

Client Alert.

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Increased Protections for Intellectual Property in the PRC Internet Industry

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Internet Service Providers (“ISP”) that typically provide video-sharing platforms, online shopping websites, or online digital libraries such as Baidu, Youku, and Tudou in China face increased penalties for intellectual property infringement. ISPs have been able to find protection provided by a safe harbor provision of the Regulations on the Protection of the Right to Network Dissemination of Information¹ when their users post materials that violate copyright laws. However, with the passing of the Tort Law of the People’s Republic of China (the “**Tort Law**”) on July 1, 2010, ISPs should be aware of the increased liability they face related to the conduct of their users.

The Tort Law marks a significant step by the Chinese government to introduce statutory protections for various forms of tortious liabilities. Protections for consumers under the Tort Law provide for a wide range of liability, including limited network services provider liability, vicarious liability, product liability, medical malpractice liability, and environmental pollution liability. In particular, the Tort Law also establishes vicarious liability for intellectual property infringements. Under Article 36 of the Tort Law, an ISP may be held liable for damages that may occur after the ISP receives notice that the ISP’s website hosts content that infringes intellectual property rights.

INTERPRETATION OF ARTICLE 36 OF THE TORT LAW

Vicarious liability is a form of secondary liability. It establishes legal responsibility for the acts of another party. Under a broader definition of vicarious liability, liability occurs because the responsible party is considered to have the “right, ability or duty to control” the activities concerning the violator. Under the Tort Law, in the context of intellectual property infringement, an ISP is considered to have the ability and duty to control the activities of its users.

Article 36 of the Tort Law spells out the vicarious liability of an ISP in internet intellectual property infringement cases.

BACKGROUND ON THE SAFE HARBOR RULE²

As provided under the interpretations issued by the Supreme People’s Court³ and the Network Dissemination Regulations, an ISP is subject to tortious liability when it assists in the infringement of intellectual property. An ISP is considered to assist in infringement by allowing its users to infringe the intellectual property rights of another by failing to remedy an infringement in a timely manner after receiving notice from the intellectual property owner.

To protect the rights of an ISP, the Safe Harbor Rule has been developed from common law to apply in cases involving

¹ Issued by the State Council, effective July 1, 2006, translated from 信息网络传播权保护条例 (hereinafter referred to as “Network Dissemination Regulations”).

² The Safe Harbor Rule refers to the provision of the Network Dissemination Regulations that provides ISPs with protection from liability under certain circumstances. For more information about the Safe Harbor Rule, please see our Morrison & Foerster client alert, “[Insights on the Application of the Safe Harbor Rule in the PRC Internet Industry.](#)”

³ See Several Issues Concerning the Laws Applicable to the Trial of Copyright Disputes Involving Computer Networks Interpretations (hereinafter referred to as the “**Interpretations**”), November 2006.

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intellectual property in China. Article 22 of the Network Dissemination Regulations provides that an ISP will not be held liable for any claim, if it has:

- a) clearly indicated that it only provides memory space for content, and publishes its name, contact person, and web address;
- b) not altered the content;
- c) no actual knowledge of, or justifiable reason to be aware of the infringing content;
- d) not obtained any economic benefit from the infringing content; and
- e) after receiving notice from the owner, deleted the infringing content pursuant to the Safe Harbor Rule.

Articles 14, 15, 16 and 17 of the Interpretations also provide for similar protections.

However, the Safe Harbor Rule is silent on the precise interpretation of an ISP's knowledge of an infringement. Nonetheless, certain ISPs have successfully defended against tortious liabilities twice, pursuant to Article 22 of the Network Dissemination Regulations and Articles 14, 15, 16 and 17 of the Interpretations in 2009.⁴

COURT RULINGS AND GUIDANCE

Article 36 of the Tort Law provides that where a network user commits a tort through an ISP, the victim shall notify the ISP to take necessary actions such as deleting the infringing content, or blocking or disconnecting the link. If, after being notified, the ISP fails to remedy the infringement in a timely manner, the ISP shall be vicariously liable for any additional harm suffered by the network user from the time it received the intellectual property owner's notification.

Even if the ISP does not receive notice from the intellectual property owner, where an ISP is aware that its network users are infringing an intellectual property right or interest of another person through its network services, and fails to take necessary measures in a timely manner, it will be held vicariously liable for any additional harm caused by its delay to remedy the infringement with the network user.

An ISP may also be held jointly and severally liable for any additional harm with the principal tortfeasor if the ISP knows, as a result of receiving a notification from a victim, for example, or should know of the harm, as might be expected from monitoring and reviewing the content its users publish. In *Zhiqian Financial Advisers Ltd. (Beijing) (知钱 (北京) 理财顾问有限责任公司) vs. Wang & Taobao.com (王某和淘宝)*, Taobao was held vicariously liable for Zhiqian's additional damage because Taobao did not delete or block the link to the infringing product after it received Zhiqian's written notice.

Practically speaking, it is not possible for an ISP to monitor all of its users and review all the content its users publish. Moreover, the Supreme People's Court does not provide specific guidance as to the situations where an ISP is expected to be aware of the occurrence or existence of an infringement of intellectual property. From the rulings made so far, if the victim can provide evidence that notice was provided to the ISP and the ISP did not take any steps to remedy the

⁴ See *Beijing Ciwen Entertainment Ltd. (北京慈文影视公司) vs. Beijing Wole Informatics Technology Ltd. (北京我乐信息科技有限公司)* (March 2009) and *LeTV Informatics Technology Ltd. (Beijing) & Beijing Ruiya Yangguang Culture Media Ltd. (乐视网信息技术 (北京) 股份有限公司 & 北京瑞亚阳光文化传媒有限公司) vs. Beijing Newnet Century Advertisement Media Co., Ltd. (北京新网世纪广告传媒有限公司)* (October 2009).

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infringement, the ISP would likely be found liable for the damage that results from its inaction.

CONCLUSIONS

Article 36 of the Tort Law is a supplemental remedy for intellectual property owners. ISPs should be aware of the liability they face resulting from the actions of their users. Given this increased liability, ISPs should consider taking steps to minimize their exposure by placing the name and contact information of a current representative of the ISP on the ISP's website to ensure notice of infringement is properly received. ISPs should also consider putting in place procedures to handle claims of intellectual property infringement and informing users how to submit their infringement claims.

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