13. PAVING THE WAY FOR THE FILTERING OBLIGATION IN CHINA: INCORPORATING WITH SAFE HARBOUR AND FAIR USE

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ABSTRACT

In the data-driven age, the progress of filtering technologg t0

has been focused on internet service providers' *ex-ante* obligations, such as monitoring the use of copyright content online. Although the European Union (EU) Copyright Directive

offer some reasons to support the formulation of a filtering obligation (or system) in China, and to provide general policy guidance for policymakers in China and other nations currently considering such reform in accordance with international trends.

This research paper analyses the topic in four parts: Part 1 is the introduction. Part 2 will discuss the possibility of formulating the filtering obligation from the perspective of four parties (namely platform, authority, right holder and end-user), and the rationality of this obligation in light of three factors (technology, economy and law) in China. Part 3 will analyse the obligation's possible inconsistencies with safe harbour and fair use. Finally, Part 4 will provide a feasible model and propose a method for the establishment of a hierarchical and comprehensive system of filtering instead of a simple obligation, in the context of algorithmic copyright enforcement.

of the 'two-sided market' it creates.[8] Furthermore, in the

(ii) The Ambiguous Standpoints of Authorities

In China, there is usually a long negotiation between platforms and authorities to reach an agreement on copyright issues. Because of varying motivations, the administration paid more attention to reducing costs of governance in cyberspace.[16] However, in the past decade, viewpoints on

must react by assessing the notices and by taking action appropriately. In the last few years, the right holders begun advocating for reconstructing the 'notice and takedown' regime. Some right holders expressed a preference that the platform, not only take down the notified content, but also prevent its reappearance in the future. In this context, the so-called 'notice and staydown' model emerged.[31] In addition, end-users are more eager to use and share online content (some content contain copyright works) freely and legally. The application of the fair use regime therefore becomes more important in relation to the UGC.

In a word, the platform's governance is a systematic program. The traditional 'notice and takedown' regime only offers right holders an ex-post infringement management of copyright. However, asTd[(H)-7.7MC /Span <</MC(w)-9 (e)0.73ee37.16 -1.827 Td[(m)-327 Td[(m)-3 the plats4(l)-2.7 it (m)- (ent Td[(h)1 (e)-170w 0 -1.827 u7

improvement may therefore finally reach online content markets.[37]

(iii) Legal Factor: The Uncertainty on the Existing Duty of Care

Reviewing the application of the 'notice-and-takedown' regime in China over the past decade, the courts and administration continuously enriched the online copyright infringement liability regime, for example the 'red flag' development. Article 9 of 2012 Provisions, defined a list of six circumstances where the 'red flag' knowledge of ISP may be presumed. Article 9 can be deemed to be a duty of care in the copyright legal system in China. In practice, the 'notice-and-takedown' reflects the objectivity of the procedure, while the duty of care is slightly subjective, and it should be noted that its implementation depends on the judges. Thus, Article 9 is usually interpreted differently in a case by case approach. This caused the uncertainty of the liability regime to be aggravated gradually.

In summary, these three factors of technology, economy, and law, are important reasons for establishing the filtering obligation (mechanism) in China. However, two controversial problems that remain are: (1) What is the effect on the safe harbour regime, and (2) what is the effect on the fair use

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From an economic perspective, filtration could help to close the value gap. In 2016, the EU draft directive aimed to close the value gap that was an alleged unfair distribution of revenues generated from the online use of copyright works between parties along the value chain.[42] According to the safe harbour, right holders usually could not monetize the exchange of UGCs and ad-funded platforms like YouTube. However, many empirical studies have shown that the digital environment for the content industry has actually promoted the benefits and so-

Court of Justice (hereafter the ECJ) case – *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v Netlog NV*,[51] pointed out that peer-to-peer service provider that adopt filtering measures to prevent the spread of pirated files, will damage users' personal data and users' dissemination and access to information rights. In *Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)*,[52] the ECJ upheld similar opinions.

If the algorithm was constructing a new paradigm in copyright enforcement, then fair use should automatically be applied in the algorithmic environment. Even if the perfection of this mechanism with the help of all parties would take many years, it is still deemed worth the wait.[53] In addition, although they are almost automated, algorithmic mechanisms have to offer right holders some independent choices, including the abandonment of rights. In the data-driven age, and in order to spread the work more widely, right holders may allow end-users to create derivative works thereby generating more revenue and influence for such right holders. It follows that when designing the filtering mechanism, right holders should be given more choices, including an option of abstaining.[54]

A 'Ratio Test'[55] is the current method of setting parameters of permitted use, and the execution is dependent on appropriate and proportionate content recognition technologies (algorithms). With the development of technologies, it is possible that the rates of underreporting or misreporting by filtering mechanisms would be greatly reduced or even negligible. Subsequently, questions arise about how to set up filtering standards relating to fair use and whether those standards are reasonable and legal. In law, a reasonable standard should achieve a balance between the low rate of underreporting and the low rate of misreporting. That is, the lower the rate of underreporting, the higher the rate of misreporting. The right holders expect a low rate of underreporting, while end-users prefer a low rate of misreporting, in order to enjoy more content. Hence, the choice of the standard is the result of weighing up different interests.[56]

4. PROPOSAL: SHIFTING FROM FILTERING OBLIGATION TO FILTERING SYSTEM

The analysis has shown that soon the establishment of a filtering obligation in China may face three main obstacles. First, in respect of technology, the reasonableness and feasibility of filtrations will still be questionable; meanwhile, a filtering standard based on an algorithm would be hard to set up and unified. Second, in respect of the economic considerations and to reach a balance among all the parties, a precise, flexible and dynamic distribution of filtering costs would be required. It should be noted that even in the EU, the balance remains illusory and the status quo is unfulfilled.[57] Third, in respect of the law, the State Council has not revised the Copyright Law since 2010.[58] One of the reasons for the

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[51] [2012] Case C-360 /10.

[52] [2011] Case C-70/10.

[53] Niva Elkin-Koren, 'Fair Use by Design' (2017) 64, no. 5 University of California Los Angeles Law Review 1082.

[54] Matthew Sag, 'Internet Safe Harbors and the Transformation of Copyright Law' (2017) 93 Notre Dame Law Review 499.

[55] Fred von Lohmann, 'Fair Use Principles for User Generated Video Content' (The Electronic Frontier Foundation (*EFF*, 31 October 2007) <https://www.eff.org/deeplinks/2007/10/fair-use-principles-ugc> accessed 12 October 2019.

[56] See Cui (n 30). Prof. Cui suggested that the 'absolute quantity' and 'relative proportion' standards, and the algorithm that should be used reasonably and designed according to these two standards.

[57] It is noticeable that art 17 para.10 of DSM Directive planes a stakeholder dialog to discuss the filtering obligation from various communities in the EU. View EU commission, 'Copyright Stakeholder Dialogues' (*Streaming Service of the European Commission*, 15 October 2019) <https://webcast.ec.europa.eu/copyright-stakeholder-dialogues-

lack of revision is the fact that the revision of the liability regime of ISPs is so controversial that the legislature could not balance the varying interests and coordinate such liability with other regimes (like the safe harbour provisions or the fair use doctrine). Hence, in the context of platforms and data-driven economies, when compared with the EU and US, the practical and feasible way to achieve this objective in China is formulating a hierarchical filtering system rather than a simple filtering obligation.

A. FORMULATING A HIERARCHICAL FILTERING SYSTEM IN CHINA

(i) Top-Level Doctrine

As mentioned above, formulating a clause for a general duty of care (without specifying the filtering obligation)[59] on ISPs in China's copyright law,[60] may currently be more feasible. The general duty of care will make room for interpretation by judges on a case-by-case basis and could be elaborated on in the emerging case guidance project on intellectual property cases.[61] In China's copyright infringement liability system, there are two ways of disseminating works by the an ISP: (1) the ISP disseminates the work by itself and strictly bears the direct infringing liability; (2) the ISP does not disseminate the work, but provides the 'conduit' to the end-users, therefore incurring contributory infringement liability. The second scenario may ascribe a duty of care to the ISP, but this duty cannot be found in the 2010 Copyright Law, Civil Code or Tort Law of China. Accordingly, under the current legal system, the limitation of the duty of care is blurred. In clarifying the limitations of the duty of care, the solution is to set up a general duty of care in China's copyright law in coordination

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In fact, under the filtering mechanism, platforms not only play

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