

Study on the Criminal Liability of Deep Link in the Crime of Copyright Infringement

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ABSTRACT

Deep linking is a form of web link, which connects to the content of another webpage but the users cannot tell the resource of the content while viewing those content. Therefore, deep linking is often regarded as an infringement of copyright. However, there is no specific regulations in Chinese criminal law to regulate deep linking. Thus, it is necessary to identify whether a deep link is an infringement or not and set up criteria for the identification. In this essay, the author will analyse the current difficulties in determining criminal liability of deep link in China. Furthermore, the author will explain the causes for the difficulties mentioned above. Then the author will research some cases regarding deep link to get the knowledge of the judicial practice. At the end of the essay, the author will propose a new model to determine the criminal liability of deep link, where the criteria would be set up to determining the criminal with parameters and the types of webpages.

Keywords: *Deep Linking, Criminal Liability, Infringement.*

1. INTRODUCTION

When looking through websites, the users usually click on links to jump to another page. With the development of technology, a new form of link named deep linking has emerged in recent years. Unlike traditional links, Andrew L. Dahm defines deep linking as a sort of link to a web page that the owner of the targeted web page does not define as the proper page from which users should begin to access the website. [1] In other words, the user accesses the content of the targeted website without being aware of it.

As shown in some researches, deep linking is a controversial practice and there are many attempts to determine whether an unauthorized deep linking is infringement of copyright or not.[2] However, many existing researches focus on the traditional deep linking, for instance, in the case of Ticketmaster v. Tickets.com, the targeted link was deep-linked to another website for the customers to purchase the tickets.[3] The justice thought this sort of deep link was not an infringement because it only provided the information to the customer as a road sign. But in China, there is no specific official document to regulate deep linking, so it is difficult to identify the correlation between of deep linking and the infringement of copyright.[4] Especially with the development of video technology, deep linking practice

has now involved with audio-visual works. In those cases, deep links still provide information, but those information cover so much content that the deep link could not be regarded as a single road sign any more. Therefore, it is necessary to research the criminal liability of deep linking covering the audiovisual works and determine whether it is an infringement of copyright or not.

This essay will research the current difficulty and its causes in determining criminal liability of deep link in China and analyze some cases regarding deep link of audiovisual works. At the end of the essay, the author will propose a new model to determine the criminal liability of deep link.

2. THE DIFFICULTY IN DETERMINING CRIMINAL LIABILITY OF DEEP LINK

Deep-linked websites steal the content from the targeted websites, but they do not store their data in their own servers. In other words, the origin of the content is still in the targeted website. According to the Criminal Law of China, the act of communicating any audiovisual work to the public through an information network without the permission of its copyright owner may be suspected to be illegal. But whether the act of deep linking belongs to "communicating to the public through

the information network" or not, there are many opinions in the academic field on this issue, attempting to solve this problem, which is the identification of crime in the cyberspace.

2.1. Lack of Relevant Regulations

There are currently no clear regulations in China to identify the criminal deep linking practice. On the issue of deep linking, China's criminal law generally regulates it through the crime of "copyright infringement". Although this regulatory path has explained the illegal act of deep linking through the existing criminal law, there is still a need to build a bridge with clear legal article between the act of deep linking and the act of "communicating through the information network".

As for the traditional problems of online linking crimes, it is common to think that the publisher of the link infringes the copyright of the original work from the moment of publishing the link. But in the case of deep linking, it is difficult to determine how the publisher of the link infringes the copyright because the publisher does not perform the act of publishing the original work. Therefore, deep linking is different from the traditional copyright infringement crimes. So deep linking cannot be directly regulated by the provisions of criminal law, which means there's a lack of relevant regulations in terms of deep linking.

Due to the characteristic of criminal law, the legislation on the issues about new technologies such as deep linking will lag behind the development of the technology itself. Therefore, there is usually no clear and uniform standard for cases that occur during this blank period. Since the judges in these cases do not necessarily have professional knowledge of the current state of Internet ecology, some judgements are likely to have a negative impact on the development of the Internet, especially the application of linking.

2.2. Three Doctrines of Deep Linking

There are three different types of doctrines have been launched to solve this problem from different perspectives.

According to the research, there are three doctrines regarding the deep linking: the server standard, the social harm standard and the substantial presentation standard. The author will tell the difference in the standards of criminalization among these doctrines.

The server standard theory, also known as the dissemination source theory, refers to the fact that only the act of uploading a work to a server open to the public is an act of communicating to the public through the information network.[5] But most deep links link to the content that comes from the original server and does not take the server ownership of the data. Thus, most of the

deep links cannot be considered as the act of infringement.

The social harm standard says that the social harm of the act is the standard to determine whether a certain deep link is an act of dissemination or not. If a website uses deep link, which takes away the page view volume of the original website, it will objectively lead to the potential loss of the copyright owner's advertising revenue, thus infringing the owner's copyright and relevant interests. According to the social harm standard, "deep linking" with significant social harm should be regarded as an infringement.

According to the substantial presentation standard, as long as the work is provided to the public, it is an act of communicating to the public through the information network. Although the work in the deep link is legal, and the ownership of data also comes from the server of the original website.[6] The users may mistakenly feel that they are viewing the works on the deep-linked website, not the targeted one. Therefore, most of the deep links are regarded as an infringement according to the substantial presentation standard.[7]

All three doctrines are trying to solve the problem of determining the legal liability of deep links, but the main difference lies in the standards of determining of the criminalization. The server standard emphasizes the act of uploading, while the social harm standard attaches importance to the consequences of the actor's behaviour, and the substantial presentation standard emphasizes the act of sharing the link. The reason for this difference is that deep links separate the act of communicating to the public through the information network into two phases about uploading and sharing, and this separation leads to the failure of determining the liability of deep linking in the criminal law.

Because of the difference in determining the deep linking, it is difficult to generally acceptable regulation in terms of deep linking, which is the exact difficulty mentioned in the last part.

2.3. The Extent of Legal Interest Infringement in the Online Arena Is Difficult to Determine

From the previous cases involving network links, no matter deep links or ordinary links, it is obvious that the courts make judgments with more consideration on the intention of the suspects, which is the subjective aspect of the crime, but ignore the damage on the legal benefits caused by their behaviour, which is the objective aspect of the crime. The reason for this is that, as follows, the proof obtained by the prosecutors is very limited, which is merely some technical parameters such as the operation time, the page view volume, and the number of works on the websites. With these parameters, it is difficult for the court to identify the social harm of the act. Compared with parameters, the illegal income of the

suspect is easier to obtain, so most of the judgments take the illegal income as an important element into consideration.

However, in some cases, the monetary income from criminal cannot accurately reflect the harm caused by the criminal practice because there are different approaches for criminals to make income.[8] In some cases, the suspect makes profit by placing advertisements,[9] while in other cases, the suspect raise membership fees of the websites.[10] The amount of illegal income generated by raising membership fees is usually lower than that from advertising. However, the act of raising membership fees reflects that the suspect has a complete criminal chain and their criminal intention is stronger. On the other hand, in cases of placing advertisement in their deep linking, those advertisements are usually not appropriate to the public and the spreading of these advertisements also cause harm to society.

In this view, when it comes to the cases which involve deep links, it is complex to determine the harm by a certain measure, let alone make a regulation to apply to all the cases of deep linking.

3. CAUSES OF THE DIFFICULTY IN DETERMINING CRIMINAL LIABILITY OF DEEP LINK

There are several difficulties in determining the liability of deep linking. Although some of the difficulties are hard to solve, for instance, the divergence in academic, there are some difficulties that are east to cope with. In order to deal with the difficulties, it is essential to analyze the cause of those difficulties.

3.1.The Lagging of Making Regulation to Guide New Technology

The proliferation of the Internet and the development of technology have brought impact to the system of criminal law. During this process, a lot of controversial practice has emerged, including deep linking.

Unlike the common law system in America and United Kingdom, there are some lagging effects in the civil law system in China. Because every judgment needs to be backed up by the guidelines from the law. However, it takes time to go through the whole process of setting up a new regulation, especially when it regards to the new technology.

However, this sort of lagging reflects the preciseness of criminal law, because the judge should refer to the professional guidelines when making the judgments. Especially when it comes to the case of deep linking, for many people, it is not a familiar concept, thus, the regulation can provide the judges reference to identify whether a specific practice an infringement or not.

3.2.The Principle of Necessity in The Criminal Law

Since the principle of necessity is a basic principle of criminal law, it is difficult to set up the regulation in criminal law to regulate specific things, such as deep linking. In contrast, the civil law has the function of filling legal loopholes. Thus, in civil cases of deep linking, judges often have more discretion to determine whether a certain link is illegal or not. Because of this, the lack of regulation in criminal law makes the process of attribution of criminal acts more difficult.

In addition, most criminal cases are more socially harmful than civil cases. However, in many cases involving deep links, the links themselves do not produce serious social harm, but the content in the links has pornographic or violent information, or the deep link has a huge amount of illegal income.[11] Therefore, only with the technical parameters of the links is not accurate enough to measure the social harm of a deep link in a case.

3.3.The Huge Impact on The Society

With the development of Internet, more and more websites are applying deep linking. Some websites even support users to share content from other websites by the means of deep linking. This indicates that the subject of deep linking has now expanded to a wider range of general Internet users, and the purpose of such deep linking is mostly for the convenience of communicating or sharing rather than for profit or other criminal intention. Thus, when regulating deep linking through criminal law, it is necessary to pay attention to set up the exceptions.

The criminal law is designed to maintain the social order and punish criminal behaviour, so there is no need to restrict or regulate deep linking of the common users of Internet. On the contrary, when setting up the regulations, consideration should be given to designate exemption rules for deep links to avoid making new restrictions to the users and the development of Internet. As can be seen, the close connection between deep links and social life leads to inconvenience and difficulties in setting up relevant regulations.

4. FINDS IN THE CASES

In judicial practice, the courts often determine whether a deep link is an act of communicating to the public by the substantial presentation standard. In the case of Shanghai Jing'an District People's Procuratorate, the defendant linked his website to a targeted website through a deep link in order to obtain the index address of the seed files of the audiovisual works. And then, he provided the QVOD software to users as the only way to watch the audio-visual works.[12] Thus, his act is

regarded as the communication to the public. As we can see in the above and other similar cases, in terms of the incrimination criteria, the court usually think more about whether the behaviour in the case substantially present the work on the information network or not.[13]

From the cases, we can find that when it come to the determination of the penalty, the court will more regard the social harm of the behaviour, which is consistent with the social harm standard. For example, in the case of Tian Yilong, the court took the fact into account that the defendant's website had some links that could not be opened, which did not actually infringe the copyright, and thus deducted them from the amount of infringing works in the sentencing.[14]

From the above cases, it is easy to draw the following conclusions, in terms of the incrimination criteria, the court usually apply the substantial presentation standard, while in terms of the penalty of the criminal, it usually applies the social harm standard.

5. A NEW MODEL OF DETERMINING OF CRIMINAL LIABILITY

In previous cases of copyright infringement, the courts often make the sentence based on the social harm caused by the deep link. However, in many cases, it is difficult to determine the extent of social harm. In order to determine the criminal liability of deep linking, the following model can be introduced. When the social harm of deep linking cannot be accurately determined, a two-dimensional judgment model can be applied. In the model, the relevant technical parameters of deep link serve as the horizontal axis and the types of websites involving deep links are the vertical axis.

5.1.Criteria of Infringement Liability and Social Harm Through the Parameters

Owing to the difficulty in determining the social harm caused by the links, it is necessary to propose a legislature to clarify the criteria for determining the infringement liability of deep linking and judge the social harm through the parameters of the relevant websites which mentioned above. Thus, there will be a clearer criterion for the incrimination and determine the penalty of the relevant cases.

For instance, once the deep link in the case is clicked more than 500 times in a single day, it can be assumed that the act of setting up the deep link has carried out the dissemination act. When the number of clicks on the link increases with the decrease in the number of views on the website, it can be assumed that the infringing website has diverted some of the page view volume from the targeted website, and in such a case, the criteria for the incrimination could be changed to 800, for instance, because of the diversion of the page view volume.

5.2.Distinguishing Deep Linking Infringement on Different Websites

As mentioned above, an increasing number of the ordinary Internet users are sharing content by links. In most cases, the behaviour of these Internet users is not intentional, and they have either intention to obtain the illegal income in this way. Therefore, a distinction between the deep linking behaviour on different websites should be considered in the legislative stage.

A stricter standard should be set for commercial companies' websites or video sites, where deep linking is usually done with more intention of making illegal profits. On the contrary, deep linking on personal blogs is usually done to facilitate the communication and expand influence, usually without subjective criminal intent. Therefore, determining the deep links on different types of websites can regulate copyright infringement more effectively and reduce the impact on normal Internet users.

5.3.Exception for the Criteria

The above-mentioned provisions should also contain exemption. For example, Assuming the page view volume of a website with deep link suddenly increases from a certain moment, and then the page view volume of the targeted website increases. It can be presumed that although the work is disseminated by deep link, it still contains the characteristic information of the original website to lead the viewers to click on the original website for browsing. Thus, the behaviour of the website with the link has a certain advertising effect, which should be taken into consideration during the sentencing.

Deep linking is gaining momentum and has been increasingly applied to works other than audiovisual works in recent years, such as the case of Li Jianxiong, the defendant managed a website of novel, and a similar model can be introduced in this type of cases.[15] Due to its characteristic of easy reproduction, the deep-linked works are more likely to be widely disseminated, so the criteria for the incrimination in this sort of cases can be adjusted to a lower number, for instance 300 daily page views.

6. CONCLUSION

In this essay, the author has introduced current difficulties in determining the liability of deep linking in copyright infringement, which could be concluded as the lack of regulations, the divergence in academic and the difficulty in determining the extent of infringement. With the analysis of the causes for the above-mentioned difficulties and the findings from cases, the author proposed a new model to help in determining the liability of deep linking. The model mentioned in the essay has

two dimensions. The first dimension, which is the horizontal axis, reflects the quantity of the relevant technical parameters of deep link. The types of websites involving deep links are the vertical axis, which is the second dimension. Besides, there are still some issues which could not be comprehensively considered in this essay. For instance, the application of the model through cases has not been thoroughly researched. Further research about cases related to the deep linking was not completed due to the limited amount of current cases. With the development of Internet, there must be more types of deep links emerging and we can cope with the new situations by adopting new models. The deep linking is currently widely applied in the websites. Therefore, it is important to use criminal law to regulate deep linking in a proper way. With the emergence of new types of deep linking, the research on this issue is of great value.

REFERENCES

- [1] A. Dahm, (2004) Database Protection v. Deep Linking. *Texas Law Review*, 82(4): 1053-1090, Doi: 10.1177/196466304040195.
- [2] B. Ouyang, W. Luo, (2018) Deep linking should be distribution in the crime of copyright infringement. *Procuratorial Daily*, 2017-07-02.
- [3] Ticketmaster Corp. v. Tickets.com, Inc., Case No. 99-CV-07654HLHVBKX, 2003 WL21406289, at * 1 (C.D. Cal. Mar. 7, 2003).
- [4] Z. Ling, (2014) Deep linking may constitute a crime of violating indigenous rights. *China Intellectual Property Journal*, 2014-08-29, Doi: 10.38336/n.cnki.nzscq.2014.000854.
- [5] Q. Wang, (2017) Identify the information network dissemination behaviour should use the "server standard". *Procuratorial Daily*, 2017-07-02.
- [6] C. Lv, (2016) A Brief Analysis of Deep Linking, Framing and Link Piracy: A Perspective on the Right of Information Network Dissemination. *China Copyright* 2016(2): 4, Doi: 10.3969/j.issn.1671-4717.2016.02.010.
- [7] Q. Wang, (2016) Legal Analysis and Regulations on Providing "Deep Linking". *Law Science*, 16(10): 23.
- [8] The Third Branch of Shanghai People's Procuratorate v. Wang Li for Copyright Infringement, Shanghai Third Intermediate People's Court Case No. 31(2020), April 21, 2020.
- [9] Xuzhou People's Procuratorate of Jiangsu Province v. Zhang for Copyright Infringement, Xuzhou Intermediate People's Court of Jiangsu Province Case No. 28(2014), January 27, 2015.
- [10] People's Procuratorate of Huguan County, Shanxi Province v. Zhu Junkai for Copyright Infringement, People's Court of Huguan County, Shanxi Province Case No. 154(2019), December 13, 2019.
- [11] M. Li, (2019) Talking about the Criminal Law Protection of Internet Copyright from "Piracy Links. *Journal of Shandong University of Science and Technology (Social Sciences)*, 21(5): 52-60, Doi: 10.16452/j.cnki.sdkjksk.20191009.010.
- [12] Shanghai Jing'an District People's Procuratorate v. Zhang Junxiong for Copyright Infringement, Putuo District Intermediate People's Court of Shanghai Case No. 11(2013), May 23, 2014.
- [13] Xuzhou People's Procuratorate of Jiangsu Province v. Yuan, et al. for Copyright Infringement, Xuzhou Intermediate People's Court of Jiangsu Province Case No. 13(2015), August 13, 2015.
- [14] Xuzhou People's Procuratorate of Jiangsu Province v. Tian Yilong for Copyright Infringement, Xuzhou Intermediate People's Court of Jiangsu Province Case No. 31(2014), February 4, 2015.
- [15] Xuzhou People's Procuratorate of Jiangsu Province v. Li Jianxiong, et al. for Copyright Infringement, Xuzhou Intermediate People's Court of Jiangsu Province Case No. 86(2019), August 20, 2019.