How to Better Regulate P2P Developers' Conduct Under Chinese Law

尚静 Sarah Shang*

Philips IP Academy - Fudan University Law School

How to prevent p2p software providers from fostering copyright infringement has been an urgent task. Most p2p software providers in china, such as thunder, poco, provide both free p2p software to users and involve in other services, such as information storage, search engines. They are internet service providers and following discussion will be based on this.

、An analysis on Chinese law regulating p2p software providers' conduct

1. Main relevant Chinese law

Chinese law has established a joint tort system to make p2p software providers share joint liability with infringing users under certain conditions.

Article 3 of the *Interpretations of the Supreme People's Court on Several Issues concerning the Application of Law in the Trial of Cases in Relation to Copyright Disputes over Computer Network (2006* (hereinafter referred to as "*the Interpretation*")

*Ms. Shang is a winner of the Philips 2007 Intellectual Property Scholarship at Fudan University Law School, Shanghai , China

has that “any internet service provider (ISP)who involves in others’ copyright infringing activities through internet, or contributes to and induces the infringing activities of others through internet shall bear joint liability with other conductors or direct infringers as prescribed in Article 130 of *General Principles of Civil Law of People’s Republic of China*. (hereinafter referred to as “*General Principles”).*

Article 4 of *the Interpretation* stipulated that: “any internet service provider who provides content services, knowingly the infringing activity conducted by internet users, or being notified by the copyright owner with firm proof, shall bear joint liability with his internet users as prescribed in article 130 of *General Principles of Civil Law of People’s Republic of China* if he refuses to remove the infringing contents to eliminate the infringing result.”

Together with Article 106.2[1], Article 130[2] of the *General Principles*, these have established the main frame work to regulate p2p software providers’ conduct. So, in order to prevail on a joint tort theory, a copyright owner must prove the following elements: **A.** two or more tortfeasors. **B**. They share concurrent fault[3]. **C**. they jointly conduct the infringement. **D**. the infringement causes damages to right owners.

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[1] Article 106.2 of the General Principles is: “*Citizens and legal persons who through their fault encroach upon state or collective property, or the property or person of other people shall bear civil liability.”*

[2] Article 130 of the *General Principles* is : *“If two or more persons jointly infringe upon another person's rights and cause him damages, they shall bear joint liability.”*

[3] In civil law theory, “concurrent fault” means that both tortfeasors have conducted the infringement intentionally or neglectingly. See, Wang Liming, *Civil Law---Tort Law*, page 354, China People’s University Press, July 1st, 1993.

2. The flaws of the joint tort system.

Although in the "kuro case[4]", the court has imposed legal liability on p2p software provider under Art.3, there are still some questions remained unsolved.

A. The legal status of p2p software providers is vague.

Art.3 and 4 set quite different rules on ISP and ISP who provides content services. And *Regulations on the Protection of the Right of Communication through Information Network(2006)*(hereinafter referred to as (*"the regulations"*)has provided that any internet service provider who provides searching, linking services, shall bear no liability if he cuts off the link to the infringing work immediately upon receiving right owner's notice[5]. No copyright law has ever interpreted the meaning of ISP and ISP who provides content or searching and linking services. So, which rule shall apply to present p2p software providers? Almost all p2p software providers pretend to only provide search engines. For example, Xunlei Company has stated that all contents on its website are formed automatically and it bears no liability for its lawfulness[6]. Different interpretation to p2p software providers' legal status will cause different result.

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[4] "Kuro case" refers to the case of Shanghai Push Sound Music & Entertainment Co., Ltd. v. Beijing flying net music software developing Co., Ltd, No, 13739, the Second Junior Court of Beijing. In this case the music company brought a suit against the p2p software providers and it is the first influencing p2p suit in China.

[5] *Regulations on the Protection of the Right of Communication through Information Network* came into force on July, 1st, 2006. Article 23 stipulates that: "*Internet service provider who provides searching or linking services bears no liability if he cuts off the infringed work, performances, video and audio products upon receiving the notice of right owners under this regulation.…*"

[6] See, *Impunity Declaration* of Xunlei Company, http://pstatic.xunlei.com/about/other/duty.htm, latest visited by June 30, 2007.

B. The words "involve in", "contribute to and "induce" are too general to be clear.

These terms are listed equally which means that no one can include the other in Chinese grammar. In fact, the first one includes the latter. This unclearness poses a big problem in practice as it is hard to define what acts can be regarded as" involve in" or "contribute to and induce". And the latter terms are too general.

C. The theory of joint tort itself is not certain in Chinese law.

One of the most important elements in joint tort theory is that joint tortfeasors have to share concurrent fault. There have long been disputes over the term "concurrent fault". The subjective theory believes that all tortfeasors shall have conspiracy or communicated their intention. While the objective theory insists that as long as their conduct causes damage to right owners, joint tort is formed[7]. It is clear that p2p software providers will benefit more under the subjective theory while copyrighter owners suffer. Therefore, uncertainness of joint tort theory may result different judgments which affects the fairness of law.

D. Joint liability does not function well.

It is stipulated that joint infringer shall bear joint liability. Each infringer is obliged to compensate the entire damage caused and then ask the other joint infringers to reimburse him for their shares[8]. However, p2p

[7] See, Wang Liming, Civil Law---Tort Law, page 355, China People's University Press, July 1st, 1993.
[8] It is stipulated by Article 87of the *General Principles* that "*When there are two or more creditors or debtors to*

software providers may not be able to acquire the infringing users' information and ask them to reimburse their shares after he compensates all damages. Therefore, in the "kuro case", the court obviously avoided using the words "joint liability" but still relied on joint tort rules.

In all, although Chinese law provides a joint tort system to regulate p2p software providers' conduct, the above flaws affects the application and fairness of law.

. Suggestion on how to amend the law regulating p2p software providers' conduct

According to the analysis above, it is suggested that the relevant Chinese law should be amended as follows:

1. It shall clearly stipulate the legal status of p2p software providers.

Different legal status may cause different rules applied. P2p software providers do not only provide free software, but also provide membership services and classify/select all the files shared. Besides this, there are introduction about music and movies files on their websites. Therefore, they are ISP in a broader sense and are not the ones mentioned in Art.4 of *the Interpretation*. This addition will avoid p2p software providers take advantage of the "safe harbors" provided in the Regulations.

2. It is better to delete the term "involve in" in Art. 3 and interpret

a deal, each of the joint creditors shall be entitled to demand that the debtor fulfill his obligations, in accordance with legal provisions or the agreement between the parties; each of the joint debtors shall be obliged to perform the entire debt, and the debtor who performs the entire debt shall be entitled to ask the other joint debtors to reimburse him for their shares of the debt."

the meaning of "contribute to" and "induce".

"Involve in" has a broad sense and its meaning includes both "contributes to" and "induce". Thus, it is reasonable to delete this term as it is too wide to make this rule hard to apply. Besides this, a specific interpretation of the latter terms is very necessary as they are too general.

3. It is necessary to introduce secondary infringement system to regulate p2p software providers' conduct.

Art.3 is based on the general joint tort system in civil law which is considerably uncertain and general. It is unsuitable to the situation that p2p technology has posed where direct infringer is hard to trace.

It is better to introduce secondary liability, which requires one who indirectly involves in infringing activities bear liabilities for direct infringers under certain situations[9].

US courts have developed three forms of secondary liability in p2p suits, which are contributory infringement[10], vicarious infringement[11] and inducement infringement[12]. These three forms has covered all the situations regulated by joint tort system and do not incur the problem of joint liability or concurrent fault as they only focus on the indirect

[9] Wang Qian， *On the Secondary Infringement Theory in Copyright World, Volume II, 2005, Technology and Law.*
[10] In A&M Records v. Napster, 239 F.3d 1004(9th Circuit, 2001), the court described it as "*one who, with knowledge of the infringing activity, induces, causes, or materially contributes to the infringing conduct of another, may be held liable as a contributory infringer."*
[11] In re Aimster Copyright Litigation, 334 F.3d 643, C.A.7 (Ill.), 2003, the court announced that anyone who has the right and ability to supervise the direct infringer and also has a direct financial interest in the infringer's activities is liable for the act of the infringer.
[12] The Supreme Court puts it as follows in Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd. 545 U.S. 913, 125 S.Ct. 2764. that "*one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties*."

infringer’s conduct. Therefore, it will work better than joint tort in the p2p network situation.

To conclude, there are two steps to amend relevant Chinese law, that defining the legal connotation of p2p software providers as ISP in Art.3 and amending Art.3 to introduce secondary infringement theory.