



## A Brief Analysis of the Tort of Network Transmission Right and Its Verification

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### Abstract

The traditional tort is limited in the framework of real life. However, the tort of network transmission right, existing on the particular medium of internet, has distinct characteristics. Its particularity has caused many complex and difficult cases, such as Baidu infringement case. This paper aims at analyzing the network transmission tort from two aspects. First, it tries to explore the special nature comparing with the traditional tort. Second, it gives some proposals concerning the identification of the network transmission tort for reference.

**Keywords:** Network transmission tort, The particularity of the tort, Identify the tort

### 1. The issues are proposed

The infringing acts of network transmission right itself result in the difficult verification of infringement liability because of global Internet, invisible network data, and rapid transmission. Thus the legitimate rights and interests of others are often violated by the infringing party. In recent years, such infringement cases have occurred frequently. The more typical are Wang Meng case, Zheng Chengsi case, Baidu case, and China MP3 case, etc. All the issues brought by these hard cases have resulted from the particularity of infringing acts of network transmission right. Before Regulations of Protecting Network Transmission Right was enacted, this type of infringement cases, for lack of legal grounds, had caused a lot of controversies just because the complex network tort itself is extremely difficult to verify. It is after the issuing of the Regulations that Baidu infringement case has a relevant legal ground. Baidu lost and the case was over. But a series of problems still remain. These problems are: what is the difference between the infringing acts of network transmission right and the traditional ones? What are the constitutive requirements? What is the standard by which the network transmission right can be verified?

### 2. The constitutive requirements of the infringing acts of network transmission right.

Traditional tort has four constitutive requirements. The infringing party has subjective faults; the infringing acts do exist; there is the fact of injuries; and the infringing acts and fact of injuries have the cause-effect relationship. However, if the infringing acts happen in the net context, there will be another situation. The tort of network transmission right has its own particularity. The four traditional constitutive requirements of infringing acts, if put in net context, may become selective rather than indispensable. It requires a choice in a certain specific case in the judicial practice.

First, one of the traditional infringing acts is that the infringing party must have subjective faults. But in digital environment, there exists deep link acts so the infringing party can make measureless reproduction at any time by ISP or OSP. And it is difficult to verify who the real infringing party is. Direct or indirect infringement is also difficult to identify. In this case, Professor Zheng Chengsi claims that infringement liability principle of intellectual property rights, generally speaking, should belong to principle of liability without faults. No-fault liability principle is applied to the acts of first utilizing acts of works (such as unauthorized copy, or the first step of direct transmission such as performance, etc.), and acts of using patented inventions and creations without permission. As for the other acts or indirect infringement of intellectual property right, infringement liability principle will be considered. (Chengsi, Zheng. 2001.06. Section 1 of Chapter 5). Professor Zheng Chengsi here adopts an approach of differential treatment, and provides a reference for other similar infringement such as Baidu case. In judicial practice, such case as the acts of Baidu deep-rooted link is classified into indirect tort. Wang Qian names it as "assistant tort". (Qian, Wang. 2007.). The judiciary authority did not relieve the search engine server's tort liability. It is the first application by our judiciary authority since the Regulations was issued.

Secondly, another of the four traditional constitutive requirements of infringing acts is that the fact of injuries does exist. Of course, most of the infringing acts have done harm to the interests of copyright owners. A few of indirect infringing acts may have no temporary facts of injuries but in the long run they are sure to bring harm. Take Baidu infringement

case as an example, its skin-deep link acts do not cause any harm to other people's music copyright. It seems only provide search services as an agency does. So Baidu won the first trial. However, Baidu's acts have potential hazards. Wang Qian in his article, Re-discussing the Verification of Indirect Infringement of Information Locating Service Provider, points out that Baidu has provided such materials as Top100 of new songs, the list of hundreds of singers, and so on, which is actually an infringing act. On the top list, it is easy to find the name of a song linked and its singer, but it is common knowledge that a record company will not authorize any website of its pop songs and the singers with free of charge. Even if managers of the website glance at the singers and the songs on the Top List, they can not be unconscious that the songs linked have been uploaded to the third-party website without any permission. (Qian, Wang, 2007.). Meanwhile, it is applied to the second half of article 23 of the Regulations that those have known or should know that linked writings, performances, audio and video products involved in tort, should bear the responsibility of joint tort. Baidu won the first trial but failed in the second one. The results are totally different. Chinese judiciaries can adopt timely the latest academic research achievements and the relevant new laws promulgated, which reflects the improvement of trial techniques in dealing with the hard net case.

Thirdly, the principle of cause-effect relationship can not be generally used as a touchstone in the net world again. Traditional tort theory believed that where there is cause, there is effect. So there exists a cause-effect relationship between the tort of the infringing party and the fact of injuries. Net is reviewing whether the principle meets the need of development and in the net context whether it has exceeded the principle of cause-effect relationship. The answer is yes. As mentioned above, in Baidu tort case, is Baidu the indirect infringing party? Or does it with a third party constitute the joint tort as Article 130 in General Principles of Civil Law says? In practice, the indirect tort is extremely difficult to verify. Deep link has resulted in unrestricted acts of duplication and there is also no standard to verify which tort is direct or indirect. An infringed object in traditional tort is a real, natural person. And the traditional tort is closely related to real life. So it is easier to verify the standard of compensation and collect data comparing with the tort in the network transmission. But digital environment is beyond the real life. So the traditional cause-effect theory is not suitable for all the situations. Therefore, in dealing with the net tort, if the existing network legal provisions are strictly adhered to, many obstacles will appear. As mentioned above, due to the acts of hyperlinks by a third party the infringement objects are not specific. An infringing party's duplication and re-duplication will result in another infringing party or perhaps numerous more.

A real example is that there are three terminal services. Duplications are made from the first one to the last in a subsequent order. Furthermore, each duplicating must be based on what the former terminal service has done. If No1 terminal service is direct tort, No. 2 will be indirect tort. Likewise, No. 2 terminal service will be direct tort relative to No.3. Therefore, No.2 terminal service is both direct and indirect infringement. It has the double natures of infringement. It is obvious that numerous terminal services like No.2 exist. The traditional cause-effect theory is no more applicable. The following table can give a further explanation.

No. 1 terminal service	No.2 terminal service	No.3 terminal service
Direct tort	Indirect tort relative to No.1	Indirect tort
	Direct tort relative to No.3	

Due to the continuity of time and space of acts of reproduction on the net, the standard by which direct and indirect infringements are classified becomes increasingly obscure. Such terminal services as No. 2, which belongs to both the direct and indirect torts, have the largest proportion of network infringing acts. It is also difficult to apply a single legal standard to define them, resulting in the hard enforcement in practice. It seems we need to find other criteria. I propose that in confirming a network tort, direct or indirect infringement has its significance only in a very limited space. Two key points must be taken into consideration as to whether it is a fair use or whether it is for commercial purpose. Or from another perspective, due to the extremely complicated network environment, it is difficult to verify who is direct infringing party or indirect party. Therefore, on most occasions, the no-fault liability principle should be applied. And on a few occasions, the principle of fault liability is applied (that is, the four infringing parties, ISP, ICP, IAP, and network terminal customers). For example, some scholars advocate that the principle of fault liability should be applied to "compensation for losses in tort. That is, liability for damage should be determined by whether the infringing party has subjective faults, its nature and to what degrees the fault is. Especially, the amount of compensation should also include the reasonable expense which a creditor pays to stop the infringing acts, as is added by TRIPS Agreement. It has broken through the provisions of the principle of compensation confirmed in China's General Principles of Civil Law and reflected the special nature of copyright protection." (Wei, Duan. P.29.). In most cases, principle of no-fault liability adopted has embodied the complicated network context and can give an effective protection of the interests of copyright network. The examples mentioned above have already exceeded the limits of the traditional tort. Therefore, we need a new angle to view such infringing acts. A judge should be allowed free space to make a judgment when he orders a specific case. Although the introduction of the Regulations has provided more reliable legal grounds for the

similar hard cases, any of the laws will inevitably have their shortcomings, which requires that Chinese judicial organs should suitably adopt some practice of international pact to give legal regulations when judging the similar hard cases.

In short, the tort of network transmission right has two types of constitute requirements, direct tort and indirect tort. First, the constitute requirements of a direct infringement are: a. The infringing acts exist (which is essential to any network tort); b. The fact of injuries exists. Direct infringement has no deep link. The infringing party has committed direct offence against the exclusive rights of the others. Thus, the fact of injuries is very obvious. c. the cause-effect relationship exists. Because it is direct infringement, no-fault liability standard is adopted to confirm it. Thus the cause-effect relationship is obvious between the infringing party and the fact of injuries. d. No-fault liability is applied to the direct tort so it is needless to consider whether the infringing party has subjective faults or not. The constitute requirements of indirect infringement are: a. The tort exists; b. The fact of injuries is often put off. That is, no actual loss is produced at that time but in the near future the injuries are to be brought in. The Internet Access Providers (IAP) such as Baidu, are typical examples. Baidu provides Top 200 singers in the music search pages. The indirect tort will result in a potential infringement. c. Subjective faults exist. At present, Chinese judicial organs adopt fault liability principle to the four types of infringing parties of network tort (ISP, ICP, IAP, network terminal customers) in the legal practice. It is a progress for the judicial organs in trial since the performance of the Regulations. d. The indirect tort has transcended the traditional one-way mode of an infringing party to infringed network works. Meanwhile it exceeds the restrictions of traditional cause-effect relationship. And all these require we should analyze different situations differently.

### 3. The standard that confirms the tort against the network transmission right

#### 3.1 Is the tort in the range of infringing the exclusive rights?

The network transmission right is not only a property right but an exclusive right. Copyright Law endows people with the proprietary right. Many works says at the rear that the copyright belongs to the original author; without the author's consent reproduction is not allowed. Then the reproduction without the consent of the author of course belongs to the infringing acts against the copyright for it has invaded the scope of the author's exclusive right. The word of exclusive right is closely related to direct infringement. A concrete manifestation of direct infringement is that direct reproduction and link are made without authorization or permission thus causing the offence to others' rights.

As for the concrete performance of network copyright infringement, Cong Lixian has cited the following ten network copyright infringement manifestations: (Lixian, Cong. 2006. pp.29-31.) a. make bold to publish an author's writings without his or her authorization and permission; b. publish the co-writings with one name without the authorization from the other co-writer; c. sign the name on the book of others without participating in the creation to seek personal fame and fortune; d. distort and tamper with other people's writings; e. plagiarize other people's writings; f. spread the writings on the internet without authorization by means of reproducing, exhibiting, distributing, and showing, adapting, translating, making notes, compiling, making films and the alike, etc.; g. spread other people's works on internet without pay according to the relative regulations; h. infringe neighboring right of copyright. From the above we can see that a. b. c. d. e. f. and g. are typical infringing acts against the exclusive rights of copyright. It is usually believed that what Copyright Law has provided on the ordinary infringing acts is applicable to those in the digital environment. The above ten situations are actually the concrete performance that Article 46 in Copyright Law has in the digital environment.

Standard of exclusive rights is applicable to distinguish direct and indirect infringing acts. Professor Zheng Chengsi believes that the infringement liability principle of intellectual property right is generally speaking the principle of no-fault liability. "As for the first step of infringing acts as (unauthorized copying, or as the first step in direct communication such as performance, etc.) using the works, as for the acts of using patented inventions and creations without any authorization, the principle of no-fault liability is applied. As for the other acts and all the acts of indirect infringement against intellectual property right, fault liability principle is applied." (Chengsi, Zheng. 2001. section 1 of chapter 5.). Here professor Zheng Chengsi differentiates the direct tort from the indirect tort and gives the applicable no-fault liability principle and fault liability principle respectively. In addition, Wang Qian in his text, *On Defining the Network Transmission Acts and Verifying the Infringing Acts* (part 1), also points out that "an act, if it is not in the scope controlled by some exclusive rights, that performed by others is not likely to be direct tort". (Qian, Wang. 2006.). Tort of network transmission right is one of the network infringing acts. Thus standard of exclusive rights can be used to define it. But its main role is to distinguish between direct and indirect infringing acts. So it is not enough to have a single standard. In real practice of trial, fair use should be taken into consideration.

#### 3.2 Is it "fair use"?

Fair use or fair dealing is used in the Anglo-American common law. China's Copyright Law names it as right limitation. That is, in a certain range works can be used with no pay and without the consent from the copyright owners. Fair use is different from the statutory license or compulsory licensing. It can be said that the fair use has cut off the economic ties

with the copyright owners. With no pay or no permission, only some obligations should be fulfilled. The functions of fair use lie in that “conflicts among writers, disseminators, and other users of the works can be reasonably eliminated to realize the equilibrium of interests among three parties on the basis of safeguarding the rights and interests of the authors, thus promoting the prosperity and progress of the whole community.” (see note 1).

When an infringing act is verified, it is a linchpin to take fair use into account. Fair use is a legal system and plays an important role in theory and in practice. In practice, it works as a comparatively good equilibrium in individual rights and public interests. Furthermore, the fair use system as an exoneration principle of the network transmission infringing acts has been recognized within the academic arena though there are controversies in some theoretical circles. Posner, an American economic jurist, provides a word of “efficiency” when studying the relationship of law and economy. That is, all the laws and all the legal systems should aim at making full and effective use of natural resources and maximizing the social wealth. (Aiguo, Xu. P394.). In my eyes, Posner’s efficiency is the existing purpose of fair use. It can be said that if there is no system of fair use, there will be no need for Copyright Law to exist. As stated above, fair use system has played a role of a comparatively good equilibrium of individual rights and public interests. Then, what is the purpose of this equilibrium? The purpose is to maximize the use of resources, and optimize the allocation of resources. Which means good steel should be used in the blade. Posner’s efficiency is a reference scale and a standard. To be thinking economically involves many social aspects and provides a mechanism for reference for the existing problems of society. The theory relative to the economic efficiency is that “to seek the most happiness for overwhelming majorities of people”, advocated by British jurist Bentham. Bentham’s opinion has something with public interests. He proposed his theory from the perspective of economic analysis. Of course it bears some features of utilitarian. In real life, the conflicts between individual rights and the public interest are not absolute, but assuasive. So we should take into account the interests of all parties and make right choices in the actual operation.

Internet as “the fourth media” certainly belongs to the traditional media scope. I believe that “and other media” in the third and fourth items of Article 22 in the Copyright Law should be understood to include network medium. Likewise, fair use in Article 22 of Copyright Law can be explained in a broader sense. Fair use in paper can be further extended to the Internet. “Except for the purpose of fair use, to download others’ works of copyright belong to copyright infringement”. (Juqian, Li & Fan, Yang. P.87.). Fair use includes that others’ works can be used for the purpose of individual study or teaching or researching. Hence, Article 22 of Copyright Law gives specific provisions of twelve cases for fair use. In addition, Article 6 in Regulations of Protecting Network Transmission Right also provides eight cases for fair use with no pay or no permission from the copyright owners, etc. To summarize what Regulations and Copyright Law has provided about network fair use, I think that network fair use can include: a. to utilize others’ works for learning, researching, and teaching; b. to repost the words on a BBS (electronic message board) to another one, that is, from one forum to another one. The sources and the relative information about the authors should be indicated when reposted. In addition, what should not be reposted, according to the author, can not be reprinted or reproduced. c. to use others’ works in distance education. However, distance education may not be used for commercial purpose. To use others’ works is only for teaching purposes. d. others’ works is used in digital library. But digital library should promptly destroy the copies in case of the tort. e. Current news is not in the scope that Copyright Law protects. Therefore, when news is reported, it is impossible to avoid the use or reproduction of the works of others. It is a fair use and it is not necessary to pay and get any permission from the copyright owners. f. The technical measure, provided in Article 26 of the Regulations, refers to the effective techniques, devices or components that prevent and control those without permission from the copyright owners from enjoying, performing, recording and making videos or offering these services by means of internet. The United States Congress in 1998 promulgated Digital Millennium Copyright Act of USA, which gives a bit more restrict provisions concerning undermining the technical measures. It stipulates that any damage to the digital book cover for protecting online intellectual property rights or the encryption is illegal. And it is illegal to manufacture and market products used for destroying the devices used to protect network copyright. I believe that it seems a bit inappropriate that the case is prescribed to be illegal since there is no corresponding rational use. For example, the police destroying the technical measures in order to detect cases, I think, belongs to fair use.

When fair use is prescribed in the law, based on the equilibrium of interests of all parties, it has some necessary restrictions. That is, the fair users should have duties while adopting fair use. Fair use itself has a greater flexibility. Should fair use system be subject to the necessary restrictions? The answer is yes. From a legal perspective, any right, if used, will certainly be subject to the constraints.

The reason to do so is to seek an equilibrium between the individual right and public interests. The new Copyright Law has shrunk the scope of fair use. One reason is to integrate with international conventions. The other reason is to further protect the creditors’ rights and the works and take precautions against any further infringing acts. But I think fair use of copyright should be expanded in the context of Internet. As we all know that network, as a fourth media, bears some characteristics of its own. It spreads rapidly and broadly. With the rapid development of internet, new forms of works, as well as digital works, will appear in large numbers. More and more people will surf the net. People surfing the net and the net information are sharing interactively the resources at any moment. The original intention of the network is

to facilitate the free flow of information and communication. If the fair use is blindly restricted to some scope, the vigor and vitality of network will be suffocated. However, when fair use is adopted, the following factors should be taken into consideration. a. When fair use is adopted, the right of authorship of others should be respected and names of others and their works should be written on timely. b. Commercial purposes become the watershed of fair use. Adopting fair use should make a timely judgment whether the act has something with the potential market value. c. The fair use is in the limit of not affecting the use of original works. First half of Article 19 in Copyright Law has prescribed that when others' works are used, the authors and the name of the works should be specifically marked. To respect others' rights of authorship is to respect their personality and affirm their works. Intellectual Property Law itself has come forth as a law of equilibrium. It aims at balancing the interests of the authors, the interests of the opus-users and the overall interests of the public. Intellectual Property Law at the same time encourages people to make intellectual creations.

#### 4. Epilogue

The tort of the network transmission right is extremely complicated in a digital environment. Although academia and the theoretical circle have made some achievements, they still have to give an active exploration because net environment itself is of complexity and there exist many defects and shortcomings.

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