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LEADING INTERNET CASE LAW

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Netflix and the German film levy

The EU General Court issued a decision in May 2018 ordering video on demand service - Netflix - to contribute to Germany's film subsidy system.



Beijing IP Court hands down important decision on streaming

Judgment No. 1818 (2015), Final, Civil Division, Intellectual Property Court, Beijing

In March 2018, the Beijing IP Court ('IP Court') handed down a decision rejecting the claim brought by Beijing Sina Internet Information Services Co. Ltd. for copyright infringement in a case involving the unauthorised online broadcasting of public television signals for live Chinese Super League football matches ('Continuous Images') by Beijing Tianying Jiuzhou Network Technology Co. Ltd. The IP Court overturned the findings of the first instance court and made a surprising decision that the Continuous Images do not constitute 'copyright works' under the Copyright Law of the People's Republic of China (the 'Copyright Law'). In reaching its decision, the IP Court discussed in detail the requirements for works to be recognised as 'cinematographic works and works created by virtue of an analogous method of film production.'

Beijing Sina Internet Information Services Co. Ltd. ('Sina'), operator of the SINA.COM portal, entered into an agreement with Chinese Super League Co. Ltd. on 7 March 2012. Under the agreement, Sina was granted an exclusive licence to broadcast the Continuous Images on its portal by way of live broadcasts, recorded broadcasts, broadcasts on demand or delayed broadcasts. Beijing Tianying Jiuzhou Network Technology Co. Ltd. ('Tianying') is the owner and operator of another portal in China, IFENG.COM. In 2013, Tianying offered hyperlinks to www.ifeng.sports.letv.com where the Continuous Images were broadcast live. Sina initiated civil proceedings against Tianying at the Beijing Chaoyang District Court ('District Court') alleging the following:

(i) By setting up a Chinese Super League channel on IFENG.COM and rebroadcasting the Chinese Super League matches live online, Tianying infringed Sina's copyright in the Continuous Images, which are protectable under the Copyright Law as 'works created by methods similar to the filming of movies';

(ii) Tianying's unauthorised rebroadcasting also constituted an act of unfair competition as it disrupted competition in the online broadcasting business and undermined the legitimate interests of Sina as an exclusive licensee of the Chinese Super League.

As www.ifeng.sports.letv.com was jointly operated by Tianying and Letv Internet Information & Technology Corp. Beijing, the latter joined as a party to the action at the request of the District Court.

Decision of the District Court

The District Court held on 30 June 2015² that the Continuous Images should be regarded as works protected by the Copyright Law due to the originality involved in the process of producing the same, due to the selection and compilation of the shots and the setting and positioning of the cameras. Regarding the infringement claim, the judge first considered whether Tianying's online live broadcast amounted to an infringement of Sina's right to 'communicate the works to the public through information networks³.' However, such right is defined under the Copyright Law to mean 'the right to communicate to the public a work, by wire or wireless means, in such a way that members of the public may access these works from a place and at a time individually chosen by them,' which is not applicable to live broadcasts online. The Judge then went on to hold that Article 10 (17) of the Copyright Law offered a broader right that could be applied in the present case, namely: "other types of rights enjoyed by a copyright owner." As a result, the District Court accepted Sina's copyright claim and ordered Tianying to pay damages of RMB 500,000. The Court dismissed the unfair competition claim raised by Sina as Sina's losses had been fully recognised and compensated in Sina's favour on the copyright infringement ground.

Decision of the IP Court

Tianying brought an appeal against the first instance decision before the IP Court and argued that, *inter alia*, the Continuous Images do not constitute works, due to their lack of originality. The IP Court delivered a long judgment discussing, *inter alia*, (i) the types of works which are

protectable under the Copyright Law, (ii) elements of cinematographic works and (iii) the interpretation of a 'rebroadcast' under Article 45 (1) of the Copyright Law.

Types of copyrightable works

Article 3 of the Copyright Law defines the categories of works that are copyrightable. The IP Court noted that the District Court did not specify in its judgment which type of work the Continuous Images amounted to and took the opportunity to clarify that only a work falling within any one of the categories of works stipulated under Article 3 of the Copyright Law can enjoy copyright protection in China. In other words, the court cannot decide that a work is protectable by copyright at its own discretion if there is no legal basis under the Copyright Law. The IP Court then considered the grounds of appeal and decided to proceed on the basis that the relevant question was whether the Continuous Images constitute 'cinematographic works and works created by virtue of an analogous method of film production' (collectively, 'Cinematographic Works') under Article 3(6) of the Copyright Law.

Elements constituting Cinematographic Works

(i) Fixation

Article 4(11) of the Regulation for the Implementation of the Copyright Law ('Regulation') elaborates that a Cinematographic Work is a work 'recorded on certain medium, consisting of a series of images, with or without accompanying sound, and which can be displayed with the aid of suitable devices or communicated by other means.' In other words, the series of

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images recorded need to be fixed in a tangible media failing which they cannot be categorised as Cinematographic Works in the copyright sense.

(ii) Originality

As a starting point, the IP Court considered the difference between works and their counterparts under the concept of neighbouring rights. Neighbouring rights offer protection to persons/entities such as performers, producers and broadcasting organisations but the scope of protection is usually more limited compared to the rights enjoyed by the copyright owner. The equivalent right to Cinematographic Works under the concept of neighbouring rights is 'video recording.' Article 5(3) of the Regulation defines video recording as 'recording of a series of images, with or without accompanying sound, which is not a Cinematographic Work.' Therefore, if a series of continuous images are not recognised as a Cinematographic Work, logically, they must be a video recording and *vice versa*. The IP Court came to the conclusion that in China, the key difference between a work (e.g. a Cinematographic Work) and its neighbouring right counterpart (e.g. a video recording) is the degree of originality. In order to assess whether a work has the requisite level of originality, the IP Court considered that at least three factors should be taken into account:

- (a) the selection of subject matters included in the work;
- (b) the method of filming of the subject matter; and
- (c) the selection and compilation of footage for the work.

Whether the Continuous Images constitute a Cinematographic Work

The IP Court applied the above criteria to the Continuous Images to determine whether all of the elements were satisfied.

(i) Fixation

As the Continuous Images are broadcast live, the broadcast happens simultaneously with the filming process, and the Continuous Images are not fixed in any form or media until the football match finishes (when it becomes a recording). Thus, the Continuous Images do not fulfill the fixation requirement.

(ii) Originality

(a) Selection of subject matters to include into the work: Given the nature

The authors would like to thank Angel Shi, trainee solicitor at Mayer Brown JSM, for her assistance with research for this article.

1. Article 3(6),

of football matches, there is literally no choice over the subject matter - the Continuous Images have to be about the football match. Therefore, there is no originality in this respect.

(b) Method of filming of the subject matter:

For most major sports events, there are detailed manuals in relation to the setting and positioning of the cameras, the contents to be included in the broadcast and the filming techniques to be adopted. In this particular case, there were elaborate production manuals. Moreover, the filming of football matches is also driven by the audience and the techniques employed by cameramen in live broadcasting. Thus, when viewed objectively, there is very little space, if any, for a cameraman to improvise at will. The level of creativity allowed in respect of the method of filming the Continuous Images is low.

(c) Selection and compilation of the filmed footage: The essential requirement for live broadcasting of a sports event is to accurately reflect the progress of the event, as such there is only minimal selection and compilation of filmed footage in a live broadcast. In this case, while the IP Court recognised that different directors or producers may make different choices in selecting what footage to insert in the short 'Highlights' segments played during the break, these segments constituted a small part of the whole of the Continuous Images and are not sufficient to render Continuous Images a Cinematographic Work as a whole. As a result, the IP Court found that the fixation element had not been satisfied and there was very little originality.

The right infringed in the present case if the Continuous Images do constitute a work

Although the IP Court came to the conclusion that the Continuous Images do not constitute a work protectable under the Copyright Law, the IP Court provided guidance in its decision on what type of right would have been infringed if the Continuous Images had been found to constitute a work under the Copyright Law. Concurring with the reasons provided by the District Court, the IP Court held that the right to communicate the works to the public through information networks⁴ is not relevant. Article 10 (11) of the Copyright Law provides that a copyright owner enjoys 'the right of broadcast,' that is, the right to publicly broadcast or

2. (2014) Chao Min (Zhi) Chu Zi No. 40334.

3. Article 10(12) of Copyright Law.

4. Article 10(12) of the Copyright Law.

5. Article 10(17) of the Copyright Law.

communicate to the public a work by wireless, wire or relay means. The IP Court held that online broadcasting falls within the scope of such a right and commented that the District Court's finding that the right at stake is a form of 'other rights enjoyed by the copyright owner'⁵ was incorrect. Nevertheless, as the IP Court found that the Continuous Images are not works, Article 10 (11) of the Copyright Law does not apply.

Interpretation of 'rebroadcast' in Article 45(1) of the Copyright Law

Article 45(1) of the Copyright Law provides that a broadcasting organisation is entitled to prohibit a third party from 'rebroadcasting' its programmes. The IP Court ruled that it is legally permissible for a broadcasting organisation to licence or transfer such right to a third party. The key issue was whether 'rebroadcasting' encompasses wired broadcasting such as live online broadcasting by Tianying.

After taking into account the relevant legislative history and previous judgments, the IP Court concluded that the scope of 'rebroadcasting' under Article 45(1) of the current Copyright Law did not contemplate online broadcasting. Notably, the Judge went on to comment that widening the scope of 'rebroadcasting' in the Copyright Law to include wired transmissions would ensure that stakeholders in the broadcasting industry have an effective recourse against unauthorised online broadcasting and streaming activities.

Final remarks

Overall, the IP Court's decision was remarkable as it not only discussed what constitutes Cinematographic Works but also took note of the legislative vacuum for unauthorised online streaming under the existing regulatory framework. Leaving aside the fact that the decision suggests a higher test of originality for certain copyright works than is the case in common law systems, the decision is important as it signals a dissatisfaction of the Chinese judiciary with the current statutory provisions. The decision is a call for a reform of the law, a point that may be taken by stakeholders in the content and broadcasting industry as an invitation to lobby for a broadening of the legal definition of 'rebroadcasting.'

Another aspect to note is that the IP Court did not address the unfair competition ground as neither Sina nor Tianying appealed on this point.