Analysis of Copyright Infringement in Deep Linking

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Abstract

With the development of Internet technology, various kinds of network link show up, from common links to deep links, from the web to mobile client. Many platforms named the deep links banner aggregation service emerged gradually. The deep linking has brought convenience to the public and also caused a lot of copyright infringement problems. This paper expounds the identification of infringement of the deep linking information transmission on internet and the identification of infringement of the right of reproduction, furthermore analyzing three kinds of applicable standards to determine internet information transmission behavior. Finally, we should gradually get rid of the dependence on server standard applicable, auxiliary for the substantive alternative standard, and gradually complete the substantive alternative standard.

Keywords: deep linking; Identification of infringement; Information network communication rights

I. INTRODUCTION

Deep linking is the product of the development of network technology. It brings lots of conveniences for the majority of Internet users but also violates the interests of the copyright owner. Deep linking and well-known common connection are both inbound links, embedding address of the other website behind the title. There are the following differences between two links:

First, the technical properties are different. The common link is the home page of the link site, which is still a complete page after clicking a jump, and does not have any special technical processing. A deep link is a conscious technical process that directs the work of a third-party site and makes a conscious effort to render it on a chain site.

Second, the ability to control management is different. Firstly, the common link is simply a direct jump action, which has no control over the domain name of the linked site. Secondly, deep linking makes third party sites become part of their works by linking way, so as to make the third party web site works can be freely under its website domain name, but also can block the third party web site advertising, etc., has strong control ability.

Finally, the benefits of rights are different. The difference in control management is bound to bring different benefits. Network traffic and the benefit of the advertising revenues are a result of the spread of the Internet, and once set deep links site control the information content of third party sites, the improvement of its traffic is bound to produce large amounts of network traffic, advertising revenue comes naturally. In practice, deep linking techniques tend to block or replace ads on third-party sites to gain benefits. It is completely different from the rights to normal links.

II. Behavior Object of Deep Linking Copyright Infringement

In order to analyze and decide the infringement of deep links, it is important to clarify what kinds of rights of the victim are infringed in the first place. In copyright infringement case, we should not only check if the affected party has the copyright but also identify copyright claim to figure out what kinds of right that the alleged infringer violates. In our country, copyright includes the following personal rights and property rights. So, what copyright would be infringed by deep linked behavior?

Deep linking is a kind of network links technology, it is a behavior that the network content providers upload the copyright owner’s works to the Internet then spread the links, namely secondary propagation behavior. Usually, the depth link does not change any information about the original work,

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it is just the same as the original work. Therefore, the practice of deep linking generally does not infringe the personal rights of the copyright owner such as the right of integrity and the right of authorship. As for the publication right, the behavior of the infringement of right of publication is without the permission of the author putting work to the public such as the Internet communication, publishing, distribution, public display, etc. But the nature of the secondary transmission also determines that the Internet providers setting up the deep linking should not burden with duty of care for the published works. Because of publication right is one-time rights once the public is in a state of the public can know, which we can’t take back nor put into public again. So, the behavior of spreading the works again by deep linking should be admitted that the works have been published by default. Therefore, the deep linking behavior generally does not cause an infringement of the publication right. In the same way, it is less likely that the publishing right becomes a deep-linking infringement object, and this article will not discuss it further.

In property rights infringement object, the deduction rights is the right to recreate it based on original works, including the translation rights, adaption rights etc., based on the analyzing the nature of the secondary transmission behavior of deep linking, knowing that the deep linking behavior will not violate of the deduction right. Rental rights is a right that temporarily admitted for compensatory using the work of a film and the work produced similarly as a film and the work of a computer software. Obviously, the compensation use is unlikely to be the object of a deep linking copyright infringement.

Right of exhibition, the right to display art works, the original elements of a photographic work, or the right to duplication. According to the China's copyright law, only art works and photographic works have the right to exhibit. With corresponding exhibition rights in China the United States is "open access", which has wide applicable scope. Not only shows the object involved in the original or copy of text, music, and graphics, sculpture, dance and the single screen of film or other audio-visual works. And the way to exhibit public includes technical infrastructure. Even can be used to explain the works spreading through the Internet, such as the displaying the work "thumbnail" on website is open access. Because the regulation of our country cannot compare with the wide regulation of America, the spread of deep linking rarely get involved in the infringement of the right of exhibition. Besides, the exhibition displays he tangible works as a carrier to disseminate and perception, in theory, it can be put into the category of copy right. The infringement of the rights of exhibition on the Internet is because of the copy of artwork or photography spreading on the website, which can be classified as the decision of the infringement object of exhibition rights. So this article will not do the further analysis of the infringement object of exhibition rights.

For the communication rights, it refers to the case that the work carrier is not transferred by using the form of intangible works, namely the public doesn't possess the "text" to get or perceive the works, including showing, playing, performance and information network transmission. It is shown that the communication rights in China generally include the right of reflection, broadcasting, exhibition and information network. The right of showing refers to reappearing film, art works, photographic works and works produced similarly as films by using projector and slide projector. Broadcasting rights refers to the spread of public broadcasting or work in wireless way, spreading to the public in the form of cable transmission or broadcasting radio work, as well as through loudspeakers to transmit symbols, sound, image or other similar tools to propagate broadcasting and radio works to the public. Performance right, namely performances works publicly, as well as the rights to broadcast work performance by various means publicly, including direct performance (also called live performances) and with the aid of technology and equipment of indirect reproduction works. The tree kinds of transmission way of communication rights above include but not limited to the network mode of transmission, and its contents are included in the scope of information network transmission right. Therefore, this article will no longer be specific to this three kinds of infringement object one by one.

Information network transmission right refers to providing works to the public by using wire or wireless ways, making individual get the work in his personal selected time and place. Deep linking as a network link technology, its special link features are easy to cause information network transmission right infringement, and the definition of information network propagation behavior are controversial, deep linking behavior can be regarded as information network propagation behavior, different decision
criteria and the results can cause different infringement. Therefore, this paper will discuss the identification of the behavior of information network propagation.

III. Identification of the Infringement of Deep Linking Information Network Dissemination Power

"Copyright law" in the first paragraph of article 9 of the 12 items says "information network dissemination behavior"[1]: the connotation of information network transmission right, that is available to the public by wire or wireless works, making the public have the right to receive work in his personal selected time and place. "Beijing higher people's court on some issues of network copyright disputes guidance (a)" (trial) stipulated in article 2: the behavior of communication information through network refers to the works, performances, sound recording or video recording posted or otherwise will be put in open to the public web server, the public can be gained the work, performance, sound recording or video recording in the selected time and place, without the proof to prove the actual implement the online download, browsing or otherwise obtained by the facts.

According to the above definition of information network propagation behavior, there should have four elements to constitute a copyright law in the sense of information network propagation behavior: one is that Internet propagation behavior provides behavior for the public through wired or wireless network transmission media; two is that result of the network transmission behavior is "to provide work" to the public, meaning that let the public has the possibility to receive work, rather than the actual work, as long as it will be uploaded to or placed in the network users to download or browse or get online in other ways, namely, constituting an "access" to work. As to whether someone actually download or browse the acquisition work, we actually don’t care; Three is that by using "peer-to-peer" network transmission behavior mode, the public system has the access to specific personal content, transmitters and receivers of information is presented by dot dispersion distribution in the network platform. The fourth is that the public of network communication can independently choose the content of the information, time and place to gain the information, namely, the "interactivity" of the receiving mode. The sufficient understanding of the four elements is conducive to determining whether an action constitutes an information network propagation behavior. It is not hard to grasp the three points "Wired or wireless", "point to point" and "interactive" from the literal understanding and related rules and regulations, only the second requirement "provide behavior" may have the most controversy.

When the copyright law (1990) was promulgated, there was no direct "provision" given to the copyright law. The "provision" of copyright that is originally associated with the work is derived from the copyright law enforcement regulations. In the first specification information network transmission right of the supreme people's court on the trial of copyright dispute cases involving computer network using the legal interpretation on several issues (2000) (hereinafter referred to as the "explanation"), using the "spread" or "through the network transmission to the public" concept, nor in the work provided by the use of "provide" sense. In order to comply with the specifications of copyright of network development, China's "copyright law" (2001) gives the copyright owner the exclusive rights of the right of communication information through network, further confirming substantive characteristics of network woks legally, for the first time writing the "offer" associated with works in this law. In 2013, "Provisions of the Supreme People's Court on the use of law in the trial of civil disputes over the right to network dissemination of information” says that the system of civil liability is constructed on the basis of dichotomy of network work providing behavior and network service providing behavior, for the proper use of the law, laying the foundation for realizing the balance of interests in the field of the right of communication through information network. How to accurately define the behavior of online service providers, also if the deep linking behavior constitutes behavior of communication information through network, whether it violates the right of communication through information network, the scholars have different theories. The following will discuss in detail.

IV. The Current Doctrine About Deep Linking

1. The user-awareness standard
The user-awareness standard, based on the general users’ visual perceptions, judging whether the
works are provided by the ISP or whether the users are confused with the ISP and the ICP which works as the criterion for judging whether or not the mentioned about is network information dissemination behavior. The different understandings of "information network propagation right", which produces the user-awareness standard and server standard, in accordance with China's "Copyright Law" that the information network propagation rights refers to the way to provide works to the public by using the wire or wireless network. By that the public can access the works in anytime and any places. The fundamental difference between the two standards is how to understand the regulation of the "making available and display to the public"

The use of user-awareness standard is also based on the following considerations: First, the user-awareness standard is in line with the principle that Copyright laws prohibit unauthorized use of works of others. Copyright is essentially a monopoly right, the copyright system is not only to protect the rights of the right-holders, but also to prohibit the works being used or disseminated by others without prior consent. And copyright is also a kind of property rights. In the prohibition of other people's behaviors to protect the right-holders' the exclusive rights is to protect their interests as well. Therefore, in some way, it means that any person is not allowed to disseminate the works to benefit himself without the consents of the right-holder. On this basis, we have analyzed the link services. Internet economy is known as the "attention economy", that is, the more visitors, the greater the economic benefits. For deep linking services, it is difficult for users to distinguish between deep linking services and some kind of linking services or content services, and it is easily misunderstood as content services. Then when the users once again need similar information may continue to visit the same sites which set the deep linking services on it so that the chain site will obtain the traffic and interests. By that the chained sites will lose their benefits. This is obviously unfair and does not conform to the basic principle of copyright law. Second, the user-awareness standard is conducive to the better protection of the rights of the right-holders. [2] to applicable to user-awareness standard, once the infringing works do not need to be determined whether the fault is subjective should take the corresponding responsibility, which greatly against the infringement in deep linking, and thus to protect the interests of the right-holders from being infringed.

(2) The Server Standard

The server standard is a standard that refers to whether the site has uploaded the work or placed it in a web server that is open to the public to judge whether the act of making available is performed. The use of the server standard argues that the term "provision" is translated from "making available" in Article 8 of the WIPO Copyright Treaty, which refers to the possibility of obtaining the work of the public. Only the site where the related work is uploaded or otherwise placed on the server makes the public have the "possibility" of obtaining the work. If the linked site deleted the related work, or closed the network server, then even if the main site still retains the original links, they cannot make the public get works by clicking on these links. On the contrary, even if the links are removed from the other sites to remove, the public can still directly log on the original link to the formal sites and get the related works. The decision to get the relevant content "public" can only be the linked sites obviously, rather than as the sites that set up the original links. In view of this, the direct implementation of information network propagation behavior can only act in the linked sites.

Most of the reasons for using the server at home and abroad is: the server in line with technical neutrality rules. The documents which are deeply linked by the web service providers can be either in common domain or legally propagated, or potentially infringing, so that deep link technology provided by network service providers can be used for legitimate purposes and can be used for illegal purposes. Server standards, perhaps more in line with technical neutrality rules. [3] If the user-awareness standard is adopted, as long as the third party website upload is infringing works, the deep linking providing behavior is identified as the information network propagation behavior, which constitutes a direct infringement, which does not meet the technical neutrality rules. Therefore, the server standard may be more suitable for the development of technology and technological progress, in line with the trend of social development.
(2) Substantial-replaceable Standard

In the exploration of the standards of information network propagation behavior in theoretical circle and judicial practices, based on the substantial-replaceable standard, some scholars consider it refers to the chain sites which once provide the works to users through their own control of the network interface, then the chain sites implement the act of providing the works. This means that no matter which form of links, or even if the future linking technology, as long as the chain sites use the relevant technology to merge other websites’ texts, pictures, audio, video into their own control of the page so that users do not need to enter other sites to view the texts etc., then the chain sites implement the information network dissemination behavior.\[1\] Substantial-replaceable standard is starting from the final action (dissemination) of “making available” to consider “dissemination”, no matter how the technology changes, as long as the chain sites substantially replace the linked sites or the right-holders and provide or disseminate the works to the public, it shall be consider as “making available”.

There is no difference between the Substantial-replaceable Standard and the User-awareness Standard in superficial terms. But in facts, it has essentially differences. In essence the judgment of the user-awareness standard causes the network users confuse the chain sites and the linked sites easily, and the user-awareness standard is more concerned about the interests of the linked sites, and the substantial-replaceable standard is to protect the right-holders’ interests and the linked sites’ interests but more focus on right-holders’ interests. The deep linking behavior changes the way of presenting the works substantially. It causes loses in the interests of the copyright owner. When the linking setters set an address information to prompt the work in a reasonable way to dispel the users from misunderstanding it, but it does not changes the fact that the linking setters are presenting the works through their own websites and client programs is the user-awareness standard is adopted. In the meanwhile, it won’t be considered as constituting infringement. It affects the copyright holders’ control of disseminating the works and does harms to the interests of the copyright holders. At this point, if the substantial-replaceable standard is adopted, regardless of whether it will cause confusion of network users, as long as the chain sites put someone else’s works in their own website, it will be considered as constituting direct infringement. In short, the substantial-replaceable standard is more comprehensive than the user-awareness standard, and is more in line with the principle of balance of interests in the copyright system, and this criterion is more effective when the interests of the copyright owner and the linked website are inconsistent.\[5\]

In the new technical environment, the work may be uploaded by the right-holders, the linking setters or even any other person, the information is dynamically scattered on multiple servers. It makes the original uploaders and specific storage addresses of the works and propagation path difficult to track to. Compared to the server standard, the Substantial-replaceable Standard does not need to consider who the initial uploader is, which server the work is stored on, and how the works are disseminated, it only needs to consider whether the chain sites substantially replace the copyright holders or the linked sites to provide and disseminate the works.

V. The Analysis and Evaluation of the Doctrine

Although many scholars have listed the advantages of user perception standards, many judges have applied it in judicial practice, but they cannot hide their own defects. First, user perception standards have a strong subjective color. It should be subjective standard that whether the network service provider implements the standard of information network communication judging by the perception of users. Even if the network service provider content the depth of the link in the third party’s website, as long as consumers mistakenly believe that the content directly come from the Settings link network service providers, you can be sure that the network service provider without permission, which provides the network content, it should be constituted direct infringement, perhaps this idea is not scientific.\[6\] secondly, user perception standards have great uncertainty. Only by user perception, it is difficult to determine whether the behavior of network work provided by the network service provider. The degree of user perceived accuracy is affected by uncertain factors such as user's perception of attention and whether they have basic network knowledge or not. Therefore, as the standard of judgment, on the one hand, it cannot seize the essence of a behavior, Unable to perceive the origin and
essential characteristics of online works. It is more difficult to determine who provides the behavior of the works, nor does it correspond to the responsibility division system involved in the information network communication, such as the scope of responsibility for network service providers may be inappropriately extended, affect the normal development of the Internet industry; on the other hand, it makes some network providers. The network work providers evade the legal responsibilities they should bear. [7]

Therefore, when judging whether the deep link behavior whether constitutes an information network propagation behavior or not, we should take care of the application of user perception standards, avoid the judge's excessive freedom of proof and the uncertainty of the case, thereby reducing the credibility of the judiciary.

The standard of the server conforms to the technical neutrality rules of the copyright system, but the limitations are great, and it cannot solve the practical application of the law directly. First of all, under the current network technology, the act of providing online works must be uploaded to the server to communicate or provide works to the public, which is determined by the technical characteristics of the existing network services. Uploading to a web server is the starting point for providing behavior from the network. However, in the final analysis, the adjustment of law is the relationship between people, and determines the technical starting point. It is not sure whether the supply behavior is provided by the network service provider or the network user or the service object. Second, the server standard is the technical starting point of the behavior provided by the technical characteristics, and will become the lack of existing foundation with the development of technology. The server standard is the expression of the technical standard as a legal standard. It is likely to lose its foundation with the updating of the technology. [8] If the development of network technology does not need to go through the server stage, how to determine the behavior of network work? Therefore, the temporary technical features determine that the technical starting point of the behavior provided by the works is not eternal, but merely a phased feature of technological development. At this stage, the server standard has been unable to solve the actual legal problems, and in future there will be a huge conflict with the legal norms. In solving the problem of infringement of the depth link, we cannot apply the server standard one by one, and we should improve the server standard or other standards to solve the problem more reasonably.

In summary, "User awareness standards" have a strong subjective color. It stresses that there is no convincing reason for users to confuse web sites with third party websites, because the possibility of protection of copyright protection of trademark rights is not as so confused as that. In our judicial practice, the "Server Standard" is widely used", easier to judge than the previous two, the judge's decision on the standard is also easy to handle. But it is just a pure technical standard, It is too small for applied elasticity, especially in the rapid development of information network technology today, the network may change at any time soon, the network technology in the storage need not the server, then the server will be the standard on the shelf.

The "Substantial-replaceable standard" conforms to the principle of prohibiting unjust enrichment in the traditional civil law. The depth of link behavior, if the server standard, there will be such a consequence, namely provides the work for the users through deep link service providers to benefit, but in many cases, users do not need to pay any price. Because in accordance with server standards, deep link services do not constitute direct infringement, and only indirectly constitute infringement. [9] The subjective element of indirect infringement is knowing or knowing, and direct infringement does not require subjective fault. Then there will be the consequences inevitably, that is, many of the "substantive Substantial-replaceable" standards constitute infringement, and if the use of server standards, it does not constitute infringement, because its subjective is not knowingly or should know. This will in many cases make the deep link service provider get unjust enrichment and the loss of the obligee, which is obviously contrary to the basic theory of civil law.

In addition, from the aspect of economic interests, the Substantial-replaceable standard ensures that the obligee enjoys the benefits directly arising from the dissemination of his work in the network, rather than belonging to set up the chain website, Through the maintenance of the rights of the network dissemination of interests, thereby encouraging the creation of works to enrich the number of works.
The Internet economy is compared to the "attention economy", and the number of visitors to the website is directly proportional to its economic benefits.\[10\] In the depth of the link, the dissemination of works from the interests of the other website part of the transfer to set the depth of chain website, especially deep links to the video, once the user can easily access to the relevant information in the design chain website, they won't go to other sites, while a chain site effect is equivalent to content service providers, the real alternative is the chain of the site, to the detriment of the interests of the chain website.\[11\]

VI. Conclusion

The standard of judging the network communication behavior of deep link information has been controversial, Substantial-replaceable standard is also a standard, which was put forward by the theoretical circle and judicial practice in the solution of the problem. In our country, judicial practice is now widely adopted in the context of server standards, instead of trying to replace the server standard, this article hopes that the real alternative standards will provide more solutions, rather than just adopting server standards that have limitation. Therefore, Comprehensive analysis of many applicable standards above. With the rapid development of network technology, we should gradually get rid of the dependence on server standards, At the same time apply Substantial-replaceable standards, and constantly improve the essence of alternative standards, in order to better meet the needs of network development.

Reference