Comment

Deep linking does not constitute a “Making Available to the Public”: The perspective of Beijing Intellectual Property Court

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ABSTRACT

It has long been a highly controversial issue as to whether deep linking constitutes a making available to the public. Chinese courts have two main ways of interpreting this: the server test and the substantive substitution test. Beijing Intellectual Property Court adopted the server test and ruled that deep linking does not constitute a making available in the recent landmark decision: Tencent case. The court also stated that deep linking might involve joint copyright infringement, unfair competition or circumvention of technological measures.

1. Introduction

The legal status of hyperlinks has been a widely discussed subject in recent years. In the European Union (EU), there have been several cases before the Court of Justice of the EU (CJEU) on the interpretation of the right of communication to the public in relation to hyperlinks. The court’s decisions sparked a fierce debate among academia.

The CJEU first encountered a case that dealt directly with the question of whether the provision of a hyperlink amounts to “communication to the public” in 2014, in Svensson v. Retriever Sverige AB. The CJEU set out two requirements for the concept of communication to the public: (1) an act of communication and (2) the communication of the work to the public. If an initial communication and a secondary communication are made by the same technical means, additional criteria are needed: the secondary communication must be directed at a “new public”. In this case, “the public targeted by the initial communication” included all Internet users, since the works on the site are freely available.

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a copyrighted work is freely available, does not constitute “an act of communication to the public”.4

Later, in the BestWater case, the CJEU held that its decision in Svensson was also applicable in framing.5 However, in a recent GS Media case, the CJEU departed from previous case law, founding that posting hyperlinks to protected works, which are freely available on another website without the copyright holder’s consent, could constitute a “communication to the public”, if the links are either provided for the purpose of financial gain, or provided by a person who know or could reasonably have known the illegal nature of the publication of those works on the linked website.6

The issue of the status of hyperlinks is also a hot topic in China. On October 21, 2016, Beijing Intellectual Property Court released its decision in e-linkway Tech Co. Ltd (Appellant) v. Tencent, Inc. (Appellee).7 The court reversed the judgment of Beijing Haidian District Court,8 concluding that deep linking does not constitute a making available and is consequently not covered by the right of communication through information network.

It should be noted that the term “deep link”, used by Beijing Intellectual Property Court is a broader term, which includes embedded link and framed link, excluding simple link.9 As simple linking contributes to a growth in both traffic and popularity, websites usually do not object to simple linking and there is no dispute related to simple linking before Chinese courts.10 On the other hand, deep linking has involved an ongoing debate because it circumvents the advertising-rich homepage and may lead to lost revenue.11 In the Tencent case, Beijing Intellectual Property Court directly addressed whether, and under what circumstances, deep linking can violate Chinese Copyright Law.

2. Chinese implementation of the making available right

China and the EU are contracting parties of the WIPO Internet Treaties:12 the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). The EU adopted the Information Society Directive (hereinafter InfoSoc Directive)13 to implement, inter alia, the making available right. Article 3 (1) of the Directive includes language identical to Article 8 of the WCT, requiring member states to protect the right of communication to the public, including the making available right; Article 3 (2) of the Directive aims at implementing Articles 10 and 14 of the WPPT with regard to the making available right for related rights holders.14 In contrast, China opted for a different statutory implementation approach, using a standalone right: the right of communication through information network.

2.1 Making available right in the WIPO Internet Treaties

2.1.1 Making available right in the WCT

The WCT is adopted to address the challenges of digital technological developments, in addition to filling in some of the gaps in the Berne Convention for the Protection of Literary and Artistic Works (hereinafter “Berne Convention”).15 In the Berne Convention, the right of communication to the public is regulated in a fragmented manner, leaving gaps, both as to the subject matter covered by the right and as to the exclusive rights conferred.16 To both complement the fragmentary set of provisions on the right of communication to the public under the Berne Convention, thereby filling certain gaps,17 and to cover

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16 In the Berne Convention, only three of the various variants of right of communication to the public extend to all categories of works: (1) the right of broadcasting (Article 11bis (1) (i)); (2) the right of communication to the public by wire of broadcast works and (3) the right of rebroadcasting of broadcast works (Article 11 (1) (ii)). However, the right of communication to the public by wire in cable-originated programmes applies only to: (1) literary, musical, dramatic, and dramatico-musical works, but only as performed or recited (Article 11(1)(ii), 11ter(1)(ii)); (2) literary and artistic works to the extent they are adapted into cinematographic (Article 14(1)(ii)); and (3) cinematographic works (Article 14bis (1)). Thus, the text of literary works (including computer programs) and dramatic, musical and dramatico-musical text, as well as graphic works and photographic works remain outside the scope of the right of communication to the public by wire in cable-originated programmes. See Ficsor (n12) 494–495; Ricketson & Ginsburg (n15) 717–718.

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