

Provider Liability in China and the EU – comparative observations

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EU: situation until 2019

Two regulatory sets:

Art. 8 (3) Infosoc Directive 2001/29/EC and Art.11 Enforcement Directive 2004/48/EC: right holders entitled to apply for injunctions against „intermediaries“ whose services are used by third infringers

vs.

Articles 12 („mere conduit“), 13 („caching“), 14 („hosting“) and 15 („no general obligation to monitor“) of the E-Commerce Directive 2000/31/EC exempts conduit, caching and host providers from liability for infringement provided that they play a mere passive, technical role and that cache and host providers react expeditiously to remove infringing content upon a right owner`s notification („notice and take down“)

EU: situation since the enactment of the Copyright in the Digital Single Market (DSM) Directive 2019/790, Art.17

<https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32019L0790&from=EN>

Big and well-established content sharing service providers who gain a profit from advertising in connection with content uploaded by their clients now directly liable for communication to the public or making available to the public, Art.17 (1);

No more „notice and take down“ privilege of such providers but Art.17 (3) explicitly exempts them from application of Art.14 (1) E-Commerce Directive

Providers henceforth expected to conclude license agreements with authors resp. collecting societies, extended collective licensing (Art.12) expected to play a significant role in this area

Provision targeted at content sharing services like YouTube, exempted are „not-for-profit online encyclopedias, not-for-profit educational and scientific repositories, open source software-developing and-sharing platforms, providers of electronic communications services as defined in Directive (EU) 2018/1972, online marketplaces, business-to-business cloud services and cloud services that allow users to upload content for their own use“ (Art.2(6))

Also, „limited liability“ regime in Art.17 (6) for new, less than three year old services with an annual turnover of less than 10 Mio Euros, do not have to meet all of the following conditions to escape liability:

EU: situation since the enactment of the DSM Directive (cont`d)

Art.17 (4) on exemptions from liability:

If no authorisation is granted, online content-sharing service providers shall be liable for unauthorised acts of communication to the public, including making available to the public, of copyright-protected works and other subject matter, unless the service providers demonstrate that they have:

(a) made best efforts to obtain an authorisation, and

(b) made, in accordance with high industry standards of professional diligence, best efforts to ensure the unavailability of specific works and other subject matter for which the rightholders have provided the service providers with the relevant and necessary information; and in any event

(c) acted expeditiously, upon receiving a sufficiently substantiated notice from the rightholders, to disable access to, or to remove from their websites, the notified works or other subject matter, and made best efforts to prevent their future uploads in accordance with point (b)

i.e., expeditious „taking down“ henceforth only one of three conditions that must be cumulatively met to escape liability

In sum: stricter liability

Main justification: value gap between allegedly huge profit gained from uploading works and low revenue returned to authors

Concern/criticism: henceforth excessive application of „upload filters“ to escape liability but Art.17 contains several safeguards for users, inter alia, that member states shall prescribe „complaint and redress mechanisms“ (Para.9).

Host/content sharing provider liability in China

General rule: joint and several liability of service providers of any kind whose premises are used by thirds for infringing purposes, according the Art.36 of the Tort Liability Law 侵权责任法 of 2009:

A network user or network service provider who infringes upon the civil right or interest of another person through network shall assume tort liability.

Where a network user commits a tort through the network services, the victim of the tort shall be entitled to **notify** the network service provider **to take such necessary measures as deletion, block or disconnection**. If, after being notified, the network service provider fails to take necessary measures in a timely manner, it shall be jointly and severally liable for any additional harm with the network user.

Where a network service provider knows that a network user is infringing upon a civil right or interest of another person through its network services, and fails to take necessary measures, it shall be jointly and severally liable for any additional harm with the network user.

第三十六条 网络用户、网络服务提供者利用网络侵害他人民事权益的，应当承担侵权责任。

网络用户利用网络服务实施侵权行为的，被侵权人有权**通知**网络服务提供者**采取删除、屏蔽、断开链接等必要措施**。网络服务提供者接到通知后未及时采取必要措施的，对损害的扩大部分与该网络用户承担连带责任。

网络服务提供者知道网络用户利用其网络服务侵害他人民事权益，未采取必要措施的，与该网络用户承担连带责任。

Appears to regulate joint and several liability as well as the same safe harbour rules for all kinds of online services.

More detailed provisions, however, contained in copyright-specific administrative rules

Regulation on the Protection of the Right to Communicate Works to the Public over Information Networks (2013 Revision) [信息网络传播权保护条例\(2013修订\)](#)

Detailed „notice and take down“ procedure for services providing “information storage space or searching and linking services” (Rules 14 – 17)

Exemptions from liability for compensation, their extent depending on the type of service:

- *providers of automatic access or transmission services*: no liability for compensation at all (Rule 20)
- *mere caching services*: no liability for compensation at all (Rule 21), unlike E-commerce directive that applies „notice and take down“
- *hosting services*: no liability for compensation, provided that they had no reason to know about the infringement, have not gained a direct profit from its upload and have reacted expeditiously upon a right owner`s notification in accordance with the „notice and take down“ procedure

Tencent „Mini Program“ decision of the Hangzhou Internet Court of 27 February 2019



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公告送达



庭审实况



诉讼工具



诉讼规程

受理范围快速预览

The court`s reasoning

Third party defendant used defendant Tencent`s Wechat „mini program“ function (similar to apps but can be directly accessed through WeChat without having to download them) to make available a program in which the plaintiff`s tutorials were without authorization

Court denied liability of Tencent, Tencent would form a „provider of automatic access or transmission services“ pursuant to Rule 20, without even the obligation to react to a right owner`s notice

Tencent would be unable to screen the mini programs for infringing content, its Wechat would simply serve as a port, and the only way of blocking access to infringing content would be to cut the connection to the whole mini program, which would go beyond the „necessary“ measures stipulated in Art.36 Tort Liability Law

Summary of the decision:

[#](http://www.pkulaw.cn/Case/pal_a3ecfd5d734f711d853207585d4cbb24c71f77d095387105bdfb.html?match=Exact)

Thank you for listening

谢谢静听