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BEIJING APPEAL COURT RULED ON A MAJOR CASE: COPYRIGHT LIABILITY FOR INTERNET SERVICE PROVIDERS DETERMINED

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On December 14, 1999, the Beijing First Intermediate People's Court (BFIPC) reviewed the landmark case of *Wang Meng, et al. v. Beijing Cenpok Intercom Technology Co., Ltd.*, a/k/a the *Beijing Online* case, in an "appeal trial."¹ Despite some speculations that the court may need more time to ponder the issues, the three-judges panel, headed by Luo Dongchuan, Deputy Chief Judge of that court's Intellectual Property Division, issued its decision right after the trial.² The court affirms the lower court's ruling that the defendant's unauthorized posting of plaintiffs' works on the Internet constitutes copyright infringement and the damage rendered by the lower court is appropriate. This case is now final.³

This is the third known copyright infringement suit in China concerning the liability of Internet service providers. Yet it has gained national prominence from the outset. The plaintiffs are all celebrity writers, the defendant is the leading Internet firm, and the outcome will no doubt have a profound impact on the future of e-commerce in China.⁴ On June 15,

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¹ Under the Chinese litigation system, an appeal court always has jurisdiction to review the facts of each case *de novo*, provided, that a party in a given dispute has indeed raised a question concerning the court of first appearance's fact finding. See Articles 151, Civil Procedure Law of the People's Republic of China.

² Formal written opinions of the court has not yet been released to the general public at the time of this report. Despite the government's conscious efforts in recent years to make the court's judgments more transparent and accessible, whether or not an opinion is to be actually made available for public consumption still requires approval from each court's leadership, and in extraordinary circumstances the Supreme People's Court. This report is based on eyewitnesses' account, interviews with those directly involved in the case and various reports in the People's Republic of China.

³ The Chinese legal system in principle permits only one appeal in both civil and criminal cases. See Article 158, Civil Procedure Law and Article 197, Criminal Procedure Law of the People's Republic of China.

⁴ For example, the lead plaintiff, Mr. Wang Meng, was formerly Deputy Minister of Cultural Affairs and prominently featured in the Chinese version of Arthur Miller's *Death of A Salesman* and film like the Oscar winning *The Last Emperor* (1990). The case gained more attention by the official Chinese Central Television's national live broadcast of the entire trial on September 18, 1999. The names of the other five plaintiffs are: Zhang Jie, Bi Shumin, Zhang Kangkang, Zhang Zhi and Liu Zhenyu.

six renowned writers jointly filed a civil complaint before the Haidian District People's Court in Beijing, charging *Beijing Online*, one of the largest Internet access and content providers in China owned and managed by Beijing Cenpok Intercom Co., Ltd., for unauthorized and illegal copying and distribution of their works over the Internet.⁵ They specifically demand compensations for their economic losses and mental suffering. On September 18, the district court ruled in favor of the plaintiffs, awarded *Renminbi* ¥26,580 (US\$3,200) in compensatory damages but rejected any award for mental distress.⁶ The defendant appealed.

Here the BFIPC must first resolve a fundamental question: are works posted on the Internet copyrightable at all? The existing law apparently does not address this issue directly. The defendant indeed raised this very argument as its primary defense. The closest statutory provision the court could identify is Article 10 of the Copyright Law. It provides that the term "copyright" shall include the right of publication, authorship, alteration, integrity, exploitation, and remuneration. Specifically, subsection (5) states that the right of exploitation is "the right of exploiting one's work by reproduction, live performance, broadcasting, exhibition, distribution, making cinematographic, television or video production, adaptation, translation, annotation, compilation *and the like*."⁷ In the Chinese language, "and the like" in connotation can be either exclusive (*i.e.*, after an exhaustive list) or inclusive. For instance, to describe that there are four factors that need to be considered in a given issue, it can be said that they are factors A, B, C, D and the like to be considered. However, it can also be said that there are elements A, B, ... and the like to be considered.⁸ BFIPC eventually sided with the lower court, ruling that "and the like" should be non-exclusive and, therefore, cyberspace publications are copyrightable subject matter under the current law. It follows that the posting (hence distribution and reproduction) of an electronic version of literary works falls within the scope of rights enjoyed by the copyright holder.

The court rejected the defendant's contention that the Internet "posting" should be treated as fair use or permissible statutory license because there was no profit taking involved (the defendant claimed that there were even losses).⁹ Furthermore, the defendant argued that as an

⁵ By the end of 1999, however, Starboom Enterprises Ltd., a subsidiary of the Hong Kong real estate giant Pearl Oriental Holdings Ltd., has purchased 65% of *Beijing Online* and announced that under the new name Starboom (China) Co., Ltd, the company intends to transform Beijing Online from a life information network into the largest comprehensive Chinese language entertainment website in the People's Republic of China. See *Pearl Oriental Holdings Buys China ISP Beijing Online*, ZHONGGUO XINXI BAO (CHINA INFORMATION NEWS), December 15, 1999.

⁶ Although stressing that they were not really for the money but only seeking the court's ascertainment of their legitimate rights, the plaintiffs have each asked for *Renminbi* ¥5,000 for mental suffering or distress.

⁷ Emphasis added. The original Chinese language for the emphasized words is *deng*. This is based on the official translation. See DOCUMENT AND ARCHIVE CENTER, NATIONAL COPYRIGHT ADMINISTRATION OF CHINA, COPYRIGHT LAW OF THE PEOPLE'S REPUBLIC OF CHINA, at 54-55 (1993).

⁸ An analogy to this is the usage of "consists of" as opposed to "comprises of" with the former being exclusive and the latter being inclusive.

⁹ Article 22 of the Copyright Law provides, among other things, "[i]n the following cases, a work may be exploited without permission from, and without payment of [*sic*] remuneration to, the copyright owner, provided that the name of the author and title of the work shall be mentioned and the other rights enjoyed by the copyright owner by virtue of this Law shall not be prejudiced: (1) use of a published work for the purposes of the user's own private study, research or self-entertainment;" For two detailed and excellent discussions on on-line copyright infringement and liability, see *Jiang Zhipei, Copyright Liability for*

access provider, it has no control over the actual content of its site (the evidence showed that the defendant acquired the ownership of *Beijing Online* through a merger with another company and did not know of the potential infringement until it received the court's summon that a case has been filed against it) and even if it were to be held responsible for the content, it has provided a disclaimer and quickly removed the contents in question once it learned of the potential infringement.¹⁰ In other words, it lacks any intention to infringe and should at best be held liable for failing to provide reasonable remuneration to the authors, and nothing more. The court, however, sided with the lower court and discarded all of these arguments.

The BFIPC held that the unauthorized reproduction and distribution of copyrighted works over the Internet is likely to cause more damages to the plaintiffs' copyright giving the nature and scope of transmission over the Internet. Although the existing law does not offer a clear guideline on the calculation of damages, and the exact amount of losses is difficult to be determined, the lower courts' ruling apparently is not unreasonable with all the facts considered. Consequently, the court affirmed Haidian court's decision to award compensatory damages and leave the total amount intact. The court also agreed with the lower court by not rendering any award for plaintiffs' alleged mental suffering.

Noticeably, the plaintiffs chose to maintain a low profile and being cautious throughout. One of them stated that the purpose of their suit was not to be an impediment to the development of e-commerce or flow of information; rather they just want to be properly recognized, be informed and consulted with before anyone put their works on the Internet.¹¹ In addition to the celebrity status given to the parties and the case itself, their reaction as such apparently was due, in part, to the contentious debates the dispute help ignited.

This case has indeed generated very mixed feelings within the legal, political and business communities in China. While most would acknowledge that the case exposes the deficiency of the current law, some nevertheless believe the court has exceeded its jurisdiction by unreasonably expanding the scope of the Copyright Law without proper or legitimate authorization from the National People's Congress, its Standing Committee or the Supreme People's Court.¹² Some even feel the whole hoopla being the result of bad influence from the American practice and caution against the adoption of U.S. practice.¹³ Some,

Internet Service Providers, reprinted and available at <http://www.chinaiprllaw.com/fgrt/fgrt1.htm> (text in Chinese); and *Li Dongtao, Challenges from the Internet Cyberspace*, ELECTRONICS INTELLECTUAL PROPERTY, September 1999, at 17-19, 39 (text in Chinese).

¹⁰ The defendant's evidence suggested that most of the contents on the web site in questions were provided through the exchange of e-mails (through uploads and downloads) by subscribers to that site.

¹¹ See *Zhang Afang, etc., Six Writers Victorious, First Trial on the First Internet Infringement Case Concluded*, BEIJING QINGNIAN BAO (BEIJING YOUTH DAILY), September 19, 1999 (text in Chinese)(interviews with Zhang Kangkang and Liu Zhengyu).

¹² See *Conflicts All-over between Tradition and Internet*, FA ZHI RI BAO (LEGAL DAILY), December 14, 1999. See also *Shou Bu, Analysis: Questions toward the First Ruling on the Six Writers' Case*, SINATECH, October 21, 1999, reprinted and available at <http://dailynews.sina.com.cn/comment/1999-10-21/24207.html> (text in Chinese).

¹³ For instance, Mr. Pan Bo, member of the Haidian District Chinese People's Political Consultation Council, suggested that China should take the "wait and see" attitude and pay particular attention to ensure that enough leeway is provided for the development of indigenous information industries within China. See

however, feel the court has done properly and brought law and order to what heretofore has been a “lawless society” within the cyberspace.¹⁴ Yet some took the middle of the road, arguing that while authors ought to be reasonably compensated, they should not, on the other hand, be permitted to reap the full profit from the Internet, giving the unique environment, functions and structure of communications on the Internet (*i.e.*, the actual profit is too difficult to calculate and the costs to disseminate works have been greatly reduced). They also argue that such a policy will be in full conformity with the national policy to encourage massive and maximum flow of information.¹⁵ For Internet service providers, they understandably fear that this will significantly discourage the growth of e-commerce.¹⁶

Those diverse opinions aside, at least two things are certain. First, there will only be more challenges on the Copyright Law of 1990 and other intellectual property laws in the days ahead concerning the use of Internet. Second, it is inevitable that the current law must be revised and the National People’s Congress will be the final forum for similar debates to take place. Regardless what the outcome may be and how many people in China are still living without electricity, a good part of the country has clearly crossed the threshold and entered the squabbling stage in how to deal with the new digital age.



Gao Wei, Is There Free Lunch on the Internet? A Commentary, SINANEWS, December 14, 1999, reprinted and available at <http://dailynews.sina.com.cn/comment/1999-12-14/41971.html> (text in Chinese).

¹⁴ For instance, Mr. Zou Bian, Deputy Director of Copyright Division, Ministry of Information Industry, drew a rhetorical analogy: “There has to be cars running on the superhighway. But if all the cars thereon are stolen, isn’t it so, then, that the superhighway itself becomes a fertile ground for criminal activities?” Given the rampant copyright piracy activities in China, this remark has touched off very strong reactions from different sectors within China. *See supra* note 11. Note that Mr. Zou is also the founder and president of the Chinese Software Alliance, an ardent advocacy group for strong anti-piracy policy and enforcement in China. Separately, Mr. Xu Chao, Deputy Director of Copyrights Division, National Copyright Administration of China (the equivalent of deputy general counsel), suggested that the principle of fault (as in intentional or negligent tort) under the General Principles of Civil Code should also be the applicable standard in copyright infringement cases, including acts take place in the cyberspace. *See Gao Wei, id.*

¹⁵ For instance, Mr. Wang Xiangdong of the Chinese Academy of Social Science argued that in order to find the balance between the interests of the copyright holder and the Internet service provider, special consideration should be given to the preliminary development stage of e-commerce and to the reduction of costs to build that infrastructure. Professor Zhang Ping of Peking University School of Law also argued that the reasonable compensation for copyright holders should be less than other from media of distribution because the use of Internet significantly reduces the costs of publication and distribution and the author’s compensation should reflect accordingly. *See Gao Wei, id.*

¹⁶ For instance, Chen Binze, Director of News Center, *Sinonet.com* complained that this case was overkill. He did acknowledge, however, that the court was correct in its ruling. *See Zhang Dongcao, More on the Six Writers’ Case, Beijing Online Appealed to Have More Say*, ZHONG GUO QING NIAN BAO (CHINA YOUTH DAILY), October 18, 1999.