**The “Dubbing Show” case**

Good afternoon, everyone. In the following part, I would like to introduce to you another case heard by the Beijing Internet Court. It also concerned the infringement of the right of communication through information network. Ok. Let’s start. Have you ever seen this little red fox? His name is Ali. He’s a very famous cartoon character. A series of cartoons have been created based on him, such as Ali’s Dreamland • My Little Cloud, Ali • Mother and Ali • Carrier Swallow. And there is also much merchandise related to this character, like throw pillows and toys. So what does today’s case have to do with Ali? Let’s take a look.

Let’s first look at the facts of this case. The plaintiff is the copyright owner of the animations of Ali that we mentioned before. While the defendant is the developer and operator of a mobile app named Dubbing Show. What is the “Dubbing Show” app for? It’s a mobile app that provides dubbing services to the users. After signing up, the users can upload dubbing materials, most of which are clips of movies, cartoons and TV dramas. Users can also dub the dubbing materials to generate new dubbing videos. The dubbing materials and dubbing videos can be shared by users to the app, and can also be downloaded.

The plaintiff found that there were at least 14 dubbing materials originating from Ali animations, and more than 20,000 dubbing videos made based on these dubbing materials on the app. Most of these clips are a few dozen seconds to a few minutes long. Users can give gifts to the dubbing videos, and the gifts are exchanged by recharging on the platform. The reward will be shared between the users who make and upload the dubbing videos and the Dubbing Show app according to their agreement.

After getting the above information, the plaintiff sued the defendant to the Beijing Internet Court, claiming that the defendant, without permission, provided the clips of the animations as dubbing materials and the dubbing videos made based on them, infringing his right to communicate the animations through information network, and shall bear civil liability including cessation of infringement and compensation for losses.

On the other hand, the defendant argued that the alleged infringing videos were uploaded by network users, and he was only an internet service provider. And because he deleted the videos in a timely manner after getting the notice from the copyright owner and he had no fault for the infringement. He shall be exempt from compensation liability by reference to the safe harbor clause.

Ok. That is the key facts of the case. You may have noticed two key words, i.e. “internet service provider” and “safe harbor”. For students who do not know about intellectual property rights, particularly copyright, these two words may be unfamiliar and difficult to understand. But they are exactly the key points for the trial of this case. Is the defendant an internet service provider? Is the safe harbor clause applicable so that the defendant can be exempt from liability? Once these two questions are answered, the conclusion of the case will be easily made.

Let’s start with the first question, what is an “internet service provider”? The term “internet service provider” has appeared in many Chinese laws, regulations and judicial interpretations. For example, the famous Article 36 of the *Tort Liability Law*, Article 1194-1197 of the *Civil Code*, and *Regulations on the Right of Communication Through Information Networks.* In this regulation, there are four types of internet service providers, namely, providers providing search and link services, those providing automatic access to the network or automatic transmission services, those providing automatic caching services and those providing information storage spaces. However, there are no definite concept of this word in any laws or regulations.

Scholars have defined ISP from different aspects. One of the quite authoritative interpretations of it is in the following two books. These books stand for the “ISP” in a broad sense which includes internet technology service providers and internet content service providers. The former one only provides channels and platforms, and does not edit, organize or modify the information itself. All contents are provided by network users. ISP in a narrow manner only means internet technology service provider. Sina Weibo, Douyin and Baidu search engine, etc. are all famous ITSP we are familiar with. Take Weibo for example. We, the users of Weibo write some words and take some pictures by ourselves and then upload them on Weibo. Right? We are the creator or author of the contents and we use Weibo to share them with our friends and other netizens. Weibo is just a platform and it will not edit or change the contents we upload. Right? Ok. These are ITSP.

On the other hand, content service providers provide contents or product to network users. Unlike TSP, They will edit, organize, modify the contents by themselves. So they should be responsible for the legality of the uploaded contents. Typical examples are major video platforms, such as Youku, iQIYI, Tencent Video.

Actually, legal provisions have adopted both its broad and narrow senses when using the word ISP. For example, in Article 1194 of the *Civil Code* the internet service provider refers to internet technology service providers and internet content service providers, while in the following Articles 1195-1197 it only means internet technology service providers with the same word ISP.

So I think we can come up with a graph like this.

There is another issue that we should pay attention to. The division of technology service providers and content service providers is not always clear, especially in nowadays. Many internet service providers offer both technology and content services. Taking Youku for example, most of the contents on Youku, like popular movies, TV dramas and variety shows, are broadcast by the Youku platform with authorization gained by agreement with copyright owners. In this case, Youku is an internet content service provider. While in some sections of the Youku platform, the video contents are produced and uploaded by users, like Li Ziqi’s videos. In this case, Youku is only a technology service provider. So to some extent, it is meaningless to make a general distinction between technology providers and content providers. We should determine it in the specific case based on the specific situation.

In this case, the defendant argued that it was an internet service provider. It in fact used the concept in a narrow sense, i.e. internet technology service provider, or more specifically, information storage space provider. Information storage space means a platform where users can upload information or contents on it and other users can browse or download such information or contents from the platform. Why the defendant argue that he is an ISP? Because the law has special provisions on the infringement determination and responsibility assumption for internet technology service providers. We will discuss this more deeply in the second part.

So, what are the criteria for identifying internet technology service providers? Maybe there is no exact standard, because internet technology service providers exist in various forms. For example, Baidu Wangpan and Sina Weibo, both of them are information storage space, but they have big difference. We use them for totally different purposes. We use Weibo to record and share daily life and we use Wangpan to save and share large documents. So we can hardly treat them as the same. However, some rules have been summarized from judicial practice. Here, we will only discuss the rules for identifying information storage space because that was the defendant’s contention. These are the identification rules in the guideline for trials of copyright cases from the Beijing High People’s Court. Let’s have a look at Article 9.10. Please note the key words “general”. It means it is a relatively flexible provision. So we should not apply it rigidly but take overall consideration of the whole case.

OK. Let’s back to this case and see how the defendant’s service are determined by the court. First is the burden of proof, who will take the burden of proof for this issue? The answer is in this provisions. Article 6 provides that the defendant shall be bear the burden of proof. It means if the defendant fails to provide evidence for this issue he will take the negative consequence. Then, let’s look at what evidence the defendant in this case has presented in order to prove that it’s information storage space. The first one is the user agreement. Article 7 stipulates that this app only provides information storage space for the users and the users should take the responsibility for the contents uploaded. This can match up with the subsection 2 of the above guidelines, right? The second evidence is a webpage that shows the name of the uploader of infringing videos. In this page, the uploader is called “飘荷无忧”. The third one is the users’ information, including the users’ nicknames, ID addresses, time of registration, and telephone number. With these evidence, how can the court determine this issue?

In my opinion, when dealing with internet related civil disputes, judges’ daily life experience can often play a very important role. Judges are also network users or netizens, and netizens have a relatively unified understanding of some common apps. For instance, when we talk about Baidu, we know it provides search and link services. In general, our determination of facts in specific cases should not contradict the general understanding. So, when trying internet related disputes, judges tend to log on the software or website to use and experience it by themselves. Back to this case, do you think the videos are uploaded by the users or staff of the app operator? I think by taking into account our online experience, we can generally conclude that the defendant is highly likely to be an information storage space. Accordingly, the court held that the defendant provides information storage space service in this case.

Okay, so our first issue is answered. Then, let’s move on to the second issue. Should the defendant, as an internet service provider, be liable for the infringement in this case or should it be protected by the safe harbor?

Before answering this question, let’s look at two basic concepts in the copyright law, namely direct infringement and secondary/contributory infringement. The former one means that directly taking an action under the control of proprietary rights without the permission of copyright owner. The latter one means that inducing, prompting or materially helping others to carry out the direct infringement. The existence of direct infringement is the precondition of the secondary infringement. The key difference between the two acts of infringement is the secondary infringement takes the fault as an element for determining liability.

Then another question is what safe harbor is? This concept comes from the US. At the very beginning of the development of internet, some US courts imposed direct liability to the ISPs. That means once there were infringing works on the websites, the ISPs should be held liable for it. Apparently this imposed the ISPs too much responsibility and badly influenced the development of them. So protect the newly-born technology, the DigitalMillennium Copyright Act of the US, DMCA provides four safe harbors to the them so that they can be exempt from liability in some circumstances. China made similar provisions in *Regulations on the Right of Communication Through Information Networks.* But as the technology develops, ISPs are mainly liable for secondary infringement in copyright cases. As we mentioned before, the secondary infringement takes the fault as an element. This is why the defendant in this case pleaded that it is an ISP. The ultimate goal of him is to prove that he has no “fault” so that he doesn’t need to take responsibility. So, the key to the question becomes whether the defendant, as an ISP, has any “fault” in this case.

Here, a key issue should be mentioned. That is the court had held that the users committed direct infringement in this case. As we mentioned before, that is the precondition of the second issue. If there is no direct infringement of the network users, there is no possibility that the defendant commit secondary infringement.

Ok, let’s continue the “fault” issue. What is fault? This word is familiar to us when we study tort law. Let’s see how to understand “fault” in internet cases. Again, Article 1197 of the *Civil Code* stipulates that a network service provider who knows or should have known that a network user has infringed upon the civil-law rights and interests of another person by using its network services but fails to take necessary measures, shall assume joint and several liability with the network user. Here, the “know or should have known” is the expression on the subjective fault of the ISP. “Know” refers to the actual knowledge, and it is a kind of fact. So it’s easy to determine. For example, the copyright owners send a notice to the ISP that there is infringing works on the platform, and in such situation the ISP actually knows about the infringement. But it is very difficult to identify “should have known”. “Should have known” is related to a certain duty of care of the ISPs. And it is a legal presumption. To what extent the ISPs should take the duty of care is the key issue. Judicial interpretations tried to make a list of factors for judging “should have known”, such as Article 9 of the *Provisions of the Supreme People’s Court on Several Issues Concerning Law Application in the Trial of Civil Disputes over Infringement on the Right of Communication through Information Network,* there are the following factors to be considered, there can be a few:

(1) The network service provider's capability of information management

(2) The type and popularity of the disseminated work and the visibility of the infringing information.

(3) Whether it has chosen, edited, modified, recommended or otherwise dealt with the work.

(4) Whether it has taken reasonable measures to prevent infringement.

(5) Whether it has set up any convenient programs to receive notice of infringement and make reasonable response to the notice in a timely manner.

(6) Whether it has taken reasonable measures against repeated infringements. And other relevant factors.

Now let’s look at the specific situation in this case. When determining the fault of the defendant, the judges mainly considered the following factors: First, the business model of the defendant and the possibility of its inducing infringement. It is a dubbing show app that provides dubbing service for the users. So the operator should have notice that the users may highly likely use clips of movies or cartoons as dubbing materials. So the court thought that such business model is a big induction of infringement. Secondly, the popularity of the plaintiff’s works and the obviousness of infringement. As we mentioned at the very beginning, Ali is a very famous character. And the names of most dubbing materials and dubbing videos include “Ali” in it. When type “Ali” in the search box, related videos will come up. On the other hand, the users, as individual customers, are less likely get permission for using it from the copyright owner. So the court thought that the infringement is obvious. Thirdly, whether the defendant has made profits from the infringing video. As we mentioned before, the platform can get profits from for the dubbing videos by the users, and it should take a relatively high duty of care for the infringement on the app. And if the defendant did not fulfill his duty of care he may be held liable. Ok, taking overall consideration to these factors, the judge concluded that the defendant should have known the existence of infringing videos and has a duty of care to prevent such infringement on its app. In such case, the defendant has a fault in that it did not take reasonable measures to prevent the infringement, so it should bear tort liability.

That’s the general information about the case. And that’s all my part. Thank you.