

INTERMEDIARY LIABILITY IN CHINA

In recent years, there has been a growing concern over the need to provide better and more efficient regulation of e-commerce in China. This includes the need to address issues of counterfeit goods, consumer fraud, privacy, intellectual property (IP) theft, tax evasion and promotion of competition and consumer protection. Since a great part of copyrighted works and trademarked goods in China is consumed via network service providers, the regulations on intermediary liability have become ever more relevant.

In China there is case law codified in guidelines for Beijing courts, which is reinforcing the duties of care. Copyright Law, which touches upon the expressions of ideas, has always been politicized in China. Trademark Law, however, was considered apolitical, and the filtering of counterfeit products more or less a private affair.

China's intermediary liability regulation evolved from broad and granular to more specific and sophisticated. The big step forward was the promulgation of the Regulations for the Protection of the Right of Communication through the Information Network in 2006 (Regulations 2006). The Regulations 2006 clarifies which kind of network service providers are eligible for safe harbor and makes clear when the immunity via the safe harbors are cancelled.

On January 1, 2019 China's new e-commerce law took effect. One important feature of the act is the requirement that online businesses must register and acquire all necessary licenses regulating particular activities, such as sales of therapeutic drugs.

The legislation also strengthens intellectual property protection and addresses the problem of manufacturing and sale of counterfeit goods. Under the law, both the counterfeiters, as well as e-commerce operators who fail to "take necessary measures" to prevent and stop sellers in violation of intellectual property rights, can be held liable. Fines can reach up to RMB 2 million (\$292 000) in serious cases of intellectual property infringement. Platform operators are also prohibited from imposing unreasonable restrictions, conditions or fees on merchants. Operators must keep transaction records, as well as information of products and services provided, for at least three years. The new law further enhances consumer protection and competition by requiring the e-commerce operator to avoid engaging in misleading and deceptive practices. E-commerce platforms will also have to establish a system to post consumer comments and introduce other measures to ensure accurate information.

These proactive measures were already accepted as standards in Article 27 of the Beijing Higher People's Court Guidelines on Trial Cases Involving Intellectual Property Rights through the Network by judicial authorities in Beijing. The guidelines work horizontally and are relevant for intermediary liability in case of both trademark and copyright infringement.

In 2012, in *Descente v. Today Beijing City Info. Tech.*, the Beijing Higher People's Court held that because the defendant was running a website for group purchasing, it should apply reactive as well as proactive measures. In a complex interplay of successive laws, regulations, case law, judicial interpretations and guidelines, a special convergence has

evolved in the case law of China in regard to intermediary liability related to copyright and trademark infringement. Eight factors that may influence liability have been distilled out of this practice. Some of them pertain to the prominent placement of the infringing information on the site of the platform service provider or to the existence of information with the network vendor acknowledging that it infringed rights – through the sale or offering of goods or services unreasonably low.



China, with its multi-layered censorship regime, extensively uses human reviewers to find and remove information that the government finds disagreeable to socialist values or endangering state security and social harmony. However, technology has passed a critical threshold and makes possible cost-effective computing power to be used to filter the servers proactively against infringements. Platforms, such as Alibaba and Baidu, with their wealth of data are best positioned to continuously teach their machines via deep learning. This can lead to an ongoing improvement of the platforms' predictive analytics that allows them to detect and identify infringements.

Experts claim artificial intelligence makes each platform omniscient, which in turn will give a fatal blow to the already weak safe harbor protection in China. The trend for China's duty of care shifts from an obligation to apply appropriate reasonable measures in case of specific knowledge to an obligation to apply reasonable measures in case of general knowledge. The implication is that the filtering standard for platform service providers will be intensified continuously and that they will have to proactively monitor and cleanse their servers gradually.

Compiled by Media 21 Foundation (2019) from

http://www.china.org.cn/opinion/2019-01/09/content_74355741.htm

<http://www.ipdragon.org/wp-content/uploads/2017/04/Chinas-IP-Regulation-and-Omniscient-Intermediaries-9-April-2017.pdf>