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Insights on the Application of the Safe Harbor Rule in the PRC Internet Industry

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In recent years, U.S. Internet service providers (“ISPs”) such as Google, Yahoo, and YouTube have been challenged in U.S. courts by copyright owners alleging that materials hosted on the ISPs’ websites infringe on the owners’ rights. Based on the U.S. safe harbor law and its exceptions to the U.S. copyright law, U.S. courts have held that an ISP may be shielded from monetary damages for copyright infringement where the ISP is unaware of the infringing nature of the hosted content and moves expeditiously to remove or block access to such content upon becoming aware that it infringes the copyrights of others. This scenario is being repeated in China.

In a widely publicized case, more than 40 Chinese authors posted an open letter to Baidu (arguably China’s largest and most prominent search engine) on March 15, 2011, claiming that certain digital books posted on Baidu Wenku (百度文库)¹ violated the authors’ copyrights and should be removed from the site. Baidu eventually removed “almost 2.8 million files, mainly from the Literary Works section of the site, which was the primary concern of the writers and publishers” after negotiations with the authors broke down.² Nonetheless, Baidu took the position that, as an ISP, it was not liable to the authors for any monetary damages for any alleged copyright infringement since the foregoing activity was permitted by the PRC copyright regime safe harbor.

Baidu struck a conciliatory tone in its approach with the protesting authors, no doubt in part due to the wide media coverage of the incident and the fact that the protesting authors included some of China’s most prominent authors. However, it is arguable whether in the future Baidu would be able to rely on the copyright regime safe harbor in order to avoid liability to rights holders for the reasons discussed below. We highlight below the regulatory background and certain key aspects and developments regarding the PRC copyright regime safe harbor potentially available to ISPs and consider its effect on the Internet industry in China going forward.

THE SAFE HARBOR RULE

The *Regulations on the Protection of the Right to Network Dissemination of Information* (信息网络传播权保护条例) (the “Network Dissemination Regulations”), issued and effective as of July 1, 2006, provide a safe harbor for ISPs with respect to any monetary liability related to potential violations of copyrights for posted or linked materials. For unauthorized posted or linked content, Article 22 of the Network Dissemination Regulations provides that an ISP will not be liable to a rights owner for any monetary compensation if the ISP:

¹ Baidu Wenku is Baidu’s online digital library and allows users to read, share or download texts for free.

² *Baidu deletes 2.8m Online Works Due to Copyright Tussle*, BBC News, March 31, 2011, <http://www.bbc.co.uk/news/business-12916641>.

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- has clearly indicated that it is only providing memory space for the content and makes publicly available its name, contact person, and web address;
- has not altered the content;
- does not know, and has no justifiable reason to know, that the posted content infringes the rights of another;
- does not obtain any economic benefit from the posting of the infringing content; and
- promptly removes the infringing content upon receiving notice from the content owner, in accordance with the provisions of the Network Dissemination Regulations (the “Safe Harbor Rule”).

Notably, Article 23 of the Network Dissemination Regulations echoes the notion that any party having actual or constructive knowledge that any linked content infringes the rights of another will not enjoy the shelter of the Safe Harbor Rule and will be liable for any compensatory damages.

INTERPRETATION OF THE SAFE HARBOR RULE

Court Rulings and Guidance

The Safe Harbor Rule was applied in a March 2010 court case, *Beijing Tianzhong Yinghua v. Tudou*. There, the Shanghai Pudong court held that Tudou³ was within the protection of the Safe Harbor Rule and thus not liable for any monetary damages to the plaintiff, Beijing Tianzhong Yinghua. The claim was filed in response to the unauthorized upload 《魔术奇缘》 to Tudou’s website of a television series produced and owned by the plaintiff. The court made its decision based on the grounds that (1) Tudou could not be deemed to be intentionally encouraging its users to commit violations solely based on the presence of the infringing materials on its website; and (2) the plaintiff failed to give notice demanding removal of the infringing material prior to filing the claim, and Tudou promptly removed the links to the infringing materials upon notice and performed its obligations with the proper duty of care.

However, PRC courts have taken differing views⁴ as to whether notice or actual knowledge is required in order have knowledge of infringement. In a 2008 case, *Beijing Xingzhuan Ltd. v. Shanghai Quan Tudou Ltd.*, the Shanghai Higher People’s Court held that, although Tudou had not received actual notice from the plaintiff of the infringing material, it was unlikely that Tudou was unaware that the movie had been posted on the website. This was due to the fact that Tudou had put in place a content censorship team to prevent the posting of anti-government, pornographic or violent content, and any content being posted by a user would have to have been approved by the censorship team before it would be publicly available on Tudou’s website. As such, it could be reasonably held that Tudou should have been aware that the user-uploaded movie would inevitably involve copyright issues since the content had the same title as the hit film “Crazy Stone (疯狂的石头)”. On this basis, the court held that Tudou was liable for monetary damages for infringement and ordered Tudou to pay RMB 50,000 in damages to the plaintiff.

The Higher People’s Court of Beijing added to the discussion in its May 19, 2010 *Notice of the Guidance on Cases Involving Copyright Disputes in Cyberspace (Trial)* (北京市高级人民法院《关于审理涉及网络环境下著作权纠纷案件若干问题的指导意见（一）（试行）》的通知) (the “Beijing Notice”). There, the court provided under what circumstances

³ Tudou is one of the largest video websites in China where users can upload, view and share video clips.

⁴ Note that the PRC is a civil law jurisdiction and does not recognize the concept of binding court precedent. Thus, a PRC court is not bound by the decisions of other PRC courts in rendering its decision.

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constructive knowledge would be deemed with respect to allegedly infringing content:

- the allegedly infringing contents stored are
 - audio-visual products from the current season or are currently being broadcast or shown, or
 - popular musical works, or
 - other highly popular works, their related performances, or sound or video recordings, and
 - placed on the homepage, other main pages, or other locations obvious to the ISP;
- the allegedly infringing works, performances, or sound or video recordings are placed on the homepage or a main page of the BBS, and the ISP fails to take measures to remove them within a reasonable period of time;
- the allegedly infringing audio-visual works are
 - professionally made and have their contents intact, or
 - from the current season or are currently being broadcast or shown, and
 - placed in a conspicuous position on the website or are recommended by the ISP, or put by the ISP on a ranking list or under the website's "film and television" channel/column, or are selected or categorized.

Although the Beijing Notice provides greater clarity with respect to the applicability of the Safe Harbor Rule to ISPs, it is not binding on PRC courts outside Beijing.

The Beijing Circular

The Beijing Copyright Office (北京市版权局) has recently made efforts to clarify the obligations of ISPs with respect to content rights holders through its widely publicized issuance of the *Circular on the Guidance on the Protection of the Right of Communication through Information Networks (Trial Implementation)* (信息网络传播权保护指导意见 (试行)) (the "Beijing Circular"), promulgated on May 10, 2011 and effective as of August 1, 2011. Critically, the circular specifically creates an obligation on ISPs to proactively prevent the unauthorized uploading of the following types of works:

- films, television dramas and other long-duration audio-visual works which are professionally produced;
- works which carry publication and copyright marks and re-publication catalog data;
- television or network live programs of sports competitions and artistic performances;
- works of authors and producers well known to the general public or works of renown; and
- other works which are still the most popular works in broadcasting or the most readily sold.

Proactive measures that each ISP must undertake pursuant to the Beijing Circular to prevent unauthorized uploading include, among others:

- placing a warning in a prominent place on the first page of its website prohibiting any uploading of

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unauthorized materials;

- keeping records of the name, network address and other information of service clients for a period of one year; and
- preventing clients who are repeat offenders from unauthorized uploading, terminating the ISP services of any such client if such preventive measures are ineffective, and reporting any such client to the applicable copyright enforcement authority.

In addition, the Beijing Circular encourages ISPs to implement a real-name registration system (实名认证制度) and an advance prevention mechanism (预先防范机制) in order to prevent the unauthorized uploading of content through the use of automatic identification technologies such as digital 'fingerprints', 'watermarks', and 'DNA'.

The Beijing Circular also directs ISPs to block access to unauthorized content and/or remove links to unauthorized broadcasts of live shows immediately upon receipt of notice from the copyright owner. If there are mitigating circumstances, the timeframe is extended to 24 hours to block access to unauthorized content or one hour to remove links to unauthorized broadcasts of live shows, in each case, from receipt of notice from the copyright owner.

Although the Beijing Copyright Office is the administrative body in charge of copyright enforcement in Beijing, the Beijing Circular does not carry the same legal weight as a statute or regulation. Despite the fact that the Beijing Circular does not expressly provide for fines or penalties, it stipulates that it is formulated in accordance with the PRC copyright laws and the Network Dissemination Regulations, as well as the other laws and regulations of the PRC. As such, violations of the Beijing Circular are likely to be treated as persuasive, if not conclusive, evidence of a violation of the PRC copyright laws and the Network Dissemination Regulations, and would accordingly be subject to the penalties and fines provided therein. We anticipate that the PRC authorities will clarify this situation in the near future.

CONCLUSION

Striking a balance between ISPs, users, and content owners is proving to be a difficult task in China and will likely continue to develop as the bandwidth of the Internet increases, bringing even more forms of Internet media into the controversy. We will continue to monitor the situation on behalf of our friends and clients.

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