

Safe Harbour Protection in China: How China's New Regulations Protect the Information Dissemination Rights of Digital Networks

In the booming age of digital information, copyright issues have taken centre stage in courtrooms across the world. China, arguably the future's most prominent financial market, has recently been at the forefront of controversy. Marcia Ellis and Jean Zheng provide a comparative analysis of safe harbour laws in China and the United States. They conclude with an observation of how the law in China might have influenced the case of Baidu.com.

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The *Regulations for the Protection of Information Network Dissemination Rights* were promulgated by the Chinese State Council on May 18 2006. For the first time in China, the Regulations prescribe a comprehensive legal framework for information network dissemination rights. The Regulations include the following new provisions:

- i. individual copyright owners' dissemination rights;
- ii. prohibition against circumvention of technological measures used to protect copyrighted works;
- iii. protection of the integrity of copyright management information (CMI);
- iv. the public's right of fair use;
- v. exceptions on network dissemination rights;
- iv. network operators' safe harbour liability limitations; and
- iiv. notice and removal procedure to handle copyright disputes.

The concept of information network dissemination rights was first introduced in the 2001 amendment to the *PRC Copyright Law*. Issues relating to copyright disputes in relation to computer networks were addressed in the *Explanation of Certain Issues Relating to the Application of Laws in Computer Network Copyright Disputes (Explanation)*, which was issued by the People's Supreme Court in 2000. The Explanation was amended in 2003 to reflect the 2001 amendment to the Copyright Law.

Nonetheless, the Copyright Law and the Explanation were not enough to handle the increasingly sophisticated and abundant network copyright disputes. They were also insufficient because they applied only to information dissemination on the internet.

In response to the development of new technology and wireless networks, the Regulations' definition of information network dissemination includes the public's use of wire or wireless networks to access audio-visual products at any time and from any location. The definition also covers the dissemination of information via mobile networks, wireless application protocol (WAP) and future wire and wireless systems.

The Regulations' most important component for service providers is that they set forth specific provisions to establish a safe harbour for service providers (the term safe harbour refers to measures designed to shield service providers from liability under specific circumstances). The Regulations state that service providers who qualify for safe harbour protection will not be held liable for certain illegal activities (such as, copyright violations)

performed by their customers.

Safe harbour protection for service providers

According to the Regulations, if a service provider successfully establishes a claim for safe harbour protection, it is automatically exempted from claims for monetary damages with respect to the following activities:

- i. providing access to or transmission of copyrighted works at the request of subscribers;
- ii. system caching of copyrighted works, which is the automatic storage and transmission of works generated by other network operators to improve their network transmission efficiency;
- iii. storage of copyrighted works on systems or networks at the request of subscribers; and
- iv. the search or linking of subscribers to third-party online addresses at which copyrighted works can be accessed and/or downloaded.

To receive safe harbour immunity, service providers must comply with several conditions specified in the Regulations. These conditions depend on what type of safe defence service providers are claiming. Independent of the specific immunity they seek, service providers must ensure that they did not take the initiative in accessing, transmitting, copying, storing, linking to or searching for unauthorized information. They must also show that they did not change a work when providing services.

To qualify for safe harbour defence, service providers must have complied with other general requirements of the Regulations. One of these states that service providers must accommodate and not interfere with technical measures used to protect copyrights and the integrity of CMI.

The drafters of the Regulations recognized that service providers cannot control the transmission and caching of information handled by their services. Thus, the requirements for these functions include more restrictions than those related to storage and linking services, which service providers have more ability to control.

Additionally, to receive safe harbour for storage and linking services, service providers must follow a notice and removal procedure. When service providers are notified of infringing activities but fail to remove the unauthorized information from their sites, their claim for safe harbour protection will be denied.

Contributory infringement and constructive knowledge

For linking safe harbour protection, the Regulations specify that if a service operator had actual or constructive knowledge of a subscriber's copyright infringement by means of its service, the service provider will be held liable for contributory infringement. Safe harbour protection for other services does not include this requirement.

However, according to the principles of Chinese tort law, when a service provider has actual or constructive knowledge that a subscriber is committing copyright infringement, but continues to provide its services, the service provider could be held liable for contributory infringement. According to Article 4 of the Explanation, when network operators participate in, assist or induce others to engage in copyright infringement, they will also be held liable for contributory infringement.

Unfortunately, the Regulations do not clarify under what circumstances service providers will be deemed to have constructive knowledge and thus be held liable for copyright infringement. Furthermore, other legislation relating to tort and copyright laws does not

clarify the issue. Consequently, this grey area should cause considerable litigation in the next years.

The lack of clarity shows that there is a need for more regulations to guide service providers. With specific guidelines, service providers would understand their duties and be better informed to avoid violating copyright laws.

Safe harbour protection in China & the US

The safe harbour Regulations seem to have been modelled after the *US Digital Millennium Copyright Act* (DMCA). However, differences in the two countries' tort laws have resulted in varied provisions. For example, according to US law, services providers in the US can be accused of copyright infringement under a theory of contributory or vicarious liability. However, the concept of vicarious liability does not exist in China.

This difference is reflected in the DMCA's and the Chinese Regulations' safe harbour provisions that govern storage services. To receive protection from the DMCA, service providers must not have received direct financial benefits from the infringing activities, inasmuch as they could control these activities. US law includes two specific elements that must be established to deny service providers safe harbour protection and find them vicariously liable:

- i. the right and ability to control infringing activities; and
- ii. the receipt of direct financial benefits from infringing activities

In China, where principles of tort law do not include vicarious liability, the Regulations only require that service providers received financial benefits from infringing activities to deny service providers safe harbour protection. Thus, the standard for receiving safe harbour protection is higher in China.

The situation with respect to linking and search services is the opposite, with China's standard for receiving safe harbour protection being more lenient than that of the US. China permits service providers to maintain safe harbour protection even if they receive financial benefits from search and linking activities.

How safe harbour applies to music download cases

The recent copyright disputes between music companies and *Baidu.com*, China's most popular search engine, show how safe harbour protection can be useful to service providers. Baidu was sued by several music companies when it posted links to websites that provided free music downloads.

Baidu's MP3 search engine includes various functions and information, such as a ranking of the most downloaded songs in different categories and information on download speed and file size to help users find and download music.

Shanghai Bu Sheng Music, a branch of EMI in China, filed a copyright infringement lawsuit against Baidu in June 2005. Baidu lost the case and was found liable for copyright infringement in September 2005. The loss sparked immediate lawsuits from several companies, including Warner Music, Universal Music and Sony BMG.

In November 2006, in a landmark ruling in one of those subsequent lawsuits, the No.1 Intermediate Court of Beijing ruled in favor of Baidu, opining that the search engine had not violated copyright laws since the music had been downloaded from the websites of third parties.

In its ruling, which is likely to be appealed, the Beijing court explained that Baidu merely

assisted users to locate information on the internet and thus Baidu could neither control their search activities nor the services provided by other websites. The court thus concluded that Baidu was not guilty of copyright infringement.

The Regulations' safe harbour protection clause might have influenced the court's decision. Nonetheless, one must question whether Baidu's service is just a search engine, given that it aggressively promotes MP3 search functions and provides ranking services and information on linking speed to assist users to download songs. Arguably, the existence of these various features is proof that Baidu was aware of potential copyright infringement, in which case the company could be found guilty of contributory liability.

As discussed earlier, financial benefits do not disqualify a search engine from receiving safe harbour protection in China. Hence, even though Baidu's MP3 search service generated 30% of its traffic and yielded financial benefits for Baidu, the company can still benefit from safe harbour protection.

However, a similar service provider operating in the US could be held vicariously liable under the DMCA because of the financial benefits received and its ability to control the activities of the search engine's users.

CONCLUSION

The Regulations are a major step forward in the protection of information network copyrights. The drafters of the Regulations considered the interests of service providers and tried to avoid imposing a financial burden on the information technology industry. The challenge ahead is how the government and the courts in China will interpret the Regulations in grey areas such as the definition of constructive knowledge.