for monetary relief...for infringement of copyright...if the ISP (who can control such behaviour) does not receive a financial benefit directly from the infringing activity" [3]. Both of the provisions exempt the ISP from liability for infringement of intellectual property rights on the condition that the ISP has not obtained economic benefits directly from infringing works. Comparing the above provisions, the exemption condition under Article 22 (4) of the Regulations is stricter than that under Section 512 of the DMCA. This is because Article 22 (4) of the Regulations provides that "no direct economic benefits" is the only exemption condition, while Section 512 (c) (1) (B) of the DMCA sets out two qualifications. One is whether the ISP can control the infringing activities, and the other is whether the ISP directly obtains profits from the infringing activities. According to the relevant laws of the PRC, if an ISP is deemed to have obtained direct economic benefits from infringing works but has no ability to control the infringing activities, it cannot enter the "safe harbor" to exempt itself from compensation liability. However, under U.S. law, such an ISP can enter the "safe harbor" and be exempted from vicarious liability.

"Direct economic benefits" is also one of the conditions in PRC laws to help determine whether an ISP has committed indirect infringement. Article 1197 of the PRC Civil Code provides that, network service providers are jointly and severally responsible with network users where they "know or should know" that a network user is violating the civil rights or interests of others using their network services and fail to take the appropriate action [4]. In the case of "should know", the ISP needs to bear the certain duty of care and take actions to stop infringement, in order to protect people's civil rights and interests [5]. In the situation described in this article, an ISP that profits directly through placing advertisements in infringing works are required to bear a "higher duty of care" towards infringing activities. If it fails to perform that duty of care, it will be deemed that it "should have known" about the infringing activities and will be liable for damages. However, due to an incorrect interpretation of the Safe Harbor Rules transplanted from the US law, many Chinese scholars and judicial practices hold the view that the opposite of the five conditions for exemption of liability in the Safe Harbor Rules shall be viewed as the elements of liability. That is to say, failure to meet the condition of "no direct economic benefits" directly implies liability for damages [6]. As a result, in some Chinese judicial practices, once an ISP is found to have directly gained economic benefits from infringing works, it may be directly presumed to be at fault. However, the relevant laws and regulations in China do not have a corresponding relationship in the US laws between the conditions for exemption of liability in the Safe Harbor Rules and the elements of vicarious liability. Therefore, to hold the ISP liable only based on the factor of gaining direct economic benefits is of no legal basis in China.

As can be seen from the discussion above, the ISP is very vulnerable to being held liable when gaining direct economic benefits from infringing works in China. Therefore, the standards for the determination of "direct economic benefits" and the follow-up "higher duty of care" shall be more explicit and reasonable in situations where an ISP obtains profits from advertisements in infringing works. By doing this, the rights and interests of the ISP can be better protected. As Chen Jinchuan mentioned, "An ISP is deemed to have gained direct economic benefits from infringing works only

because it receives fees from its services means it would be unreasonably subject to liability for its actions" [7].

3. The Determination of Whether Economic Benefits from Advertisements in Infringing Works Placed by the ISP Constitute "Direct Economic Benefits"

As can be seen from the above analysis, the determination of "direct economic benefits" plays an important role in determining the ISP's indirect tort liability. However, with respect to the commercial conduct of ISP to place advertisements in infringing works, different courts in China hold different standards for determining whether this conduct constitutes directly gaining economic benefits from infringing works.

Table 1. The Determination of Whether Economic Benefits from Advertisements in Infringing Works Placed by the ISP Constitute "Direct Economic Benefits" in Chinese Juridical Practices

Case	Reason	Conclusion
Wangle Hulian (Beijing) Technology Co., Ltd. v. Shanghai Quan Toodou Cultural Communication Co., Ltd. (case of dispute over copyright infringement)	Although the defendant's website does not charge users for watching the movie involved in the case, there are advertisements on relevant website pages of the movie. The number of users who watched the movie determines the number of people who saw the advertisement, which is helpful for the defendant to obtain benefits from the advertisements. Therefore, the defendant can directly benefit from the infringing work [8].	The defendant has obtained "direct economic benefits".
Shenzhen Tencent Computer Systems Co., Ltd. v. Yuncheng Yangguang Culture Media Co., Ltd. (case of dispute over copyright infringement and unfair competition)	The defendant places advertisements below the play window and above the comment area of the infringing short videos posted by its network users and gains economic benefits from these advertisements [9].	The defendant has obtained "direct economic benefits".
Yingdu Media LLC of Chongqing Broadcasting and TV Corporation v. BeiJing IQIYI Science & Technology Co., Ltd. (case of dispute over infringement upon the right to network dissemination of information)	As there are pre-show advertisements placed by the defendant in infringing works involved in the case, the defendant bears a higher duty of care for the direct economic benefits that the defendant can derive from the transmission of the works involved in the case [10].	The defendant has obtained "direct economic benefits".
COL Digital Publishing Group Co., Ltd. v. Shanghai Jinhao Network Technology Co., Ltd. (case of dispute over infringement upon the right to network dissemination of information)	Although the advertisements placed by the defendant are not specific to the works in question, it is clear that the storage of the infringing articles on the defendant's website does increase the visibility and viewership of the website, as well as the opportunity for viewers to see the advertisements. Thus, the defendant is deemed to have directly benefited financially from infringing	The defendant has obtained "direct economic benefits".

	works provided by the network users [11].	
Henan Yindu Film and Television Production Co., Ltd. v. Youku Tudou Inc. (case of dispute over infringement upon the right to network dissemination of information)	Although the advertisements placed by the defendant are displayed during the screening of the fringing film in dispute. The content of such advertisements has nothing to do with the film. Meanwhile, the plaintiff did not submit evidence to prove the specific relevance between the advertisements and the film. Therefore, the defendant does not obtain direct economic benefits [12].	The defendant has not obtained "direct economic benefits".
Great Tang Huihuang Media Co., Ltd. v. Beijing Wole Information Technology Co., Ltd. (case of dispute over infringement upon the right to network dissemination of information)	Although advertisements placed by the defendant are displayed before and after the infringing video, the advertisements are loaded by the video player automatically. The plaintiff failed to prove the specific relevance between the advertisements and the video. Therefore, the defendant does not obtain direct economic benefits from the infringing film [13].	The defendant has not obtained "direct economic benefits".

As shown in Table 1, many Chinese courts tend to deem the proceeds from any kind of advertising placed by the ISP in infringing works as "direct economic benefits", and only a minority of judgments deem the proceeds as "no direct economic benefits". The author considers the standard for determining "direct economic benefits" in most judgments is too low. Therefore, the author agrees more with the judgment made by the Henan Higher People's Court that "providing such services as free uploading of video to network users entails certain costs. It has been a common business model in practice for the ISP to maintain the normal operation of the platform by placing commercial advertisements and gaining economic benefits from them" [12]. Generating advertising revenue from user traffic is a legitimate and reasonable business practice. Indiscriminately identifying the economic benefits obtained by the network service providers from advertising in infringing works as direct economic benefits would hinder the normal business activities of the network service providers and aggravate their burden.

In the author's view, in determining "direct economic benefits", what should be done is establishing clear distinctions between "economic benefits obtained from placing advertisements in specific works" and "general advertising charges", namely emphasizing the specific connection between the economic benefits obtained from placing advertisements in infringing works and the infringement act. The determination of whether the advertising charges should be defined as "direct economic benefits" should be based on this specific connection, rather than on the number of user traffic and the popularity of the infringing works. Only when the advertisements placed by the ISP have a specific connection with the infringing works, can the benefits obtained from placing advertisements be deemed as "direct economic benefits". For example, advertisements related to the game placed in an infringing game video, or advertisements specifically targeting infringing works with high popularity. If such advertisements have no specific connection with the infringing works, but are random advertisements automatically loaded by the video player, then the economic benefits obtained from the advertisements should be considered general advertising charges and should not be considered "direct economic benefits".

4. The Determination of Tort Liability of the ISP Constituting Obtaining "Direct Economic Benefits" by Placing Advertisements in Infringing Works

As mentioned above, an ISP who is deemed to have obtained "direct economic benefits" from placing advertisements in infringing works in China shall bear a "higher duty of care" to the infringement acts. If it fails to perform such duty of care, it shall be liable for damages. However, in the views of many scholars and judicial practices, "one of the direct factors for determining the ISP's compensation liability is whether the ISP has obtained direct economic benefits from infringing works" [14]. As long as the ISP's proceeds from placing advertisements in infringing works are deemed as "direct economic benefits", the ISP will be directly determined that it has not performed the "higher duty of care" and shall be liable for damages. At the same time, many courts in China also equate the "higher duty of care" unlimitedly with review obligations. For example, the definition of "higher duty of care" in judgments of network service providers who gain direct economic benefits from the infringement includes "initiatively review the uploading works of network users, and adopt reasonable and effective technological measures" and "a relatively high duty of reviewing and verifying the works provided by network users" [15, 16].

In the author's opinion, it is harsh to directly presume fault on ISP who obtain direct economic benefits from placing advertisements in infringing works. Therefore, under this circumstance, firstly, ISP shall not be deemed to be at fault simply because they directly make economic benefits from the infringing act, but whether such ISP have performed a "higher duty of care" is required to be determined. Secondly, defining a "higher duty of care" as requiring ISP to bear the obligation to censor all profited works also adds an unnecessary burden to them. A "higher duty of care" cannot be directly equated with a duty of review. China's regulations on the censorship obligations of the ISP stipulate that "The people's court shall not find that a network service provider is at fault when it fails to conduct a proactive examination into a network user's violation of the right of communication to the public on information networks" [17].

The determination of a "higher duty of care" should be coordinated with the popularity and completeness of the infringed works. For example, if the video uploaded by a network user is a complete film with high popularity, based on general knowledge and the professionalism they should possess, the ISP could make a preliminary judgment as to whether the film has infringed upon others' copyrights. If the ISP still permits the uploading of such video under such circumstances, and the proceeds from advertising in the infringing video are deemed as "direct economic benefits", then the ISP shall be deemed as having not performed its "higher duty of care". By contrast, if it is difficult to determine whether the infringing works constitute infringement, the standard for a "higher duty of care" shall be appropriately lowered. In addition, the determination of a "higher duty of care" shall also be coordinated with the ISP's ability to detect and control infringement activities. According to Wang Qian, whether an ISP could or should detect and control infringement activities depends on a series of factors [18]. Different ISP have different business models and technical capabilities. Therefore, the determination of a "higher duty of care" shall also be based on the specific situation of the ISP's ability to detect infringement activities.

5. Conclusion

In summary, the standard for determining "direct economic benefits" obtained from infringing works has a great influence on the determination of tort liability under the circumstance that the ISP obtains economic benefits through advertising in infringing works. In order to avoid situations where the ISP shall bear over-heavy compensation liability due to its normal and reasonable commercial profits in China, there are some actions that can be taken**.** First of all, the differences between the relevant Chinese and American provisions shall be clarified. Secondly, the definition of "direct economic benefits" shall not be too broad and a clearer distinction shall be made between the ISP's "economic benefits obtained from inserting advertisements into a specific work" and "general advertising charges". Only where the proceeds obtained from placing the advertisements have a

specific connection with the infringement may the economic benefits be deemed as "direct economic benefits". Thirdly, if the ISP is found to have made "direct economic benefits" by placing advertisements in infringing works, it shall not be directly presumed to be at fault. The popularity and completeness of the infringed works and the ISP's ability to detect and control the infringement acts shall be taken into consideration to determine whether the ISP has breached the "higher duty of care". If the ISP has breached, it shall be deemed that it "should have known" the infringement and shall be held liable. Although it is important to protect the interests of the infringed, relevant laws and judicial practices in China shall also be optimized so as to protect normal business conduct and the healthy development of the economy of the ISP.

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