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## 2016 – Study Question (Copyright)

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Linking and making available on the Internet

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### I. Current law and practice

1) Does your Group's current law have any statutory provision that provides for protection of an author's making available right, in line with Article 8 of the WCT?

yes

Please explain.:

Copyright Law of the People's Republic of China ("Copyright Law"), Article 10 paragraph (12) stipulates that copyright owner shall enjoy "the right of communication through information network, that is, the right to make a work available to the public by wire or by wireless means, so that people may have access to the work from a place and at a time individually chosen by them." (the "right of information network communication")

2) If no, does your Group's current law nevertheless protect the making available right or a right analogous or corresponding thereto? If so, how?

3) Under your Group's current law, if:  
a) a copyrighted work has been uploaded to a website with the authorization of the copyright holder;  
and  
b) is publicly accessible (i.e. there are no access restrictions),  
would the act of providing a user-activated hyperlink to the starting page of the website to which the work has been uploaded be considered a "communication" of the copyrighted work?

no

Please explain:

This type of linking is deemed as one information location tool, rather than the act of “communication” of the copyrighted work.

4) If yes, would such an act be considered as communication "to the public"?

5) If yes, does that constitute direct infringement of the making available right, assuming there are no exceptions or limitations to copyright protection that apply?

6) If the answer to question 5) is no, on what basis would infringement be denied (e.g. by application of the theory of an implied license)?

7) If the relevant act is deep linking as described in paragraph 11) above, would the answers to questions 3) to 6) be different? If yes, how?

no

Please explain:

8) If the relevant act is framing as described in paragraph 12) above, would the answers to questions 3) to 6) be different? If yes, how?

yes

Please explain:

Answer to question 3): There exists controversy regarding this question, and it will be analyzed together with question 5).

Answer to question 4): Under the circumstance where no specific limitation is imposed on the communication scope, it is generally considered that the communication is made to the public.

Answer to question 5): No clear provisions on this matter can be found under Chinese law and there are controversies within the judicial and academic circles. In practice, the act of linking itself does not constitute the infringement of the right of communication through information network in accordance with the widely-adopted “standard of server test” where whether an act is considered as information network communication is determined as to whether the content being linked to is stored in the server of the linking webpage. But in court hearings, the “standard of user perception” where whether an act is considered as information network communication is determined by users’ perception (that is, if the user thinks that the content linked to is provided by the link provider, then the link provider is deemed to have conducted the act of information network communication), is adopted for the purpose of the presumed-default liability.

9) If the relevant act is embedding as described in paragraph 13) above, would the answers to questions 3) to 6) be different? If yes, how?

yes

Please explain:

Similar to framing, please see the answer to question 8) for reference.

10) If the website displays a statement that prohibits the relevant act of linking or linking generally, would the answers to questions 3) to 9) be different? If yes, how?

no

Please explain:

11) If the copyrighted work has been uploaded on the website with the authorization of the copyright holder but the access to the work has been restricted in some way (e.g. a subscription is required in order to access the copyrighted work), would the answers to questions 3) to 9) be different? If yes, how?

yes

Please explain:

A. Hyperlinking still does not constitute such infringement. For the reason that hyperlinking does not avoid the restriction measures adopted by the initial website. When the reader was directed to the initial webpage, verification (e.g. the webpage is not available in the event that there is no subscription) is still needed.

B. Regarding deep linking, framing and embedding, avoiding technical measures adopted by the website on which the copyrighted work is posted would constitute copyright infringement.

Article 48 paragraph (6) of Copyright Law specifies that those who have committed the following infringing actions shall bear civil liability such as ceasing the infringement, eliminating the impacts, making an apology, or compensating for the losses: intentionally circumventing or destroying, without the authorization of the copyright owner or copyright-related right owner, the technological measures applied by the copyright owner or copyright-related right owner to protect the right owner's copyright or copyright-related rights in a work, sound recording, visual recording, etc.

Article 4 of Regulations on the Protection of the Right of Information Network Communication stipulates: An owner may adopt technical measures for the purpose of protecting the Right of Information Network Communication. No organization or individual may purposely avoid or break technical measures, purposely manufacture, import or provide the general public with any equipment or component that is mainly applied to avoiding or breaking technical measures, or purposely provide technical services for any other person to avoid or break technical measures, unless otherwise provided by any law or administrative regulation that the relevant technical measures may be avoided.

In Baidu v. QIHU 360 , QIHU 360 avoided the technical measures adopted by Baidu and constituted unfair competition. [1][#\_ftn1] In another case, Baidu conducted framing of the video resources from Tudou, and claimed that it only provided linking services. However, Tudou utilized anti-leech technical measures, therefore Baidu was held to have constituted infringement.[2][#\_ftn2]

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[1][#\_ftnref1] Baidu v. Qihu 360, (No. 2668 [2013], First Instance, Civil Division, Beijing First Intermediate People's Court.)

[2][#\_ftnref2] Shanghai Quantudou Internet technology Co., Ltd. v. Beijing Baidu Netcom Science and Technology Co., Ltd. (No. 27450 [2013], First Instance, Civil Division, Beijing Haidian District People's Court.)

12) If the copyrighted work has been uploaded on the website without the authorization of the copyright holder, would the answers to questions 3) to 9) be different? If yes, how?

no

Please explain:

For the reason that questions 3) to 9) only refer to direct infringement, and this question mainly refers to indirect infringement.

- 13) Under your Group's current law, if a copyrighted work is made available on a webpage without any access restrictions, would that work be considered as having been made available to all members of the public (i.e. globally) that have access to the Internet?

yes

Please explain:

- 14) If no, why not? For example, would such communication be considered as directed only to certain members of the public (e.g. people living in a certain country or region, or people who speak a certain language)? If yes, under what circumstances?

- 15) If under your Group's current law the circumstances described above do not constitute direct infringement, would any of those circumstances support a finding of indirect or secondary copyright infringement?

yes

Please explain:

- 16) If yes, please identify the circumstance(s) in which indirect or secondary copyright infringement would be applicable.

In judicial practice, subjective status of the person who conducted linking needs to be taken into account in order to decide whether secondary (joint infringement) or indirect infringement is constituted. Article 8 to Article 14 of Provisions of the Supreme People's Court on Several Issues Concerning the Application of Law in Hearing Civil Dispute Cases Involving Infringement of the Right of Communication through Information Network (Interpretation No. 20 [2012]) address that issue with details.

Article 4 of Provisions of the Supreme People's Court on Several Issues Concerning the Application of Law in Hearing Civil Dispute Cases Involving Infringement of the Right of Communication through Information Network (Interpretation No. 20 [2012]) Where there is evidence proving that a network service provider, jointly with another person, made any works, performance or audio-video product available on any information network in cooperation with a due division of labor or by other ways, which constitutes a joint infringement, the people's court shall rule that the network service provider bears joint and several liability. However, if the network service provider can prove that it provides automatic network access, automatic transmission, information storage space, search, link, file sharing technology or other web services only and claims that its act does not constitute a joint infringement, the people's court shall uphold its claim.

Article 23 of Regulations on the Protection of the Right of Communication through Information Network: A network service provider that provides a search or link service to those who receive its services shall be exempted from liability for compensation if it has disabled, in accordance with these Regulations, the link to an infringing work, performance, or sound or visual recording after receiving the right owner's written notice, unless it is aware of or should be aware of the infringement of that work, performance, or sound or visual recording, in which case it shall bear joint liability for the infringement.

In eleven major record companies v. Yahoo, the court held that the defendant was liable for the reason

that it did not fulfill its obligation to remove the related links after receiving such request, and allowed such infringement result to occur with subjective fault. In *MeiYa v. Youdu and Tencent*, the court held that Youdu Company should bear stronger information management capability and duty of care as a professional searching engine and linking provider for motion pictures. When it became aware of Tencent's infringement of the right of information network communication of MeiYa Company, it still maintained the linking with subjective fault, therefore it shall bear the civil liability for contributory infringement (joint infringement).

## II. Policy considerations and proposals for improvements of the current law

- 17) How does your Group's current law strike a balance between a copyright owner's ability (or inability) to control the act of linking by others to their copyrighted work and the interests of the copyright owner, the public and other relevant parties?

In China, for the purpose of protecting the right of information network communication, the Copyright Law and Regulations on the Protection of the Right of Information Network Communication specify the copyright owner's right to restrict others from linking to their copyrighted works by adopting technical measures. Meanwhile, hyperlinking is not considered as infringement of the right of information network communication in judicial practice. Accordingly, the current law reflects the balance between protecting the right of copyright owner and the public interest.

Provisions of the Supreme People's Court on Several Issues Concerning the Application of Law in Hearing Civil Dispute Cases Involving Infringement of the Right of Communication through Information Network provides for the obligation of network service providers and standard of infringement of copyrighted works, which reflects the interest balance between copyright owners and network service providers.

- 18) Are there any aspects of your Group's current law that can be improved? For example, by strengthening or reducing the copyright owner's control over linking?

yes

Please explain:

Yes. There is inconsistency between the definition of the right of information network communication in current laws and judicial practice. It is advised that, the scopes of protection provided by different laws regarding related issues should be clarified. For example, under the circumstance where there is no access restriction to the copyrighted work, the copyright owner's control over linking should be weakened for the benefit of the public interest so as to facilitate the exchange of communication. If the website displays a statement that prohibits the relevant act of linking, the Anti-Unfair Competition Law shall be applied to related disputes.

## III. Proposals for harmonisation

- 19) Does your Group consider that harmonisation in this area is desirable?

no

Please explain:

If yes, please respond to the following questions without regard to your Group's current law. Even if no, please address the following questions to the extent your Group considers your Group's laws could be improved.

- 20) Should an act of linking (hyperlinking to the starting page, deep linking, framing and/or embedding) to

a website containing a copyrighted work be considered a "communication" of the copyrighted work?

no

Please explain:

21) If yes, should such an act of linking be considered a communication "to the public"?

22) If yes, should such an act of linking constitute infringement of the making available right, assuming no exceptions or limitations to copyright protection apply?

23) Having regard to your answers to questions 20) to 22), should different forms of linking (hyperlinking to the starting page, deep linking, framing or embedding) be treated equally or differently? If yes (in any case), why?

yes

Please explain:

Different forms of linking should be treated differently.

Hyperlinking does not constitute infringement of the making available right because hyperlinking does not avoid the access restrictions and it does not change the way of displaying the copyrighted work. The difference between hyperlinking and deep linking is that deep linking directs a reader directly to a webpage that displays the copyrighted work, rather than to the starting page of the website, so deep linking shall be treated the same as hyperlinking except that the starting page uses the access restrictions.

Both framing and embedding directly display the content of the webpage linked to so that the reader can read the copyrighted work without being directed to the initial webpage containing such work. Despite of technical differences, both forms of linking have similar ways of displaying and incur similar legal issues. Accordingly, they are not distinguished both in judicial practice and theoretical study in terms of legal consequences, and they are legally treated in the same way.

24) If yes in any case, in relation to each such case, should the finding be one of direct or indirect infringement? If yes (in either case), why?

yes

Please explain:

A. Hyperlinking (including deep linking)

Hyperlinking does not constitute direct infringement. However, in the event that the website linked to constitutes infringement, the person who conducts linking would constitute secondary infringement with subjective default. Deep linking would constitute direct infringement if the starting page of the initial website utilizes access restrictions.

B. Framing and Embedding

If the person providing such linking service fails to prove that it provides linking services solely, there may be a presumption that such person also provides the copyrighted work without authorization, which would constitute direct infringement.

If the website directed to by linking infringes the rights of the copyright owner, the subjective fault of the person that provides such linking service is a crucial factor to determine whether indirect infringement is constituted.

25) Do your answers to any of questions 20) to 24) depend on whether the website expressly displays a statement that prohibits the relevant act of linking or linking generally? If yes (in any case), please explain.

no

Please explain:

26) Do your answers to any of questions 20) to 24) depend on whether the public's access to the work uploaded on the website is limited in any way? If yes (in any case), please explain, including limitations that should be relevant.

yes

Please explain:

A. Access restriction is unrelated to deciding whether hyperlinking constitutes the infringement of the making available right of the copyrighted work for the reason that hyperlinking does not avoid any access restrictions. Verification or examination is still required after linking to the initial webpage.

B. Deep linking, framing and embedding may constitute copyright infringement under the circumstance where circumvention of technical measures is conducted.

27) Do your answers to any of questions 20) to 24) depend on whether the copyrighted work has been uploaded on the website without the authorization of the copyright holder? If yes (in any case), please explain.

yes

Please explain:

When the copyrighted work has been uploaded on the website without the authorization of the copyright holder, the act of linking may constitute the joint infringement.

28) If there has already been an authorized communication of the copyrighted work directed to certain members of the public, should a finding of infringement of the making available right depend on a subsequent act of unauthorized communication of the said work to a "new public"? If yes, please propose a suitable definition for a "new public."

yes

Please explain:

New public is a public that was not taken into account (i.e. there are access restrictions by employing technical measures) when the copyright holder authorized the initial communication to the public.

29) If a copyrighted work is made available on a webpage without any access restrictions, should there be any circumstances under which the work should be considered as not having been made available to all members of the public that have access to the Internet? If yes, under what circumstances?

no

Please explain:

30) Please comment on any additional issues concerning linking and the making available right you consider relevant to this Study Question.

Is it feasible to adopt neighboring rights to protect the Internet disseminators, taking the

rebroadcasting right among the rights of broadcasting organizations into consideration?

Please indicate which industry sector views are included in part “III. Proposals for harmonization” of this form:

#### Summary

A large number of new cases inspired the discussion of the relationship between the act of linking and the act of making available. In accordance with Chinese law and practice, the “making available right” in EU directives is corresponding to the “right of information network communication”. Hyperlinking (including deep linking), framing or embedding themselves are not deemed as the act of making a work available to the public by utilizing the “standard of server test”. However, in practice, the court may presume that the person conducting framing and embedding infringes the right of information network communication by employing the “standard of user perception”. Meanwhile, deep linking, framing and embedding would constitute direct infringement under the circumstance where circumvention of technical measures occurs. In the event that there are no legal sources regarding the copyrighted work directed to by linking, joint infringement of the right of information network communication may be constituted with the subjective fault of the person who conducts such linking being taken into account. All in all, it is advised that the scopes of different laws should be clarified in order to resolve related issues on the basis of different linking features.