Technology Development and Legislation Progress: Third Party Liabilities of Internet Service Providers in China Tort Law

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This paper discusses about historical transitions of third party liabilities of Internet service provider (ISP) in Tort Law and Copyright Law of China. In the emerging period, drawbacks such as strong administrative legislation, limited valid duration of stipulations and unclear civil legislation characteristics existed in legislation, and the adjustment way in aspect of public law neglects civil remedy for the infringed. In the forming period, the legislation adjusts information network dissemination rights of copyright owners, performers, video & audio producers by transplanting system design highlights of DMCA. As a legislation model in the fusing period, Tort Liability Law (TLL) is featured in improving legal ranks, expanding adjustment scopes, updating legislation thoughts and balancing conflicts of interest. Where TLL § 36 is applicable, it should be clear that the § 36(1) does not classify ISP, and § 36(2),(3) are not applicable for parts of civil rights; the ‘notice’ is just a component of requirement of liability, whereas ‘take-down’ measures are not limited to those stipulated in the article, and all that are able to stop tort information dissemination should be deemed as reasonable ‘take-down’ measures; TLL § 36(3) is the subjective element for ISP to bear third party liabilities, and ‘know’ should be interpreted as ‘knew or should have known’.

Keywords: Internet service provider, ISP, TLL § 36, legislation evolution, infringement

Internet Service Provider refers to the legal subject that provides digital online telecommunication link for terminals designated by users and provides transmission or transfer of materials chosen by users without changing any content of materials transmitted or received.† When Internet users have committed infringement online and Internet Service Provider (ISP) objectively induces or contributes to infringement of users as ISP fails to undertake reasonable duty of concern or neglects implementing measures to stop, ISP should bear third party liabilities. In terms of traditional tort law, ISP bearing third party liabilities complies with the purpose of legislation for private right protection, but it arouses relatively large disputes about whether ISP should ‘share liability for damage consequences caused by infringement of users without exception’ in legislation of different countries at the early 20th century: proponents are mostly private right subjects represented by the infringed that expect to get full compensation by ‘expanding liability subject’ in legislation; objectors are service providers and industry developers represented by ISP that appeal legislation should define liability boundary by taking ‘technology characteristics’ as standards, so that unblamable ISP could avoid bearing additional compensation and then negatively affect Internet industry development. The contradictions and conflicts between private right protection and industry development become considered for legislation later, but it is certain that legislators of every country want to realize balance between rights and interests by designing scientific legal system.

In 2009, Article 36 of Tort Liability Law (TLL § 36) promulgated by China provides new provisions on third party liabilities of ISP by referring to the adjustment mode in Digital Millennium Copyright Act (DMCA) of United States, ‘Where Internet users and ISP infringe rights and interests of others via Internet, they should bear liabilities for tort. Where Internet users commit infringement by utilizing Internet service, the infringed shall have rights to inform ISP of taking necessary measures such as deleting, shielding, disconnecting links, etc. In case

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that ISP fails to take necessary measures upon receipt of such notice, ISP should bear joint and several liabilities for the damage expansion with such Internet user. In case that ISP knows Internet users infringe civil rights and interests of others by utilizing the Internet services and fails to take necessary measures, such ISP should bear joint and several liabilities with such Internet user.’

The law promulgated is consistent with international generally accepted legislation rules to some extent. However, China juridical practice circle have relatively large disputes about how to correctly understand and apply Article 36, mainly because the driving force of Internet industry to national economy development cannot be ignored today, so balance of rights and interests and policy allocation should be considered more in system design and infringement identification about ISP third party liability. The paper discusses about ISP third party liabilities systematically from legislation evolution, legislation thoughts, liability mechanism, etc. for the purpose of interpreting TLL § 36 correctly on the standard ground.

Legislation Evolution of ISP Third Party Liabilities in China

Legislation in Emerging Period

Altogether more than 1,000 normative legal documents concerning Internet legal regulations issues such as legal provisions and regulations & rules of departments were promulgated by China legislation authorities of different levels from 1994 to 2005, and they cover laws, administrative rules, department regulations, judicial Interpretation, etc. in validity order. Legislations quoted frequently in civil trials are: (1) Decision of the National People's Congress Standing Committee on Guarding Internet Security § 17 released in 2000 stipulates that ‘units engaged in Internet businesses should develop activities lawfully, take measures to stop harmful information dissemination and report to relevant authority in a timely way in case of discovering illegal criminal acts and harmful information online.’ (2) Measures on the Administration of Internet Information Service § 16 issued in 2000 stipulates, ‘In case of discovering information disseminated on its website is obviously one of fifteen kinds of content listed in § 15 of the measures, ISP should stop dissemination immediately, keep relevant records and report to relevant national authority.’ (3) Management Provisions on Electronic Bulletin Services in Internet § 13 issued in 2000 stipulates, ‘In case that discovering information in its Bulletin Board System is included in information content listed in § 9 of the Provisions obviously, E-bulletin service providers should delete such information immediately, keep relevant records and report to relevant national authority.’ (4) Provisions for the Administration of Internet News Information Services § 20 in 2005 stipulates, ‘Internet news information service units should establish news information content management responsibility system; not publish and transmit news information specified in Paragraph One of § 3 and § 19 of the provision; in case of discovering content disobeying provisions in Paragraph One of § 3 and § 19 in current politics E-bulletin services provided, Internet news information service units should delete such content immediately, keep relevant records and provide such content during legal inquiry of relevant authority.’

In terms of characteristics of quoted clauses, legislation of the period did not highlight on providing civil remedy to the infringed in the private law area. Legislation characteristics in the emerging period are reflected in the following respects:

(1) Distinctive administrative legislation: (a) The legislation of the period is mostly administrative provisions and some rules and regulations, and generally administrative or criminal penalties are imposed when ISP violates obligations of public laws such as administrative law or criminal law, meanwhile legislation also emphasizes ISP should fulfill report obligations. For example, most laws stipulate, ‘Once service providers discover any legal circumstances of online materials, they should have the obligation of deleting or stopping transmission immediately, keeping records and reporting to relevant national authority.’ ‘Legal circumstance’ here generally refers to circumstances concerning disobeying fundamental principles of constitution, criminal law, administrative law, etc. (b) According to legislation expression of this period, administrative authority is the responsible unit, and mostly telecommunication administration authority of province, autonomous region and municipality or information industry ministry (now altered into ‘Industry and Information Ministry’) are law enforcement units or superior responsible units. (c) Adjustment scope is extremely wide. Most laws emphasize ISP should obey public laws, and most provisions are closely associated with China public policies to try to maintain the state stable in the respect of speeches.
the period is featured in timeliness and pertinence. Generally, subject legislation is implemented for specific ISPs in the form of single provisions with regard to Internet technology development degree and actual demand, such as Management Provisions on Electronic Bulletin Services in Internet prepared for E-bulletin service providers and Provisions for the Administration of Internet News Information Services prepared for Internet news information service units. The legislation style has overlapping parts in normative measures, and ‘overlapping’ problem may exist in application. As Internet technology updates and new ISPs appear, some law sources have lost their practical significance or have legislative blanks.

3. Unclear civil legislation characteristics: Although ‘discover-delete or stop transmission immediately’ set by some standards restrains infringement information dissemination to some extent, the mode is lack of ISP infringement behaviour identification rules and ways to provide civil remedy to the infringer. In juridical practice, Chinese courts are used to quoting of General Principles of Civil Law of the People’s Republic of China § 130 released in 1988 and other relevantly obsolete provisions to deal with network infringement cases. The practice is to justify itself from juridical effects and legal principle foundation, but once it comes to specific issues such as damage result share, flaws of laws above will reveal without any doubt. However, the ‘discover-delete or stop transmission immediately’ rule established in this period has something similar to relevant articles in American DMCA § 512 and Directive of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services (Directive2000/31).

Legislation in the Forming Period

Laws of this period are mainly comprised of Regulations on the Protection of the Right to Network Dissemination of Information (the Regulation has been revised in 2013) promulgated by the State Council and Interpretation on Some Issues about Applicable Laws for Trials concerning Computer Internet Copyright Dispute Cases amended by the Supreme Judicial Court in the 2nd time (hereinafter referred to Interpretation). These two legislations transplant comparatively mature regulation systems in DMCA § 512 to different degrees, but the adjustment scope is only limited to copyright disputes and therefore reflects the legislation background of China to promote intellectual property right strategy gradually. On the whole the legislation mode is adopted by TLL § 36 issued later.

Interpretation promulgated in 2000 is focused more on liability form of ISP after two amendments (in 2003 and 2006). For example, it stipulates: (a) infringement actions and liability foundation of ISP; (b) joint infringement liability after ISP does nothing when knowing facts or receiving warnings; (c) General tort liability of ISP: without just causes, ISP cannot refuse to provide infringer information; (d) liability of ISP to provide infringement tools; (e) Exemption from liability for breach after ISP fulfills obligations according to laws.7 In order to protect information Internet dissemination rights of copyrighters, performers and audio & video producers, Regulation promulgated in 2006 defines ‘information Internet dissemination actions’ as ‘actions of providing works via wired or wireless ways so that the public could get works in their selected time and place.’ Based on transplanting DMCA § 512(a)(b)(c)(d)(g), Regulation also stipulates the content below in § 14-25: (a) the notice rules and content of the notice of the infringed; (b) take-down obligation, the obligation of sending or announcing the notice to the public of ISP; (c) counter-notice rules and rights of recovering taken-down information of the infringed; (d) Four grounds for exemption of ISP: service providers providing automatic access services and automatic transmission services in line with users’ instructions, cache service providers, information storage service providers and searching or linking service providers; (e) Damage compensation liabilities due to notice errors; (f) Administrative liabilities if ISP refuses to provide information about the infringer.9

Legislation in the Fusing Period

Legislation in the emerging and forming periods became obviously better than those before, but as Internet technology develops more and more civil disputes appear in the Internet environment, the public law of limited adjustment objects and normative measures and other characteristics existing in the aforesaid legislation reflects drawback concerning inadequate remedy of the infringed. For instance, in cases regarding right of online reputation and virtual property right disputes, the court could only quote principle provisions of previous General Rule of the Civil Law for verdicts, while these principal provisions have comparatively unreasonable
parts in liability remedy and right relief. Targeting at theoretical and practical requirements, TLL particularly sets § 36 which provides detailed stipulations concerning right relief and damage consequence bearing of the infringed. Compared with laws earlier, TLL § 36 has breakthroughs in the following respects:

**Enhancing Legal Rank and Expand Scope of Application**

Generally Chinese legislation distinguishes the hierarchy of law according to different legislation authorities, lawmaking time and applicable scope difference. Generally the hierarchy of domestic laws is the constitution law, administrative provisions, local provisions and rules & regulations in sequence. TLL is the law only second to the constitution, and its rank is higher than Regulation and Interpretation, so it enjoys preference in application. Regarding application, TLL § 36 as basic civil law concerns all civil rights, while Regulation and Interpretation only regulate disputes in the area of copyright. Therefore, no matter in legal rank or in adjustment scope, TLL is different from previous laws.

**Updating Idea of Legislation**

Laws in the emerging period place more stress on beforehand supervision and afterwards control obligations of ISP for Internet information, and deem ISP as self-disciplinary supervisors when providing Internet services. Once discovering harmful content in the Internet information, ISP should take measures to delete or stop transmission timely; otherwise, ISP shall be imposed on administrative and criminal punishment; however, inheriting the idea of technology neutrality of DMCA, TLL § 36 stipulates only when the infringed informs or ISP has known infringement information existing, ISP shall then take measures such as deleting, shielding and disconnecting links, and ISP shall not bear beforehand examination obligations during routine Internet operation. It is worth mentioning that the rule structure provisions ‘discover-stop transmission and delete immediately’ established by administrative provisions in the emerging period are absorbed by the TLL § 36(2), (3) in fact, and the only difference lies in that the way of ‘discovering’ is replaced by ‘notice and takedown’ and ‘knowledge rule’.

**Concentrating Representation of Article**

Compared with stipulations in Regulation and Interpretation, TLL § 36 uses more concentrated representation. In particular: (a) TLL § 36 abandons ISP classification and generally uses the name of ISP; (b) the Paragraph One of TLL § 36 covers tort liability basis of ISP stipulated in Interpretation § 3; (c) the notice and take-down rules in TLL § 36(2) is the summary of Regulation § 14-17 and Interpretation § 4; (d) the knowledge rule in TLL § 36(3) is the summary of the proviso of Regulation § 23 of and Interpretation § 4. Nevertheless, there is no doubt that concentration in representation brings in many legal loopholes. For example, TLL § 36 does not stipulate the content of notice, counter-notice system, remedy of mistaken notice and other auxiliary systems, and according to Chinese legislation habits, these loopholes will be supplemented by Judicial Interpretation issued afterwards.

**Balancing Conflict of Interests**

Another breakthrough of TLL § 36 is that it objectively associates subjective faults of ISP with ISP liability scope: if ISP fails to take necessary measures timely after receiving the notice from the infringed, ISP shall only bear joint and several liabilities with the infringer for the damage expansion; if ISP knows the infringement actions of the infringer beforehand and fails to take deterrent measures, ISP shall bear joint and several liabilities with the infringer since the time ISP knows the information. Evidently the way of associating faults with liabilities balances conflicts between public rights and interests and private rights and interests. Defining liability scope aims to protect Internet industry development, and stipulating joint and several liabilities of the infringer and ISP is for the purpose of providing adequate remedy for the infringed.

To sum up, legislation in the fusing period is featured in coexistence of public laws and private laws in ISP third party liability legislation. Administrative and criminal liabilities of ISP are mainly solved in public laws; as for private law, TLL § 36 is general stipulation of Internet infringement and stipulates civil rights and interests of the infringer such as right of personality and property right, and Regulation and Interpretation provides special stipulations concerning Internet copyright infringement. The advantage of binary legislative mode lies in regulating behaviours of ISP from civil law, administrative law, criminal law, etc. in all-around way, and its weak points are how to interpret laws and applicable laws in overlapped and repeated laws. In general, interpretation theory after legislation should still adhere to legislative thoughts and ground on theoretical foundations.
Legislation Design of TLL § 36

TLL is the outcome of legislation transplanting to a large extent, but considering domestic theoretical research foundation and rich experience accumulated from judicial practice, and TLL § 36 has its special system design concerning ISP third party liabilities, it does not copy the legislative mode of DMCA or Regulation completely, and the following two points are the most persuasive arguments:

Nature of TLL § 36: Constitutive Requirements rather than Grounds for Exemption

After TLL § 36 is promulgated, some scholars think the nature of TLL § 36 is a ground for exemption as the Article originated from DMCA § 512(ref.16). In fact, TLL § 36 and DMCA § 512 are actually quite different, and the former’s nature should be constitutive requirements. The reasons are as follows:

(a) In terms of applicable scope, the ‘safe harbor provisions’ is the system in DMCA, it only restricts copyright tort liabilities and is not applicable for civil rights other than copyrights; while TLL § 36 virtually expands the scope including right of personality like right of reputation, portraiture right and right of privacy and special property rights like copyright, patent right and trademark right, so application scopes of these two are different obviously.

(b) As for legal nature, the nature of ‘safe harbor provisions’ is ground for exemption. ‘Safe harbor provision does not stipulate if ISP should bear tort liabilities for violation of liability limitations; on the contrary, safe harbor provision is applicable only when ISP constitutes into infringement pursuant to current laws.’ In other words, the precondition of applying American safe harbor provision is that ISP has infringed rights, while the purpose of DMCA § 512 is to exempt liabilities of ISP complying with legal conditions; the TLL § 36(2),(3) are the requirements of liability for tort liabilities. When ISP fails to take necessary measures after receiving notices or knowing infringement of its users, such ISP shall be deemed as infringer; otherwise, ISP will not commit infringement and it is unnecessary for ‘exemption’. As a result, legal nature of the two is utterly different.

(c) As for identifying the action nature or not, in many legal precedents concerning American copyright law, it is only necessary to judge if ISP complies with the conditions of safe harbor provisions in order to apply safe harbor provisions. If so, ISP may be exempted from liabilities directly and the judge could save the step of identifying the action nature of ISP completely. In China, however, TLL § 36 is requirement of liability, it is required to judge if ISP constitutes Internet infringement, separate or joint infringement or not in sequence for application, and then the ISP shall bear separate infringement liability or joint and several liabilities based on the action nature.

To sum up, it is obviously groundless to come to the conclusion that TLL § 36 is ground for exemption by merely making ‘form comparison’ with legislations of other countries.

Infringement Form: Contributory Infringement

In DMCA, the form of ISP third party liability is uniformly included in indirect infringement concept, and indirect infringement is comprised of contributory infringement and vicarious infringement, the former referring to that the actor is fully aware of infringement but the actor induces, promotes or virtually help others, and the latter referring to that the vicarious actor has rights or capabilities to supervise direct infringement actions but fails to perform due obligations. In copyright law, vicarious infringement should also meet the condition that ‘the actor should gain economic profits from infringement actions’. As technology develops, in order to solve copyright infringement after P2P technology emerges, the practice circles also further define inducement infringement form in contributory infringement. In MGM Studios v Grokster, the Supreme Court says, ‘In case of providing equipment for the purpose of inducing copyright infringement and contributing to the occurrence of infringement through clear representation or taking other determined steps, ISP should bear liabilities for infringement actions incurred by third party, and the lawful purpose of the product itself shall not be considered.’ It can be seen that the third party liability of ISP in DMCA has three forms: contributory infringement, vicarious infringement and inducement infringement.

However, the TLL § 36(2),(3) only establishes contributory infringement, and there are three reasons for the conclusion: firstly of all, representation shows that both Paragraphs use the structure ‘in case of Internet uses commit infringement by taking advantage of Internet service…ISP fails to take necessary measures (timely)…bear joint and several liabilities with the Internet user’ and the purpose is to state the precondition of ISP ‘failing to take necessary measures’ is that ‘Internet users have already or are committing infringement by taking advantage of
Internet’. The structure emphasizes actions of users are the direct infringement actions, while ISP is generally the ‘contributor’. ‘Contribution’ in traditional joint infringement theory refers to providing tools, indicating objects or encouraging in words, i.e. tortious action with material and spiritual contribution. Evidently ISP ‘failing to take necessary measures’ is not deemed as making negative contributions. Secondly, in terms of legal consequence bearing, TLL § 36 (2), (3) stipulate ‘contributors should bear joint and several liabilities with the actor’, which works in concert with contributory infringement in TLL § 9 (ref.20), and clearly TLL § 36 is the specific circumstance in TLL § 9. Thirdly, as for legislative purpose, the reason why legislators think contributory infringement is the main form of ISP infringement is because legislators hope ISP stops occurrence or expansion of infringement consequences by technical measures when ISP knows Internet user is committing tortious acts; once ISP chooses to sit by, legislators cannot tolerate the nonfeasance blame, so it is proper for legislators to impose joint infringement liabilities on ISP. Of course in addition to contributory infringement form, if ISP commits tortious acts by using its technical advantages initiatively, of course ISP should bear infringement liabilities, but then the legal basis should be Paragraph One of TLL § 36. To sum up, TLL § 36 does not copy three infringement forms of DMCA completely, but only provides relevant stipulations concerning contributory infringement of ISP based on domestic theory.

Application of TLL § 36

TLL § 36 (1)

As general provisions of Internet infringement, the paragraph defines subject, object and legal consequence. Legislators distinguish the relation between Internet users and ISP in two ways: (a) joint infringement of Internet user and ISP; (b) separate infringement of Internet user or ISP. It should be clear in application that special provisions of TLL § 36(2), (3) are applicable when Internet user and ISP constitute joint infringement; when Internet users or ISP commit separate infringement, only general provisions in the Paragraph One are applicable. It should be explained that as for whether ‘typify ISP’ or not, the practice of DMCA and Directive 2000/31 is to classify ISP into ‘Transitory Digital Network Communications, System Caching, Information Residing on Systems or Networks at Direction of Users, Information Location Tools.’ TLL, however, adopts an evasive attitude and general provisions are provided in TLL § 36(1), i.e. taking ‘ISP’ as a superior concept but not further classify them according to technical characteristics. To be objective, the provision has certain validation duration and provides applicable room for new ISPs emerging with technical development. But it brings more requirements for judges who have to distinguish if notice and take-down rules in TLL § 36 are applicable for ISP in complicated technical cases, and it is rather difficult for judicial status in China now.

TLL § 36 defines the legal object protected as ‘civil rights and interests’, and this is consistent with TLL § 2(ref.23), i.e. personal and property rights and interests such as right to life, right to health, right of name, right of reputation, right to honor, portraiture right, right of privacy, right of marital autonomy, guardianship, ownership, real right for usufruct, real right for security, copyright, patent right, exclusive right to use trademark, right of discovery, stock right and right of succession. The ‘summary + enumeration’ way is an innovation in China TLL, but it has certain shortcomings. For example, notice and take-down rules of TLL § 36 are not applicable for personal rights such as right to life, right to health, right of marital autonomy and guardianship as well as property rights such as real right for usufruct and real right for security among aforesaid rights. This is obvious, but legislators do not provide special explanations.

The fault liability is regarded as the doctrine of liability fixation of torts in Chinese juridical practices at the end of last century when Chinese courts ascertained ISP’s liability for tort.

In the year 2000, in Undergraduate Magazine v Jing Xun Co Ltd & Xiang Li, the court held that Jing Xun Co Ltd had not offered any personal information to Xiang Li’s free personal website...All the content of this personal website was designed by its owner, Xiang Li. On the basis of the feature of Internet techniques, as well as the legal principle that the doers shall take responsibility for their behaviors, ISP who only provides network techniques and device will not undertake the legal results of the torts of their clients. Jing Xun Co Ltd was not legally bound to organize and filter the disseminated messages; neither did computer system have any selectivity in the duplication and dissemination of the information. Further, Internet media are high-speed, information
messages have legal faults. Therefore, it is extremely difficult and not objective to require ISP who only provides dissemination device to make judgment on whether or not the disseminated messages have legal faults.\textsuperscript{24}

The court judgment ascertains that Chinese courts are inclined to the fact that ISP did not necessarily have to be responsible, nor was it possible to be responsible for investigation, which firmly indicates the recognition of fault-based liability in juridical practices.

TLL § 36 (2): Notice and Take-down Rules

Notice and take-down rules stipulated in the Paragraph Two originated from ‘notice provision’ in DMCA § 512. Pursuant to DMCA § 512, ‘If people other than ISP upload materials protected by copyrights online without approval of the copyrighter, ISP should delete or shield materials suspected of infringement upon receipt of infringement notice, and then the stipulation (safe harbor provision) shall apply.’\textsuperscript{25} TLL § 36(2) adopts more concise representation and expands applicable scope to all Internet infringements. The obligee may send a notice to ISP once discovering materials suspected of infringement, and ISP shall not constitute joint infringement when taking ‘take-down’ measures (delete, shield, disconnect link, etc.); when ISP fails to take measures timely, ISP shall be deemed as committing contributory infringement and then bear joint and several liabilities for expansion of loss upon after receiving such notice.

In terms of the nature of notice, numerous judicial precedents of DMCA state clearly that the infringed usually understand ‘notice’ as the only remedy of copyright infringement, and then mistake for notice with executive force of ‘eliminating infringement facts rapidly and efficiently’.\textsuperscript{26} In fact, no matter in DMCA or in TLL, the function of notice is only the presentation for the infringed to execute claim to stop infringement, such as deleting, shielding, disconnecting link, etc., and it does not have executive force for judicial judgment. ISP may take necessary measures for exemption after receiving the notice, or choose to ‘turn a blind eye to it’ until it is accused by the accuser. If the notice sent by the infringed complies with conditions stipulated by laws, ISP will lose protection from safe harbor provision at law, but ISP will not lose other counterargument reasons like reasonable use, prescription counterargument, etc.\textsuperscript{27} ISP should take necessary measures timely after receiving the notice. ‘Timely’ here should be interpreted as ‘immediately without any delay’, and its connotation is to take relevant technical measures within relatively reasonable time, and the time length could be known through technical ways and corresponding counterargument could be proposed at lawsuits. ‘Necessary measures’ described in the paragraph mean that all measures in addition to deleting, shielding and disconnecting link that could stop infringement information dissemination in judicial practice are ‘necessary measures’.

TLL § 36 (3): Knowledge Rule

The knowledge rule in TLL § 36 (3) is the same as that of TLL § 36 (2) in structure. The only thing left is how to interpret ‘knowledge’. Most domestic scholars think it just can be interpreted ‘knew’,\textsuperscript{28} Instead, it is generally recognized in juridical practices that, “The defendant (OSP), as a professional network service company has the responsibility of warning and is faulty, due to its failure in content investigation.”\textsuperscript{29}

However, the previous points confuse the relation between ‘Internet information general examination obligation’ of ISP and ‘duty of care for infringement activity’, because any ISP has the duty of care to find infringement facts in their websites. In fact these two obligations are the same, but different in degrees. Fault judging standard objectification has become a trend in worldwide infringement laws and theories, ‘Countries of the continental law system applies ‘bonus pater familiar’, and Anglo-American Law adopts ‘reasonable person’\textsuperscript{30}, but these two standards are virtually the same, i.e. judge if the actor commits faults or not without considering the subjective foresee abilities due to age, gender, health, knowledge structure, etc. to get the conclusion of the adverse psychology, but judge if the actor commits faults or not based on the condition that whether a bonus pater familiar or a reasonable person pay required attention under specific conditions; if required attention is paid to meet bonus pater familiar or reasonable identification standard, the actor is faultless; otherwise the actor is judged as committing faults.’

When it comes to identifying infringement liabilities borne by ISP, ‘general examination obligation’ has excessive expectation on ISP, and deems ISP is capable of examining Internet information to avoid unhealthy infringement materials. Therefore, DMCA § 512 (m) points out particularly that ‘a service provider monitoring its
service or affirmatively seeking facts indicating infringing activity, except to the extent consistent with a standard technical measure complying with the provisions of subsection (i)… Although DMCA does not specifically points out the subjective elements for ISP to constitute contributory infringement includes ‘knew’ and ‘should have known’, the viewpoint has been acknowledged in congress legislation report repeatedly, DMCA’s knowledge rule differs from existing law, under which a defendant may be liable for contributory infringement if it knows or should have known that the material was infringing.31’ Hence ‘knowledge’ should be interpreted as including two items ‘knew’ and ‘should have known’. As a matter of fact, the conclusion conforms to contributory infringement theory and also provides another way of protection for the infringed in addition to notice and take-down rules. But it should be noted that DMCA adopts ‘red flag test’ to judge ‘should have known’, i.e. ‘when infringement information appears like a red flag waving in front of ISP, any reasonable person could be fully aware of infringement facts under the same circumstances. Even if the infringed does not inform ISP of infringement facts, ISP will bear liabilities for failing to discovering and stopping infringement actions ISP should have discovered and stopped.’ The standard denies ISP bears general examination obligations, affirms ISP has reasonable duty of care at the same time, and severely fights against ISP that adopts ‘ostrich policy’ for particularly evidential infringement actions.33 It is a pity that TLL § 36 does not clearly establish the standard due to limited provisions, but the standard is of significance for the judge to ascertain facts.

Fortunately, the correction provision was put forward in Rules of the Supreme People’s Court on Some Issues Concerning the Trial of Cases on Information Network Transmission Right Infringement. Article 18 includes:

“People’s court should confirm ISP’s responsibility for abettal and assistance in torts, based on whether or not ISP have fault, on the condition that ISP ‘knew’ or ‘should have known’ their clients’ infringement of the rights of Internet information dissemination.” “Those who take initiative in investigating their clients’ infringement will not be regarded as faulty.”

In juridical practices, concerning the current techniques and the fact that ISP is fully able to discover certain obvious torts, some courts have offered their own explanation as ‘Normally, audio and video producers, broadcasting companies and other obligees would not unload or allow their products to be uploaded by others for free online playing. Thereby, the illegal dissemination of those up-to-date and highly popular audio and video products is easily discovered by ISP.’34 In the meantime, ‘popularity’, ‘hot showing’ and ‘top on website’ are also referred to as important elements in determining the faults of ISP.35

In this way, although TLL § 36 (3) did not make any specific explanation about ‘knowledge’, provisions somewhat gave a more detailed and correct interpretation, shortening the gap between rules and juridical practices.

Conclusion

In the age of Internet, every country is attaching more and more importance to regulating Internet infringement. China civil legislation area lacked legal standards to uniformly regulate Internet infringement before TLL was promulgated, but the promulgation of TLL § 36 changed this situation. If the promulgation of TLL was considered as a milestone in the formulation of China Civil Code, TLL § 36 would be undoubtedly a fundamental progress in China Internet infringement legislation. Compared with previous legislation, TLL § 36 refers to legislative results of DMCA as well as domestic judicial trial experience, and establishes ‘notice and take-down rules’, ‘knowledge rule’, etc. by legal transplant and other means. However, legislators neglect that ‘concentrated’ design cannot play a good role when preparing ISP infringement provisions in TLL § 36, and especially due to repeated and conflicted legal provisions at home, it is obviously unrealistic to expect TLL §36 to make vigorous efforts to turn the situation. Fortunately, countries of the continental law system solve problems concerning legal loopholes, regulation conflicts, lapping, etc. by legal interpretations and so on. According to the present legislation traditions in China, a more feasible practice is to formulate detailed judicial interpretations, reasonably apply legal interpretations and loophole remedies to achieve the legislative effect to some extent.

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Legal circumstances listed in these standards are: (I) violate the law; (II) violate public morals or propagate heretical teachings or feudal superstitions; (III) undermine national unity; (IV) Undermine State religious and interests; (V) Incite ethnic hatred or ethnic discrimination, security, disclose national secrets, subvert the national power and responsibilities of action subjects like basic telecommunication business operators, Internet access service providers, ISPs, etc., and some normative legal documents may serve as verdict basis directly).

Measures on the Administration of Internet Information Service § 27: If news information published and transmitted by Internet information service units has prohibitory content in § 19, or Internet information service units refuse to fulfill obligations, Information Office of State Council or Information Office of Provincial, Autonomous Region and Municipal People’s Government could send a warning and impose penalties more than RMB 10,000 and less than RMB 30,000; in case of serious circumstances, telecommunication department in charge may stop the Internet information service or require the Internet access service provider to stop access services according to stipulations of Internet information service management administrative provisions based on written identification opinions of relevant department in charge. Another example, Provisions for the Administration of Internet News Information Services § 23: in case that (ISP) violating obligations (stopping transmission) in § 16 in the Provisions, telecommunication administration authority of province, autonomous region and municipality should require them to make corrections; In case of serious circumstances, license issuance authority should cancel the business license of ISP; as for non-operating Internet service information providers, the filing authority should require such service providers to close the website.

Legal circumstances listed in these standards are: (I) violate fundamental principles of constitutions; (II) threaten national security, disclose national secrets, subvert the national power and destroy national unity; (III) damage national reputation and interests; (IV) Incite ethnic hatred or ethnic discrimination, undermining national unity; (V) Undermine State religious policy or propagate heretical teachings or feudal superstitions; (VI) Spread the rumor, the harass social order, destruct social stability; (VII) Spread obscenity, pornography, gambling, violence, terror, or abet the commission of crimes; (VIII) Insult or slander other people, violate the other people legitimate rights and interests; (IX) Incite unlawful assembly, association, procession, demonstration and gathering crowds to disturb social order; (X). Other content prohibited by laws and administrative provisions.

E-bulletin service stipulated in Management Provisions on Electronic Bulletin Services in Internet § 2 refers to the action of taking interactive ways such as E-bulletin board, W-whiteboard, E-forum, online chat room, message board, etc; to provide information release conditions for Internet users. Internet news information service stipulated in Provisions for the Administration of Internet News Information Services § 2 refers to publishing news information, providing current politics E-bulletin services and sending current politics communication information to public via Internet.

Interpretations of the Supreme Judicial Court on some issues about applicable laws for trials concerning computer Internet copyright dispute cases § 3-6, 8.


The ‘law’ here particularly refers to normative documents prepared by National People’s Congress and Standing Committee, the highest power and standing power in China. Mainly the most fundamental issue of the state and social life like criminal, civil and administrative laws are involved.

‘Administrative regulations’ are the normative documents prepared by the State Council, the highest administrative organ of China. Regulations on the Protection of the Right of Communication through Information Network discussed in the paper is administrative provision.

There are three kinds of rules and regulations in Chinese legislation practice: department rules & regulations are those prepared within their authority by ministries, commissions and committees of the State Council pursuant to laws, administrative provisions, decisions and orders of the State Council; military rules & regulations are those prepared within their authority by headquarters, categories of troops, military regions of the Central Military Commission pursuant to laws, administrative provisions, decisions and orders of the State Council; military rules & regulations are those prepared within their authority by headquarters, categories of troops, military regions of the Central Military Commission pursuant to laws, administrative provisions, decisions and orders of the State Council.

‘Local statute’ refers to normative documents prepared by provinces, municipalities and cities as the locations of provincial governments and People’s Congress and Standing Committee of relatively large cities approved by the State Council.

‘Interpretation’ in Chinese legal system has three kinds: Legislative interpretation is prepared by National People’s Congress Standing Committee and its effectiveness is equal to ‘law’; judicial interpretation is prepared by the Supreme People’s Court and the Supreme People’s Procuratorate; administrative

References

1. DMCA § 512 (k).
2. DMCA in 1998 is the typical example. The law is focused on free information communication and places equal stress on normal development of Internet industry and E-commerce technology. The law creatively provides ‘Safe Harbor Provisions’ in § 512 ‘Limitation on Liability Relating to Material Online’, which is followed by later generations.
3. Representative laws such as Decision of the National People’s Congress Standing Committee on Guarding Internet Security (2000) and Law of the People’s Republic of China on Electronic Signatures (2004); Administrative regulations such as Regulations on the Administration of Business Sites of Internet Access Services (2002) and Regulations on Protection of the Right of Communication through Information Network (2013); Department regulations and rules such as the Administration of Internet News Information Services (2005). Measures for the Administration of IP Address Archiving (2005) and Mobile Internet Malicious Program Monitoring and Disposal System (2011), etc.; Judicial interpretations such as Rules of the Supreme People’s Court on Some Issues Concerning the Trial of Cases on Information Network Transmission Right Infringement (2012) and so on (Remark of the author: Internet basic resources management, information communication regulations, information security guarantee are involved in laws and provisions above which provide provisions about legal duties and responsibilities of action subjects like basic telecommunication business operators, Internet access service providers, ISPs, etc., and some normative legal documents may serve as verdict basis directly).
4. Measures on the Administration of Internet Information Service § 27: If news information published and transmitted by Internet information service units has prohibitory content in § 19, or Internet information service units refuse to fulfill obligations, Information Office of State Council or Information Office of Provincial, Autonomous Region and Municipal People’s Government could send a warning and impose penalties more than RMB 10,000 and less than RMB 30,000; in case of serious circumstances, telecommunication department in charge may stop the Internet information service or require the Internet access service provider to stop access services according to stipulations of Internet information service management administrative provisions based on written identification opinions of relevant department in charge. Another example, Provisions for the Administration of Internet News Information Services § 23: in case that (ISP) violating obligations (stopping transmission) in § 16 in the Provisions, telecommunication administration authority of province, autonomous region and municipality should require them to make corrections; In case of serious circumstances, license issuance authority should cancel the business license of ISP; as for non-operating Internet service information providers, the filing authority should require such service providers to close the website.
5. Legal circumstances listed in these standards are: (I) violate fundamental principles of constitutions; (II) threaten national security, disclose national secrets, subvert the national power and destroy national unity; (III) damage national reputation and interests; (IV) Incite ethnic hatred or ethnic discrimination, undermining national unity; (V) Undermine State religious policy or propagate heretical teachings or feudal superstitions; (VI) Spread the rumor, the harass social order, destruct social stability; (VII) Spread obscenity, pornography, gambling, violence, terror, or abet the commission of crimes; (VIII) Insult or slander other people, violate the other people legitimate rights and interests; (IX) Incite unlawful assembly, association, procession, demonstration and gathering crowds to disturb social order; (X). Other content prohibited by laws and administrative provisions.
6. E-bulletin service stipulated in Management Provisions on Electronic Bulletin Services in Internet § 2 refers to the action of taking interactive ways such as E-bulletin board, W-whiteboard, E-forum, online chat room, message board, etc; to provide information release conditions for Internet users. Internet news information service stipulated in Provisions for the Administration of Internet News Information Services § 2 refers to publishing news information, providing current politics E-bulletin services and sending current politics communication information to public via Internet.
7. Interpretations of the Supreme Judicial Court on some issues about applicable laws for trials concerning computer Internet copyright dispute cases § 3-6, 8.
10. The ‘law’ here particularly refers to normative documents prepared by National People’s Congress and Standing Committee, the highest power and standing power in China. Mainly the most fundamental issue of the state and social life like criminal, civil and administrative laws are involved.
11. ‘Administrative regulations’ are the normative documents prepared by the State Council, the highest administrative organ of China. Regulations on the Protection of the Right of Communication through Information Network discussed in the paper is administrative provision.
12. There are three kinds of rules and regulations in Chinese legislation practice: department rules & regulations are those prepared within their authority by ministries, commissions and committees of the State Council pursuant to laws, administrative provisions, decisions and orders of the State Council; military rules & regulations are those prepared within their authority by headquarters, categories of troops, military regions of the Central Military Commission pursuant to laws, administrative provisions, decisions and orders of the Central Military Commission; government rules and regulations are those prepared by provinces, autonomous regions, municipalities, and cities as the location of provincial and autonomous region people’s governments and relatively large municipal people’s governments approved by the State Council pursuant to laws and administrative provision of the State Council.
13. ‘Local statute’ refers to normative documents prepared by provinces, municipalities and cities as the locations of provincial governments and People’s Congress and Standing Committee of relatively large cities approved by the State Council.
14. ‘Interpretation’ in Chinese legal system has three kinds: Legislative interpretation is prepared by National People’s Congress Standing Committee and its effectiveness is equal to ‘law’; judicial interpretation is prepared by the Supreme People’s Court and the Supreme People’s Procuratorate; administrative
interpretation is prepared by national administrative authority; the effectiveness rank of judicial interpretation and administrative interpretation is lower than ‘law’.

15 TLL §2.

16 Xi Xiaoming, Understanding and Application of Tort Liability Law of the People’s Republic of China (People’s Court Press, Beijing), 2010, p.264.


18 Just because this, American legal critics have severely criticized safe harbor provision and held the idea that this provision will let judges keen on judging if the provision is applicable and ‘get away from responsibility identification’, and the juridical and trial world will be lost in self-perpetuating strange circle in the long run. See e.g., Matt Jackson, One Step Forward, Two Steps Back: A Historical Analysis of Copyright Liability, Journal of Cardozo Arts & Entertainment Law, 20 (3) (2002) 403-415.


20 TLL § 9(1): ‘The one inciting or helping others to take infringement actions should bear joint and several liabilities with the actor.’

21 Some scholars think the object specified in Article 36 is only restricted to joint torts, and the conclusion is open to discussion. Yang Ming, Understanding and Expansion of Article 36 in Tort Liability Law [EB/OL], http://www.civillaw.com.cn/article/default.asp?id=51388(12 April 2012).


23 ‘Civil rights and interests’ referred to ‘personal and property rights and interests such as right to life, right to health, right of name, right of reputation, right to honor, portrait right, right of privacy, right of marital autonomy, guardianship, ownership, real right for usufruct, real right for security, copyright, patent right, exclusive right to use trademark, right of discovery, stock right and right of succession.’

24 Undergraduate Magazine v Jing Xun Co Ltd & Xiang Li, 1st Inst. No.18 of IP (Beijing 2nd Intermediate People’s Court 2000).

25 DMCA § 512 (b)(1), (b)(2)(E).


27 DMCA § 512 (c)(3),(l).


29 Bo Ku Co Ltd v Xun Neng Net Co Ltd & Tom Co Ltd, 1st Inst. No. 13 of IP (Beijing 2nd Intermediate People’s Court 2001); Friendship Publishing Co Ltd v Taobao Net Co Ltd, Last Inst. No.15423 (Beijing 2nd Intermediate People’s Court 2009).

30 German Civil Code (BGB) constitutes current § 276 by referring to the theory of ‘Bonus Pater Familiar’ in Roman law: ‘Neglect of doing duties necessary in social life means committing faults.’ Also see Restatement of the Law, 2nd, Torts, §§ 282, 283.


33 Wang Qian, Internet Copyright Law (China Renmin University Press, Beijing), 2008, p.140.

34 Interpretations of the Zhejiang Higher people’s Court on Some Issues Concerning the Trial of Cases on Internet Copyright Infringement Art.30.

35 In Zedong Zhuang v ShangHai Yin Zhi Net Co Ltd, the Court held that whether or not ISP has subjective fault should be judged based on an objective concern about ISP’s business operations…Clients posted on the website of Very CD resources involving such a great number of authors’ masterpieces that even a normal Internet user would be suspecting the resources to be illegal, let alone those professional ISPs. Proficient in sharing Internet resources, they ought to be able to discover the trace of their clients’ torts…However, since their business profits made by selling advertisement space which is closely related to the popularity of their clients’ unloaded resources, the higher clicking rates, the more advertisement space sold and thus the higher profit ISP gets. In this case, ISP’s obligation and responsibility of investigating those so-called best or hot resources are highly emphasized, according to the equity between rights and obligation…This case occurred, to some extent, because of the ISP’s failure in taking responsibility of investigating and warning.‘ Zedong Zhuang v ShangHai Yin Zhi Net Co Ltd, Last Inst. No.33 (Shanghai 2nd Intermediate People’s Court 2011). ‘Jia Jia v Bai Du Co Ltd, Last Inst. No.20479 (Beijing 1st Intermediate People’s Court 2010)’ is another case where ‘popularity’-like elements are used for judgments.